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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegere, et.al. Plaintiffs, v. UNITED STATES OF AMERICA, et.al., Defendants.	Case No. 16-cv-2442-AJB-KSC PLAINTIFFS' OPPOSITION AND RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT DATE: July 19, 2018 TIME: 2:00 P.M. CTRM: 4A JUDGE: Hon. Anthony J. Battaglia

PLAINTIFFS' RESPONSE AND OPPOSITION TO INDIVIDUAL DEFENDANTS DUTSCHKE'S AND MOORE'S MOTION TO DISMISS

PLAINTIFFS' THIRD AMENDED COMPLAINT

I

INTRODUCTION

Defendants DUTSCHKE and MOORE, who are being sued as individuals, move to Dismiss Plaintiffs' Fifth, Seventh, and Eleventh Causes of action against them on the following basis: **Fifth Claim:** Violation of Civil Rights - Violation of Due Process: [TAC ¶¶126 - 136]. Defendants argue that Plaintiffs failed to state a due process claim and DUTSCHKE and MOORE have qualified immunity. [D&M-MTD[1] Pg 20]. **Seventh Claim:** Violation of Civil Rights - Violation of Equal Protection:[TAC ¶¶141 - 156] Defendants argue that Plaintiffs failed to state an equal protection claim and that they have qualified immunity.. [D&M-MTD Pgs 13, 20]. **Eleventh Claim:** Conspiracy to Interfere with Civil Rights pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics . [TAC 188 - 206]. Defendants argue that Plaintiffs TAC pleadings fail the test for a new *Bivens* Claim; Plaintiffs failed to state a conspiracy claim; they have qualified immunity [M&M-MTD Pgs. 7, 14, 20]. Defendants' objections are without merit and will be addressed one at a time below.

II

SUMMARY OF FACTS

A FACTS RELEVANT TO GROUP A PLAINTIFFS

Pursuant to Title 25, C.F.R. §48, [Exhibit 2] which is incorporated into the BAND's Constitution [Exhibit 9], in 2005 Plaintiffs submitted their applications for enrollment to the Constitutionally valid elected Enrollment Committee. [See Declaration of James Quisquis ¶¶] 17, 18, (Exs. 4,5), incorporated herein and written in response to DUTSCHKE's Declaration stating that SP041005-01 was not valid: ¶¶7, 8, 4, 5, 6] . After considering historical documents in its

[1]"D&M-MTD" refers to DUTSCHKE and MOORE's Motion to Dismiss.

possession, as well as newly discovered documents such as the 1955 San Pasqual Census (the only Bureau census to state blood degrees of the San Pasqual Indians), the Enrollment Committee unanimously voted that Plaintiffs had sustained their burden of proof establishing they were qualified for enrollment. [See Declaration of James Quisquis]. [Exhibit 11]. [TAC ¶29].

The Enrollment Committee's determination was predicated on their finding that Plaintiffs' ancestor Modesta Martinez Contreras was a full blood San Pasqual Indian. The Enrollment Committee took its determination to the Tribe's General Council which agreed with the Enrollment Committee on April 10, 2005. [Declaration of James Quisquis ¶¶17, 18, 27, incorporated herein]. [Exhibit 11]. [TAC ¶30]. On September 12, 2005, the Tribe's Business Committee, exercising its rights under *Santa Clara Pueblo v. Martinez* (1978) 426 U.S. 49, wrote to James Fletcher ("Fletcher"), [Defendant MOORE's predecessor] Superintendent of the Southern California Agency, stating it concurred with the Enrollment Committee and General Council. Under 25 CFR §48 and the Tribal Constitution, Group A Plaintiffs were eligible to be enrolled. Under 25 C.F.R.§61.11(b) the Defendants were required to accept the Tribal recommendations, unless the recommendation was "clearly erroneous." There is no record of any finding by the Defendants that the Tribal recommendation to enroll Group A plaintiffs is "clearly erroneous." [Exhibit 1, 2 TAC ¶31].

Ten days later, on September 22, 2005, the Enrollment Committee submitted a letter to Fletcher (Superintendent) , requesting that the BIA correct Modesta's blood degree from 3/4 to 4/4 degree San Pasqual blood. [See 25 CFR 48.14 (c) This letter along with Plaintiffs' applications was hand delivered to Fletcher. [Declaration of James Quisquis]. [Exhibit 12]. [TAC ¶32].

On December 8, 2005 in a responsive letter, James Fletcher [MOORE's predecessor] (Supervisor-Riverside) stated "the preponderance of the evidence does not sufficiently demonstrate that Modesta is full blood." [TAC ¶33]. James Fletcher's December 8, 2005, letter was only sent to the alleged "Pacific Regional Director", Amy Dutschke. ("DUTSCHKE"). It was not sent to any of the Plaintiffs. [Exhibit 13]. [Declaration of J. Quisquis ¶27, incorporated herein]. [TAC ¶34]. On January 31, 2006, DUTSCHKE summarily concurred with Fletcher [MOORE] [Riverside] that Modesta was not full blood San Pasqual Indian. [TAC ¶35].

The record reflects the fact that DUTSCHKE was serving as the Office's Deputy Regional Director for **Trust Services** between 2000 and her appointment to Acting Director in 2006. It further reflects the fact that she was not appointed to the position of Director until 2006. There is no evidence to show that Dutschke's appointment complied with the requirements of 25 C.F.R. Part 61 at 61.1 and 62 at 62.1. [Decl. J. Quisquis ¶16, incorporated herein]. [TAC Par ¶23].

On January 31, 2006, DUTSCHKE summarily concurred with Fletcher [MOORE] [Riverside] that Modesta was not full blood San Pasqual Indian. DUTSCHKE did not allow the Plaintiffs to submit their evidence in support of their position in violation of 25 C.F.R. §48.9. [TAC 35]. This procedure was not followed when Plaintiffs' twenty-two (22) cousins filed their applications. In fact, the Defendants allowed numerous not just the twenty-two (22) cousins, to submit additional documents; because there were more than just twenty-two (22) of the April 10, 2005 enrolled. This statutory requirement was not offered to Plaintiffs. [See Declaration of Ann Chehahtah Quisquis, incorporated herein].

On April 7, 2006 Defendant DUTSCHKE, claiming that she received

documents from "all" parties", acted outside of her appointed authority, as Pacific Regional Director - Indian Affair, and denied the BAND's request to increase Modesta's blood degree and to enroll the Plaintiffs. [TAC ¶36]. Between April 7, 2006, and the present time neither DUTSCHKE, nor any of the other Defendants, provided Plaintiffs with written notice of any of these determinations as required by 25 C.F.R. §48.9. [TAC ¶38] [Declarations of J. Quisquis,¶27, incorporated herein].

DUTSCHKE, in violation of the statutory requirements set out in 25 C.F.R. §48 returned Group A Plaintiffs' applications to Fletcher who sent the applications to the new illegally formed Enrollment Committee unadjudicated. Without any written notice to Group A Plaintiffs as required, Acting Assistant Deputy Secretary of Indian Affairs Michael Olson stated that the April 7, 2006 decision was final for the BIA. [Exhibit 14] [TAC ¶37]. [TAC ¶44] [Exhibit 15]. [See Declaration of Alexandra R. McIntosh, incorporated herein].

In January and April 2015, Plaintiffs filed 25 C.F.R. §2.8 appeals with DUTSCHKE, seeking adjudication of the Plaintiffs enrollment application. On or about July 25, 2015, MOORE issued a letter stating that the BIA no longer had the original applications to adjudicate the enrollment, and the April 7, 2006 letter was 'Final' for the Department; exhausting Plaintiffs administrative remedies. [TAC ¶45, Exhibit 3-4].

On or about May 6, 2016, certain enrolled members, descendants and counsel, met with Superintendent MOORE, Morris Smith who had been appointed Tribal Operations, and Tina Salinas, Assistant Tribal Operations. Morris Smith requested Plaintiffs resubmit their §2.8 appeal and enrollment documents to the Riverside for review. [TAC ¶46]. [Declaration of Alexandra R. McIntosh].

Plaintiffs supplied the documents as requested on May 23, 2016, but have not received any response from the BIA to the submission of those enrollment documents. [TAC ¶47]. [Declaration of Alexandra R. McIntosh].

B. FACTS RELEVANT TO GROUP B PLAINTIFFS

In the 1950's, the true San Pasqual Indians negotiated and wanted assurances in the proposed enrollment regulations that in order to be enrolled in the San Pasqual Tribe, one must possess no less than 1/8 blood of the San Pasqual Band. The Defendants agreed, and published on July 29, 1959, in the Federal Register, Proposed Rule Making, Department of the Interior, Bureau of Indian Affairs, 25 CFR Part 48, Enrollment of the San Pasqual Band of Mission Indians in California. This was the enrollment statute that the true San Pasqual Indians had negotiated and agreed upon. [TAC Exhibit 6, ¶50].

On July 29, 1959, the BIA published the Proposed Rule governing Enrollment of the San Pasqual Band of Mission Indians in California at 25 C.F.R. §48, Code of Federal Regulations. The BAND approved this specific proposed rule into its Constitution in 1971. [Exhibit 1]. Following the approval of the proposed regulation, and unbeknownst to the BAND, the rule that was ultimately codified and published at 25 C.F.R. §48 on March 2, 1960, differed in a significant respect from that which the BAND approved. The added section, codified at 25 C.F.R. §48.5(f), read in pertinent part as follows:

> A person who meets the requirements of paragraphs (a), (b), or (c) of this section, but whose name has been carried on the census roll of another reservation shall be declared ineligible for the enrollment unless he can establish that he has been affiliated with the San Pasqual Band for a continuous period of at last one year immediately prior to January 1, 1959, evidenced by residence on the reservation or through active participation in tribal affairs such as attendance at tribal meetings, and being permitted to vote on matters relating to the San Pasqual Reservation. [Exhibit 2].

See Declaration of Huumaay Quisquis ¶¶ 3, 4, 5, 6, incorporated herein.

On July 14, 1960, the Defendants created a base roll that included non-San Pasqual persons. In 1966 the Defendants added more non-San Pasqual persons to the 1959 Base Roll, that was approved by Robert Bennett acting on behalf of the Defendants-Department of Interior. The true San Pasqual Indians, through their Enrollment Committee, objected to the inclusion of the non-San Pasqual persons. The BIA never responded to their objections; and has never responded to their objections. [Exhibit 4, 5, 6, Declaration of Huumaay Quisquis ¶7, Ex.4; ¶14, Ex.9; ¶15, Exs. 10, 11; ¶16, Ex. 12; ¶17 (incorporated herein)]. On June 7, 1965, E.E. Hyden, Associate Solicitor of Indian Affairs, sent a letter to Leonard M. Hill, Area Director, Bureau of Indian Affairs [Sacramento] stating, in pertinent part: "[I]t is our conclusion that a construction may be placed on the language of the regulations governing the preparation of the membership roll of the San Pasqual Band to hold that persons of Indian blood who were recognized as Band members when the basic roll of June 10, 1910, was compiled, may be considered to be of the blood of the San Pasqual Band. Further, the respective amounts of Indian blood of tribes other than San Pasqual possessed by such persons as of 1910 may be included in the computation of the total amount of their San Pasqual Indian blood and that of their descendants. With this interpretation, non-San Pasqual persons could qualify for enrollment, provided the Indian blood they derived from their respective mothers totaled at least 1/8 degree." [Exhibit 7].

In 1966, Leonard Hill, Pacific Regional Director in Southern California unilaterally, without the Tribe's consent, prepared (and Robert Bennett as Commissioner [now Assistant Secretary, DOI] unilaterally approved) the Tribal Membership Roll of the BAND, without the BAND's approval. This Roll included

several non-San Pasqual people due to Section 48.5(f) which was based on a E.E. Hayden's[2] secretarial construction of the phrase "blood of the Band," as used in the C.F.R. to mean "total Indian blood of a person named on the basic membership Roll dated June 30, 1910. [Exhibit 8, Decl.H. Quisquis ¶¶10, 12, Ex 6].

In 1971 the BAND created their Tribal Constitution which incorporated 25 C.F.R. §48. The BIA approved the BAND's Constitution on January 14, 1971. [Exhibit 4]. The BAND's Constitution provides for the formation of a business committee in Article VI, Section 3. Article VIII (j) gives the Governing body the power "To delegate administrative authority and functions to the business committee . . . Section VIII(l). . . To control future membership . . .". [Exhibit 9].

On August 11, 1960, The San Pasqual Enrollment Committee, after the final version of CFR 48 was published with 48.5(f) [1960], wrote a letter to the Defendants objecting to the inclusion of non-San Pasqual blood persons into their Tribe. The letter states, in pertinent part: "In relation to Section 48.5, paragraph (f) of the Enrollment regulations of the San Pasqual Band of Mission Indians: At every meeting called by the Bureau Representative of the people who were claiming membership in the San Pasqual Band, someone present asked or demanded that proof of membership was the first requirement before anything else could be considered. The Bureau Representative always replied, 'Anyone who thinks he or she has the right to membership may vote, but this will not constitute right to membership; he or she will have to prove the right to membership in the Band.' The San Pasqual Band stands on the first clause in paragraph (F), 'A

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[2]E.E. Hayden signed his memo as Associate Solicitor of Indian Affairs. He was the Deputy Solicitor for the U.S. Department of the Interior.

person who meets the requirements of paragraphs (a), (b), or (c) of this section . . .' which state that the applicant must have 1/8 degree of the blood of the Band." [Exhibit 4]. The Defendants never responded to the Tribe's objections to 48.5(f) that were sent to the Defendants in 1960 and the Defendants never responded to the Tribe's objections to enrolling non-San Pasqual Blood persons that were brought in 2011 and 2014. [See Exhibit 5-Letter from Huumaay Quisquis dated April 27, 2015]; [Declaration of H. Quisquis, incorporated herein].

III

LEGAL BASIS AND ISSUES - RULE 12(b)(6), F.R.CIV.P.

Defendants DUTSCHKE and MOORE bring their Motion to Dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure arguing that Plaintiffs complaint against them as individuals fails to state a claim. Contrary to their contention, Plaintiffs' complaint contains sufficient factual matter, which this Court is required to accept as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs' TAC[3] contains eleven claims against all of the Defendants. Only Claims five, seven, and eleven are brought against DUTSCHKE and MOORE individually. Plaintiffs have replied to Defendants' Companion Motion to Dismiss brought by all Defendants in their official capacity. As to the exhibits, declarations, and arguments that accompany their companion Response and Opposition, Plaintiffs hereby incorporate all appropriate documents to be cross-referenced with their companion Response and Opposition. Plaintiffs' exhibits support all of their allegations. The exhibits and declarations that are filed with their companion Response and Opposition, Motions to Strike, and Motion to Recuse are certified and Plaintiffs

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[3]"TAC" refers to Third Amended Complaint.

have satisfied the Federal Rules of Evidence in laying the foundation for their exhibits. The Declarations submitted are made on personal knowledge. Since the Defendants set both of their Motions to Dismiss on the same day and time in this Courtroom, for judicial economy, Plaintiffs are not going to re-submit everything that is being submitted with their companion Response and Opposition, Motions to Strike, and Motion to Recuse, but hereby incorporate all documents and declarations referred to in their companion Response and Opposition, Motions to Strike, and Motion to Recuse.

IV

PLAINTIFFS' CLAIMS AGAINST DUTSCHKE AND MOORE AS INDIVIDUALS

Plaintiffs have based their claims as alleged in their Third Amended Complaint (SAC) on the following federally protected interests: Article III of the San Pasqual Constitution, [Exhibit "A"]; Fifth Amendment to the United States Constitution, 25 C.F.R. §48, [Exhibit "B"]; Civil Rights Statutes as applied to individual Federal Employees such as DUTSCHKE and MOORE through *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). [SAC §83]

As pled in Plaintiffs' TAC the DUTSCHKE and MOORE are government agents who have not received any delegation of authority to act from the Secretary of the DOI. Yet, they hold themselves out and have been acting under the color of duty. Therefore, they have been acting without legal authority. *Assuming arguendo*, DUTSCHKE and MOORE were acting under the color of law, their acts were beyond their statutory authority and they conspired with each other and divers unknown to place non-San Pasqual blood persons into the San Pasqual tribe and conspired to keep Plaintiffs out so that Plaintiffs can not have the ability to

receive tribal benefits, including monthly stipends, and the right to vote. Each of the defendants is responsible for the acts and/or omissions of the other Defendants because they are liable for each others' acts as co-conspirators. DUTSCHKE and MOORE have the alleged statutory power, and it is within this alleged 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].

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).

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 v. Forsyth*, 471 U.S. 511, 530-535 (1985).

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." 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' TAC, 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 TAC. Therefore, pursuant to *Harlow* and *Mitchell* DUTSCHKE and MOORE are not entitled to have Plaintiffs TAC 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.

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.

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, DUTSCHKE and/or MOORE 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' TAC 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.

In *Hunter v. Bryant*, 502 U.S. 224 (1991) 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' TAC were or are reasonable.

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

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

THE COURTS HAVE ALREADY EXPANDED BIVENS CLAIMS TO VIOLATION OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT OF THE U.S. 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 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 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.[4] In numerous decisions the Supreme Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of laws.[5] See, *Bell v. Hood*, 327 U.S. 678, 684 (1946), *Bolling v. Sharpe*, 347 U.S. 497 (1954). DUTSCHKE

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[4]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. 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.

[5]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).

denied Plaintiffs equal protection of the law when she adjudicated Plaintiffs' cousins' applications, and even more cousins after 2006, which were also enrolled by the General Council April 10, 2005, 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 Plaintiffs Fifth Amendment Rights, tactically approved DEUTSCHKE's unconstitutional actions.

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." [ciataions 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 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 *Bivens* 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 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 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.

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

CONCLUSION

For the reasons stated above, this Court should deny Defendants' Motion to Dismiss in its entirety and allow Plaintiffs to do discovery so that they can learn the extent of the conspiracy that they have uncovered.

DATED: April 4, 2018

Respectfully submitted,

/s/ Alexandra R. McIntosh

Alexandra McIntosh

/s/ Carolyn Chapman