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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

REPLY BRIEF IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

[FRCP 12(b)(6)]

DATE: July 19, 2018
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

Defendants Amy Dutschke and Javin Moore respectfully submit the following reply brief in support of their motion to dismiss Plaintiffs' Third Amended Complaint ("TAC").

A. Plaintiffs Seek *Bivens* Remedies in a New and Unapproved Context.

Based on *Zigler v. Abbasi*, 137 S.Ct. 1843 (2017), Defendants Dutschke and Moore move to dismiss the Fifth, Seventh and Eleventh Causes of Action of the TAC on the grounds that Plaintiffs' claims seek to extend *Bivens* liability in a context not previously

approved by the Supreme Court. *See* Motion [Doc. #66-1], 7:16-10:18. In their Opposition, Plaintiffs ignore *Abbasi* entirely and instead argue that it is sufficient that their claims are "analogous" to cases previously decided by the Supreme Court. *See* Opposition [Doc. #79], 16:16-23. For support, Plaintiffs rely primarily on several circuit court cases decided in the 1970's. *Id*., p. 17 n.4. Plaintiffs' arguments, however, are directly at odds with *Abbasi*.

The plaintiffs in *Abbasi*—individuals detained for several months by the FBI following the September 11th terrorist attacks—sought *Bivens* relief for alleged violations of their due process and equal protection rights under the Fifth Amendment. *Id*. at 1852-53. In evaluating the viability of the claims, the Second Circuit applied an analysis very similar to that proposed here by Plaintiffs: the court evaluated the novelty of the claims by asking only whether the asserted constitutional rights and the "mechanism of injury" were at issue in prior *Bivens* cases approved by the Supreme Court. *Id*. at 1859. The Supreme Court, however, rejected this analysis and instead held that "[t]he proper test for determining whether a case presents a new *Bivens* context is" whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id*. The Supreme Court further explained:

> Meaningful differences may include, e.g., the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. Applying this analysis, the Supreme Court concluded that the plaintiffs were pursuing new *Bivens* claims that bore "little resemblance to the three *Bivens* claims the Court has approved in the past." *Id*. at 1860, citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980).

Abbasi teaches that, in evaluating the novelty of a *Bivens* claim, the only relevant case law is *Bivens*, *Davis*, and *Carlson*; opinions issued by the circuit courts are immaterial.

Abbasi, 137 S.Ct. at 1859 (evaluating whether "the case is different in a meaningful way from previous *Bivens* cases *decided by this Court*") (emphasis added), 1860 (concluding that the claims bore "little resemblance to the three *Bivens* claims *the Court has approved in the past*") (emphasis added).[1] And, when comparing a claim to *Bivens*, *Davis*, and *Carlson*, "significant parallels" are not enough. *Id*. at 1864. "[E]ven a modest extension is still an extension." *Id*.

Here, Plaintiffs' claims differ from those presented in *Bivens*, *Davis*, and *Carlson* in many significant ways. As an example, Defendants Dutschke and Moore are civil servants employed by the Bureau of Indian Affairs, not FBI agents as in *Bivens*, members of Congress as in *Davis*, or prison officials as in *Carlson*. And, the mechanism of the claimed injury here is in the form of administrative actions in response to enrollment applications, not handcuffing (*Bivens*), firing based on gender (*Davis*), or failing to treat health issues during incarceration (*Carlson*). Indeed, the *only* parallel between this case and one of the three established *Bivens* cases is the constitutional right at issue. As emphasized by the Supreme Court, however, predicating a claim on a similar constitutional right is not nearly enough. Accordingly, Plaintiffs' *Bivens* claims are new and, as such, must survive the "alternative remedies" and "special factors" tests to proceed. *See Abbasi*, 137 S.Ct. at 1857-58; *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

Because Plaintiff's *Bivens* claims are based on the same allegations of agency action and inaction that support their claims under the Administrative Procedures Act ("APA"), their *Bivens* claims fail the "alternative remedies" test. *See Western Radio Servs. Co. v. U.S. Forest Service*, 578 F.3d 1116 (9th Cir. 2009) ("the APA leaves no room for *Bivens* claims based on agency action or inaction"); *Winnemem Wintu Tribe v. U.S. Dept. of*

[1] The case law cited by Plaintiffs dates from 1882 to 1980, a period that the *Abbasi* Court described as an "*ancien regime*" in which the Court "followed a different approach to recognizing implied causes of action than it follows now." *Abbasi*, 137 S.Ct. at 1855. The Supreme Court has since "adopted a far more cautious course before finding implied causes of action." *Id*. "Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Id*. at 1856.

Interior, 725 F. Supp. 2d 1119 (E.D. Cal. 2010). Plaintiff's *Bivens* claims also fail the "special factors" test, because matters involving tribal enrollment are "generally beyond judicial scrutiny." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013); *Boney v. Valline*, 597 F. Supp. 2d 1167 (D. Nev. 2009).

In their Opposition, Plaintiffs ignore *Western Radio*, *Winnemem*, *Martinez*, *Alto*, and *Boney*. Indeed, they fail to address in any substantive manner the "alternative remedies" and "special factors" tests. *See* Opposition, 18:11-17 (arguing in conclusory fashion and without analysis that "neither" the "alternative remedies" nor the "special factors" tests apply here). Given the inescapable conclusion that their *Bivens* claims are new, their failure to substantively address these matters signals their concession to dismissal of these claims. Accordingly, the Court should grant the individual defendants' motion and dismiss, with prejudice, the Fifth, Seventh and Eleventh Causes of Action as against Defendants Dutschke and Moore in their individual capacities.

B. <u>Plaintiffs Fail to Address Defendants' Additional Substantive Objections</u>.

In addition to challenging the viability of Plaintiffs' *Bivens* claims in light of *Abbasi*, the Individual Defendants contend that (1) Plaintiffs fail to state a due process claim; (2) Plaintiffs fail to state an equal protection claim; (3) Plaintiffs fail to plead a claim for conspiracy; and (4) Plaintiffs improperly premise their *Bivens* claims on allegations of vicarious and/or successor liability. In their Opposition, Plaintiffs simply ignore these arguments and, as such, concede that these issues must be resolved in the Individual Defendants' favor.

First, Plaintiffs fail to respond to the Individual Defendants' contention that they have no constitutionally-protected property interest in support of their due process claims. *See* Motion, 12:12-13:23. Plaintiffs' claims are predicated on a theory that they own property interests in the form of benefits associated with membership in the Band. Yet, by their own admission, they have only an expectation of benefits that cannot be deemed an entitlement to benefits until and unless the blood degree of their ancestor, Modesta Contreras, is increased from 3/4 to 4/4 degree San Pasqual Indian. *See* TAC, ¶¶ 30, 32. In

accordance with *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999), a mere expectation of benefits, as opposed to an established entitlement to benefits, does not constitute a property interest subject to due process protection. *Id*. at 60. By failing to respond to this argument, and by ignoring *American Manufacturers* entirely, Plaintiffs concede this issue. Accordingly, the Court should dismiss the due process claims of the Fifth, Seventh and Eleventh Causes of Action.

Second, Plaintiffs fail to respond to the Individual Defendants' challenges to their equal protection claims. Plaintiffs contend that they have been denied equal protection based on allegations that the Individual Defendants have treated them "differently than 22 of their cousins," and they base their claims on the Fourteenth Amendment, the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq.*, or, alternatively, 42 U.S.C. § 1981. *See* TAC, ¶¶ 5, 142, 144, 206. As set out in the motion, however, the Fourteenth Amendment, ICRA and § 1981 are all inapplicable in a suit against federal officials. *See* Motion, 11:19-12:11. Moreover, Plaintiffs have failed to allege that their cousins are similarly situated, and the evidence presented in support of the Motion demonstrates otherwise. *See* Motion, 13:24-14:10; Long Decl. [Doc. #66-2], ¶ 4. In their Opposition, Plaintiffs simply fail to respond to these factual and legal arguments,[2] thereby conceding the issues. Accordingly, the Court should dismiss the equal protection claims of the Seventh and Eleventh Causes of Action.

Third, Plaintiffs fail to respond to the Individual Defendants' contention that the Eleventh Cause of Action fails to state a claim for conspiracy because Plaintiffs have failed to allege any facts demonstrating an agreement to violate their constitutional rights, and

[2] Plaintiffs submit the Declaration of Ann Quisquis on this issue, but she merely confirms the statement in Harley Long's declaration that the "cousins" are *not* the descendants of "Jose Juan, Guadalupe and Modesta Martinez [Contreras]." *See* Quisquis Decl. [Doc. #81-29], ¶¶ 7-9. Separately, Plaintiffs have also filed a motion to strike the declaration of Harley Long. *See* Motion [Doc. #78]. On April 10, 2018, the Court issued a scheduling order modifying the reply deadline for the United States' separate motion to dismiss and setting additional deadlines, including an April 24, 2018 deadline for responding to the motion to strike. Order [Doc. #82]. Accordingly, the Individual Defendants will respond to the motion to strike separately on or before April 24, 2018.

they have failed to plead any overt act on the part of either Defendant Dutschke or Moore in furtherance of the alleged conspiracy. *See* Motion, 14:11-15:2, citing, *inter alia*, *Davis v. Powell*, 901 F.Supp.2d 1196, 1217 (S.D. Cal. 2012) ("Courts in the Ninth Circuit have required a plaintiff alleging a conspiracy to violate civil rights to state specific facts to support the existence of the claimed conspiracy"). Because Plaintiffs concede these issues based on their silence, the Court should dismiss the Eleventh Cause of Action.

Fourth, Plaintiffs fail to respond to the Individual Defendants' contention that the *Bivens* claims must fail to the extent predicated on theories of vicarious or successor liability. *See* Motion, 10:24-11:18. Indeed, Plaintiffs' recitation of "relevant" facts continues to focus on the decades-old actions of the Individual Defendants' predecessors. *See* Opposition, 6:4-9:7. Moreover, while Plaintiffs reassert their allegation that Defendant Dutschke violated their civil rights by denying their enrollment applications in 2005, they still seek to hold Defendant Moore liable as a supervisor based solely on his alleged "fail[ure] to correct" Defendant Dutschke's decisions. Opposition, 17:8-18:8.

C. <u>Defendants Have Qualified Immunity</u>.

Defendants Dutschke and Moore enjoy qualified immunity because (1) Plaintiffs have failed, as explained above, to assert valid due process and equal protections claims, and, in any event, (2) the claimed constitutional rights were not clearly established at the time of the alleged wrongdoing. *See* Motion, 15:3-16:5, citing, *inter alia*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) ("existing [case law] precedent must have placed the . . . constitutional question beyond debate" and a clearly established constitutional right must be demonstrated by either controlling authority or a "robust 'consensus of cases of persuasive authority'").

In their opposition, Plaintiffs ignore *al-Kidd*. Instead, Plaintiffs appear to challenge the qualified immunity defense by suggesting that Defendants Dutschke and Moore "violated clearly established statutory or constitutional rights." Opposition, 12:14-15 (internal quote and citation omitted). At the core of their argument is the contention that tribal law (and specifically the provisions of otherwise defunct regulations formerly

codified at 25 CFR §§ 48.7, 48.8 and 48.9) "mandated" that Defendants Dutschke and Moore modify Modesta's blood degree, adjudicate their enrollment applications, and provide notice of their actions. Opposition, 4:25-5:14, 12:15-21.

In *Davis v. Scherer*, 468 U.S. 183 (1984), the Supreme Court rejected an argument nearly identical to the one raised by Plaintiffs in this case. After being terminated from his employment with the Florida Highway Patrol, the plaintiff sued his former supervisors for violating his due process rights by denying him a formal pre-termination or a prompt post-termination hearing. *Id*. at 185-87. At the time of the alleged wrongdoing, the plaintiff's constitutional due process rights were not clearly established. *Id*. at 187-88. Yet, the plaintiff argued that the defendants lost their qualified immunity because they acted in a manner that violated "the personnel regulations of the Florida Highway Patrol" which "clearly required 'a complete investigation of the charge and an opportunity [for the employee] to respond in writing.'" *Id*. at 188, 193. The Supreme Court, however, rejected this contention:

> Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.
>
> * * *
>
> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives [] who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them.

Id. at 195-96.

As in *Davis*, the question whether Defendants Dutschke and Moore violated formerly codified regulations incorporated within tribal law is immaterial to the evaluation of their qualified immunity. All that is relevant is whether the constitutional right at issue was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 129 S.Ct. 808, 816 (2009). Given the absence of *any* case precedent (let alone controlling authority or a robust consensus of cases of persuasive authority) establishing constitutional rights in the context of tribal enrollment applications, the Individual Defendants easily

satisfy the second prong. *See al-Kidd*, 563 U.S. at 741. Accordingly, the Court should dismiss Plaintiffs' claims with prejudice against Defendants Dutschke and Moore in their individual capacities.

D. Conclusion

For the foregoing reasons, Defendants Dutschke and Moore respectfully move the Court for an order dismissing, with prejudice, the Fifth, Seventh and Eleventh Causes of Action of the TAC.

Date: April 16, 2018

Respectfully submitted,
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By */s/ Glen F. Dorgan*
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