

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CAROLYN NEW HOLY, STEPHANIE
STAR COMES OUT and SANDRA FIRE
LIGHTNING,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, BUREAU OF INDIAN
AFFAIRS, DANIELLE DAUGHTERY¹,
Deputy Regional Director, and JOHN M.
LONG, Acting Superintendent²,

Defendants.

Case: 19-05066-JLV

**REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

Defendants, by and through their attorneys, United States Attorney Ronald A. Parsons, Jr., and Assistant United States Attorney Alison J. Ramsdell, respectfully submit the following Reply Brief in Support of Defendants' Motion to Dismiss (Docket 8) and in response to the arguments raised in Plaintiffs' Memorandum in Opposition to Motion to Dismiss (Docket 22). Defendants hereby renew their request for dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

A. The Federal Rules Require More Than A Short, Plain Statement Giving Defendant Fair Notice of Plaintiffs' Claims.

Plaintiffs cite abrogated case law to support the assertion that the Federal Rules of Civil Procedure require "only a short, plain statement of the claim which will give defendant fair notice of what the plaintiff is claiming and the grounds upon which it rests." Docket 22 at p. 5 (citing

¹ The Deputy Regional Director's name is Danelle McQuillen (formerly "Daugherty").

² John Long currently serves as Superintendent for the BIA's Pine Ridge Agency.

Conley v. Gibson, 355 U.S. 41 (1957)). But “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). It is well settled that to survive a motion to dismiss for failure to state a claim, a Plaintiff must plead facts sufficient to “raise a right to relief above the speculative level.” Id. As Plaintiffs have asserted in the instant action, the Complaint contains pleadings sufficient to afford Defendants notice of each of the asserted claims. Docket 22 at p. 6. The Complaint does not, however, contain facts sufficient to raise a right to relief above the speculative level. Dismissal is therefore appropriate.

B. The Court Is Not Required to Accept Plaintiffs’ Legal Conclusions.

“Courts must accept a plaintiff’s specific factual allegations as true but are not required to accept a plaintiff’s legal conclusions.” Brown v. Medtronic, Inc., 628 F.3d 451, 459 (8th Cir. 2010) (citing Twombly, 550 U.S. at 556). Here, Plaintiffs’ broad, conclusory statements that “fairness dictates an extension of time,” that “the one-year time limit is arbitrary,” and that Defendants have a “duty to make an exception to the one-year rule” represent legal conclusions that the Court is not required to accept as true. In the absence of specific factual allegations to support those legal conclusions, dismissal is appropriate.

C. Plaintiffs Have Not Alleged Facts Sufficient to Support a Claim for Breach of Trust Responsibility.

Plaintiffs do not meaningfully contest Defendants’ assertion that this Court lacks subject matter jurisdiction over their APA claim. Instead, Plaintiffs repackage the facts set forth in support of their APA claim to bolster their insufficiently plead breach of trust claim. This evolution in legal

strategy does not change the fact that Plaintiffs have failed to allege facts sufficient to state a claim upon which relief may be granted, regardless how that claim is classified.

In Count Three of the Complaint, Plaintiffs alleged that “Defendants acted arbitrarily, capriciously, and in direct violation of federal law and their trust responsibility to Plaintiffs by failing to exercise their discretion pursuant to 25 C.F.R. § 1.2 and unreasonably failing to proceed with the secretarial election under the 25 U.S.C. § 461 *et seq.*” Docket 9 at ¶ 46. This was the extent of Plaintiffs’ initial allegations regarding Defendants’ alleged breach of trust responsibility. Plaintiffs offered no facts to support Count Three, making it a breach of trust claim in name only. Now, however, Plaintiffs argue that Defendant McQuillen breached her trust responsibility by failing to “provide adequate counsel on how to request a waiver or request reconsideration or otherwise obtain an extension of time,” and by “failing to inform [the Task Force] that they must request a waiver or lose their legal rights.” Docket 22 at pp. 5, 8.

The regulations do not explicitly contemplate a process by which extensions to the time restriction imposed by 25 C.F.R. § 81.58 could be requested or granted. Accordingly, there was no specific guidance for Defendant McQuillen to have offered the Task Force on that subject, and there was no duty to otherwise grant Plaintiffs an extension of time to collect petition signatures. As for the availability of a waiver, the power of the Secretary to waive a regulation pursuant to 25 C.F.R. § 1.2 is an extraordinary remedy that would not be within the scope of guidance generally provided by the BIA about navigating the Secretarial election petition process under Part 81 of the regulations. Even so, because the authority to grant a waiver ultimately rests within the Secretary’s discretion, Plaintiffs’ failure to request a waiver did not deprive them of a “legal right” to which they would have otherwise been entitled.

Neither Defendant McQuillen's failure to offer non-existent guidance related to requesting an extension of time, nor her alleged failure to inform the Task Force that they could request a waiver to the regulations constitutes a breach of her trust responsibility. As the e-mail correspondence submitted to the Court demonstrates, Defendant McQuillen remained engaged and responsive throughout the administrative process. See Second Declaration of Danelle McQuillen at ¶ 4, Exhibit A; see also Dockets 24-1, 25-1. The Court should therefore deem this newly asserted argument insufficient to cure Plaintiffs' insufficiently plead breach of trust claim.

To be clear, Defendants highlighted the absence of a request for either an extension of time or a waiver to the regulations for the sole purpose of demonstrating that Plaintiffs have asked this Court to find Defendants at fault for failing to grant relief that was never requested and to which Plaintiffs were not otherwise entitled. Put another way, Plaintiffs have asked this Court to find that Defendants had a legal duty to *sua sponte* create an avenue for relief that is not explicitly contemplated by the regulations or to *sua sponte* waive existing regulations. No such legal duty exists. Accordingly, regardless how Plaintiffs choose to classify the underlying claim, the facts plead in the Complaint are insufficient to raise a right to relief above the speculative level. Dismissal is therefore appropriate.

CONCLUSION

At the heart of Plaintiffs' Complaint is the allegation that Defendants violated federal law and their trust responsibility when they failed to use the discretion granted to them under 25 C.F.R. § 1.2 to waive the one-year time limit on the collection of signatures imposed by 25 C.F.R. § 81.58 and permit Plaintiffs additional time to collect the requisite number of signatures. Docket 1 at ¶¶ 38, 46. This allegation relates to the Agency's discretionary exercise of power, thereby depriving this Court of subject matter jurisdiction. Further, the allegation otherwise fails to state a claim upon

which relief may be granted. Defendants therefore respectfully renew their request for an order dismissing Plaintiffs' Complaint.

Dated this 18th day of June, 2020.

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