Robert G. Wing (4445) rwing@parrbrown.com
Thomas M. Melton (4999) tmelton@parrbrown.com
Jonathan O. Hafen (6096) jhafen@parrbrown.com
Kade Olsen (17775) kolsen@parrbrown.com
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

Vanessa R. Walsh (16180) vwalsh@agutah.gov
Assistant Utah Attorneys General
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

Attorneys for Defendants Utah School and Institutional Trust Lands Administration and Michelle McConkie

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe, Plaintiff, vs. DAVID URE, MICHELLE MCCONKIE, MICHAEL STYLER, SPENCER COX, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Case No. 2:23-cv-295 Honorable David Barlow Magistrate Judge Daphne A. Oberg

The Tribe's Complaint should be dismissed for several reasons, as set forth in SITLA's opening brief. In its Response in Opposition to Motion to Dismiss by Defendants SITLA and McConkie ("Op."), the Tribe responds to some of SITLA's arguments. For its response to other arguments, SITLA simply cross-references to its opposition to the motions of other defendants. To avoid confusion, SITLA includes an appendix laying out arguments made by the Defendants, where they are addressed by the Tribe, and where they are addressed in reply memoranda. This memorandum argues that SITLA is not a person subject to suit under 42 U.S.C. §§ 1981–85, the Tribe cannot succeed on its claim for specific performance, the Complaint does not adequately plead the state law claims, and the claims are barred by the statute of limitations.

I. SITLA is not a person subject to suit under 42 U.S.C. §§ 1981–85.

SITLA is not a "person" subject to suit under 42 U.S.C. §§ 1981–85.[1] The Tribe does not dispute that "a governmental entity that is an arm of the state" cannot count as "a 'person' within the meaning of" the Civil Rights Statutes. *Harris v. Champion*, 51 F.3d 901, 905–906 (10th Cir. 1995). Nor can the Tribe seriously disagree that SITLA "is established within state government," Utah Code § 53C-1-201(1)(a); that SITLA is "subject to legislative and executive department controls," *id*. § 53C-1-201(3)(a); that SITLA is a "state agency," *id.* § 53C-1-201(2); that SITLA's board is appointed "by the governor with the advice and consent of the Senate," *id.* § 53C-1-202; and that from its board, SITLA's director is appointed "with the consent of the governor," *id*. § 53C-1-201(4). At bottom, SITLA is a state agency created to "*fulfill the state's obligations* to the trust beneficiaries." Utah Code § 53C-1-102 (emphasis added). The Tribe's arguments do not suggest SITLA is anything other than an arm of the State.

[1] The Tribe abandons its Title VI claim against SITLA and McConkie.

First, the Tribe's truism that SITLA is "independent" does not move the needle. "Independent" just means SITLA is not "a division of" some "other department" within the executive branch. *Id.* § 53C-1-201(2). Its concerns are statewide and not local, it cannot levy taxes, and it is nothing like "political subdivisions such as cities and counties" which are addressed in Title 11 of the Utah Code. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1170 (10th Cir. 2000). Were there any doubt, each SITLA board member is "appointed by the governor" and SITLA's budget is controlled by the governor and legislature. Utah Code § 53C-1-303(1)(e) That is proof enough that the Administration is "not autonomous but rather is a state-controlled entity." *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575 (10th Cir. 1996).

Second, the Tribe's unsourced assertion that SITLA's "assets are segregated from the State" misses the mark. (Op. at 3.) The state holds title to the land SITLA administers. Utah Code § 53C-1-102(1)(c). And the Utah Supreme Court made clear that "the State [bears] the general liability of a trustee to reimburse the trust" for mismanagement of assets. *State v. Mathis*, 223 P.3d 1119, 1122 (Utah 2009). "[T]he State, as trustee, [must] bear the cost of its conveyances made in breach of its fiduciary duties," and "it is the State that must make the State School Fund whole when this occurs." *Id.* at 1123-24. SITLA also participates "in coverage under the Risk Management Fund," Utah Code § 53C-1-201(7), which suggests the State would be "responsible for funding a judgment." *Watson*, 75 F.3d at 575.

II. The Tribe cannot obtain specific performance against the state.

The Tribe's defense of its specific performance consists more of *ad hominem* attacks than arguments. The Tribe, of course, cannot invoke *Ex parte Young* "to obtain a monetary judgment." (Op. at 5.) But the Tribe does not dispute that *Ex parte Young* "cannot be used to obtain" an

"order for specific performance of a State's contract." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256–57 (2011). Nor does the Tribe disagree that federal courts cannot entertain the "functional equivalent of a quiet title suit" that would "extinguish" a "State's control over a vast reach of lands and water." *Id.* at 257. That spells the end of the Tribe's request for specific performance.

The Tribe's one argument (at 5)—that the Court cannot dismiss a remedial request at the pleading stage—is incorrect. Courts routinely hold that claims do not fall within the *Ex parte Young* "exception to Eleventh Amendment immunity" at the pleading stage. *Opala v. Watt*, 454 F.3d 1154, 1157 (10th Cir. 2006) (dismissing complaint); *see also Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (same).

III. The Tribe has not sufficiently stated a breach of contract claim.

The Complaint repeatedly says there was no contract between SITLA and the Tribe. It acknowledges that SITLA did not accept the Tribe's bid. (Compl. ¶176). And it recognizes that SITLA did not enter into the contract: "Defendants' refusal to enter into a contract with the Tribe violates 42 U.S.C. § 1981 and 1982." (*Id*. ¶147). It says: "In furtherance of Defendants' conspiracy to prevent the Tribe from executing a contract to purchase the property…." (*Id*. ¶107). And it alleges that Defendants' decision to suspend the sale "prevented the Tribe from making or enforcing a contract for the purchase of Tabby Mountain." (*Id*. ¶138). If the Tribe has a claim, it cannot be for breach of contract.

In the face of this plain language, the Tribe asserts there is a contract because SITLA's bid solicitation included an "Offer to Purchase" form, which said the offer was binding on the bidder. This does not create a contract. The Complaint notes the bid solicitation document states

"All sales will be finalized on SITLA's standard certificate of sale." (*Id*. ¶71). But the administrative rules governing a certificate of sale say a bid is only one step in the contract formation process. There is no contract until the certificate of sale is signed by SITLA's director, and the certificate "shall not be final and no rights shall vest in the purchaser until the certificate is executed by the director." Utah Admin. Code R.85080-615(3). "Promissory estoppel cannot be asserted against a public entity to bypass rules that require contracts to be in writing or be put out for bids, rules which reflect a public policy to preclude oral contracts or other exposures to liability, including claims of promissory estoppel." *Childhelp, Inc. v. City of Los Angeles*, 308 Cal. Rptr. 3d 193, 207 (Ct. App. 2023).

The Complaint does not, and cannot, allege that a certificate of sale was issued. Without that certificate, there was no contract. The Tribe's offer bound the Tribe, but that does not mean that its acceptance was assured. This is not, as the Tribe asserts, an argument requiring discovery. As a matter of law there is no contract without acceptance. *Bear v. Lifemap Assurance Company*, 2021 UT App 129, ¶29, 503 P.3d 507, 517. And, as a matter of law, there was no contract without the signature of the SITLA director on the certificate of sale. The Complaint does not allege the director signed. The claim should be dismissed.

Nor does the Complaint adequately plead contract by estoppel. As between private parties, estoppel is generally a fact-intensive inquiry.[2] But a claim of estoppel against the government requires the complaint to point to a specific statement or written representation. The

[2] The only case cited by the Tribe in support of its argument is *State, Dep't of Hum. Servs. Ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997). *Parker* is a child custody case, and the estoppel allegations involved the parents, not the State. The case does not mention the elements of a claim of estoppel against the government.

express certificate of sale requirement makes this impossible. A generally applicable document, like the bid solicitation document, does not meet the exacting "very specific" standard. *See, Davis v. Utah*, No. 20-4042, 2021 WL3930277, at *13 (10th Cir. Sept 2, 2021).

Although one the Complaint's headings references reasonable reliance and equitable conversion as substitutes for acceptance and consideration, the Tribe's Response does not address those theories, and they are forfeit.

IV. The Complaint does not state a claim for breach of trust.

The Tribe is not a beneficiary of the Trust. The beneficiaries are public institutions defined by the Utah Enabling Act. Act of July 16, 1894, ch. 138, 28 Statutes at Large 107. There are twelve beneficiaries. By statute, SITLA owes duties "for the exclusive benefit of the trust beneficiaries." Utah Code, §53C-1-102(2)(a). Because the Tribe is not one of the defined beneficiaries, SITLA does not owe the Tribe a trust duty. Without a duty, there is no claim.

Although children who are members of the Tribe, along with children statewide, attend schools that receive money from the Trust, and the Tribe may share a general interest in school funding with the public, there is no private right of action for a third party like the Tribe to sue SITLA or its board for breach of fiduciary duty. The cases cited by the Tribe are inapposite. *Anderton v. Boren*, 2017 UT App 232, 414 P.3d 508, and *Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742, 745 (Utah Ct. App. 1992) say a beneficiary of a trust may sue. SITLA's beneficiaries may sue SITLA, and the Attorney General alone represents those institutions. But the Tribe is not a beneficiary and may not sue on behalf of the beneficiaries.

V. The Tribe's claims are not pleaded with particularity.

Rather than confront the requirements of pleading fraud with particularity, the Tribe merely recites the elements of the alleged fraud, lumping the Defendants together. The Tribe must do more. The Complaint's broad allegations against multiple defendants combined with the misconduct alleged does not permit the court to "tell *which* defendant is alleged to have done what, nor can we tell *what* the misconduct was." *Burnett v. Mortgage Elec Registration Sys., Inc.,* 706 F.3d 1231, 1240 (10th Cir. 2013) (emphasis added).

Throughout the Complaint, the Tribe refers to "Defendants" collectively. For example:

- "The *Defendants* worked together to concoct a public record to hide their discrimination based upon race, ethnicity, national origin, and religion. They first had DNR submit a second bid, higher than the Tribe's bid. SITLA, DNR, *and others* who were in the conspiracy knew DNR's bid was a sham, because DNR did not have sufficient money to meet the required and primary bidding condition---that the bidder could pay the amount bid. The *Defendants* had SITLA "suspend" the bidding and sale based upon a pretextual excuse." (Complaint ¶ 2) (emphasis supplied throughout).

- Thereafter, *Defendants* conspired that if they could not sell the land to DNR, SITLA would suspend the sale, to prevent the Tribe from acquiring the land." (Complaint ¶ 80).

- "As part of their conspiracy and also to hide their unlawful conspiracy from the Tribe and the public, *Defendants* created a false public record." Complaint ¶ 82.

- "Behind the scenes, *Defendants* conspired that the public record would begin with SITLA publicly giving DNR an opportunity to increase its bid and that DNR would then submit a new bid which exceeded the Tribe's bid." (Complaint ¶ 83)

- "*Defendants* knew that DNR's new bid would be a sham, because they knew DNR did not have the ability to pay any bid which would match or exceed the Tribe's bid" (Complaint ¶ 84).

Other paragraphs that merely allege that "Defendants" have committed an act or had knowledge of a specific act without specifying more. *See id.* ¶¶ 85, 88, 90, 91, 101, 102, 107, 143, 144, 145, 166, 169, 170, 171. The Tribe also refers to one Defendant in one paragraph (Ure)

and then resorts to "Defendants" in the next. *See, e.g.*, *id.* ¶¶ 88 and 89. The Tribe imputes "the action of one or more Defendants to all of the Defendants, which is improper and cannot be the basis of a claim against all Defendants." *CVB v. Corsicana Mattress Company,* 604 F. Supp.3d 1264, 1291 (D. Utah 2022).

The Tribe's argument about Defendant McConkie is a microcosm of the Tribe's pleading deficiencies. The Tribe asserts that it "more than adequately alleges she is now a participant in the ongoing wrongful conspiracy." (Op., p. 3). Missing from this argument is any reference to the Complaint. The Tribe does not even mention what McConkie's role was in events that preceded her SITLA tenure. The Complaint fails to allege any communication McConkie had with any other alleged conspirator or when and how her conduct occurred. More fundamentally, the Complaint is silent on what causes of action are specific to her. The Tribe claims, "[McConkie] cannot both support the ongoing discrimination and claim she cannot be sued." (Op. Brief, p. 4). The Complaint's allegations against McConkie fail because the Complaint has no allegation that she supports the alleged ongoing discrimination or had any role in the alleged conspiracy.

The same is true for each Defendant. The Complaint is rife with allegations that impute the conduct of one Defendant to another without stating any facts. For example, in paragraph 100, the Complaint claims SITLA suspended the sale to deceive the Tribe. In the next paragraph, the Complaint alleges without facts that "[n]o Defendant disclosed to the Tribe or the public that DNR's bid was a sham." There are many examples of this conflation in the Complaint. This collective pleading fails to meet the particularity standard, which is especially important in cases where public officials are charged. *Robbins v. Oklahoma,* 519 F.3d 1242, 1249 (10th Cir. 2008)

("complaints against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants.").

VI. The Tribe's claims are barred by the statute of limitations.

A. The federal claims.

There is no dispute that in February 2019 (1) SITLA announced it had voted to suspend the sale (Compl. ¶ 93), and (2) the Tribe threatened to sue a few days later (*id.* ¶ 104). This leaves the Tribe arguing (at 8-21) its §§ 1981-85 claims did not accrue until it knew SITLA's decision was "pretextually justified." That is not the rule for accrual.

A civil rights action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Baker v. Bd. of Regents of State of Kan.*, 991 F.2d 628, 632–33 (10th Cir. 1993). A plaintiff need "not know the full extent of his injuries before the statute of limitations begins to run," *Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994), or "know all of the evidence ultimately relied on for the cause of action to accrue." *Baker*, 991 F.2d at 632.[3]

In *Baker*, a race-based admissions case, the plaintiff's claim accrued when "he knew that his application had been rejected." *Id.* That the plaintiff later discovered his race might have been the reason for his rejection did not change the fact that he "had reason to know of the injury which formed the basis for this action." *Id.* So too in *Alexander v. Oklahoma*, where the plaintiffs discovered Oklahoma's culpability for the Tulsa race massacre after the publication of a

[3] The Tribe's authorities do not suggest a contrary standard or outcome. In *Herrera v. City of Espanola*, the cause of action accrued when the defendant took the allegedly unlawful act: cutting off the plaintiff's water. 32 F.4th 980, 992 (10th Cir. 2022). And *Jenkins v. Chance*, 762 F. App'x 450, 454 (10th Cir. 2019), stands for unremarkable proposition that an excessive force claim accrued when the plaintiff was tased.

legislative report. 382 F.3d 1206, 1215 (10th Cir. 2004). The court "resist[e]d the urge to alter circuit precedent" to delay accrual "until a plaintiff has detailed knowledge of the level of culpability of each of the actors involved." *Id.* at 1216. The § 1983 claim instead arose when "the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm." *Id.* The same result should follow here: Plaintiffs knew, more than four years ago, that SITLA chose not to sell the property.

The Tribe's fallback arguments fare no better. For equitable discovery, the plaintiff must show "that he did not know nor should have reasonably known the facts underlying the cause of action." *Eyring v. Fondaco*, No. 13-cv-1137, 2015 WL 136308, at *3 (D. Utah Jan. 9, 2015). The Tribe knew enough in February 2019. But more to the point, the Tribe says (at 13) that a "whistleblower informed the Tribe that" everything "was a sham" in "2022," but "the discovery rule does not apply to a plaintiff who becomes aware of his injuries or damages and a possible cause of action before the statute of limitations expires." *Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064, 1065 (Utah 1992). The Tribe's "equitable estoppel" argument proves no better. As explained above, the Tribe would need to show a clear writing. None exists.

The Tribe's reliance on a "continuing violation" suffers a similar problem. That doctrine applies only "when a particular defendant allegedly committed wrongful acts within, as well as outside, the limitations period." *Vasquez v. Davis*, 882 F.3d 1270, 1277 (10th Cir. 2018). Missing from the Complaint is *any* suggestion that SITLA or McConkie "had any interactions with" the Tribe after February of 2019. *Id.* The alleged wrongdoing—refusing to sell the property—instead took "place on a discrete date": February 22, 2019. *Colby v. Herrick*, 849 F.3d 1273, 1280 (10th Cir. 2017). That is a far cry from *Tiberi v. Cigna Corp.*, where the defendant provided repeated

post-accrual "assurances that it would compensate" the plaintiff "for his losses." 89 F.3d 1423, 1431 (10th Cir. 1996).

B. Fraud.

The parties agree that the three-year statute of limitations applies to fraud. The Complaint was filed more than four-years after February 2019, and therefore is barred. The Tribe's arguments in favor of extending the statute fail for the same reasons articulated above.

C. Contract.

As the Complaint makes clear, there was no written contract. The Tribe's argument is that absent discrimination, there would have been a contract. If that stated a claim, it would be for breach of an oral contract. The statute of limitations for breach of an oral contract is four years. Utah Code § 78B-2-309. That claim, too, is time barred.

CONCLUSION

The Complaint does not meet the standards for pleading. It improperly asserts a claim against SITLA, which is an arm of the state. It seeks specific performance, which is not available against the State. It claims to be a beneficiary of the SITLA Trust, which it is not. It admits there is no contract but sues for breach of contract anyway. It does not plead with the requisite particularity. And its claims are time barred. These deficiencies are not papered over by invoking the talisman of racial animus. The Complaint should be dismissed.

DATED this 6th day of November 2023.

PARR BROWN GEE & LOVELESS, P.C.

By: */s/ Robert G. Wing*
Robert G. Wing
Attorneys for Defendants Utah School and Institutional Trust Lands Administration and Michelle McConkie

UTAH ATTORNEY GENERAL

By: */s/ *Vanessa R. Walsh*
Sean D. Reyes
Vanessa R. Walsh
Attorneys for Defendants Utah School and Institutional Trust Lands Administration and Michelle McConkie
**Electronically signed with permission*

CERTIFICATE OF SERVICE

I CERTIFY that on the 6th day of November 2023, I caused the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MEMORANDUM IN SUPPORT to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification to all counsel of record.

/s/ Lori J. Stumpf

APPENDIX

Argument	Motion to Dismiss	Opposition Memorandum	Reply Memorandum
The Tribe is not a person for § 1983 purposes	ECF 17, Section 1 ECF 23, Section 1.1 ECF 25, Section 3.2	ECF 38, Section I	Ure Reply, Section 1
State officials in their official capacity and SITLA are not a persons for § 1983 purposes	ECF 17, Section 2 ECF 23, Section 1.2 ECF 25 Sections 1.2 and 2.2	ECF 38, Section II ECF 40, Section II	Ure Reply, Section 2.1 Cox and Styler Reply, Section 1.2 and 2.2 SITLA Reply Section I
The Tribe does not satisfy Rule 8's pleading standard for § 1983 claims	ECF 17, Section 3 ECF 25, Section 1.1 ECF 25 Section 2.1 and 3.4	ECF 38, Section III	Ure Reply, Section 2.2 Cox and Styler Reply, Section 3.4 SITLA Reply, Section V
The Tribe fails to state a claim for Title VI	ECF 23 Section 1.2 ECF 25, Section 3.3		Cox and Styler Reply, Section 3.3
Specific performance cannot be ordered	ECF 23 Section 1.3	ECF 40, Section V	SITLA Reply, Section II
The Tribe does not satisfy Rule 8's pleading standard for fraud and conspiracy	ECF 17, Section 3 ECF 23, Sections 3.2 and 3.3	ECF 38, Section IV	Cox and Styler Reply, Section 4.3 SITLA Reply, Section V
The Tribe is not a trust beneficiary	ECF 23, Section 3.1	ECF 40, Section III	SITLA Reply, Section IV
The Tribe has not stated a breach of contract claim	ECF 17, Section 5 ECF 23, Section 3.4	ECF 40, Section VI	SITLA Reply, Section III.
The Tribe's state claims are barred because they did not file a Notice of Claim	ECF 17, Section 6 ECF 23, Section 2 ECF 25, Section 4.1	ECF 38, Section V	Ure Reply, Section 3 Cox and Styler Reply, Section 4.1
The Tribe's claims are barred by the statute of limitations	ECF 23, Section 4 ECF 25, Section 3.1 and 4.2	ECF 40, Section VII	SITLA Reply, Section 6
The Tribe's claims are barred by the Immunity Act	ECF 25, Section 4.3		Cox and Styler Reply, Section 4.2