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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH
AND OURAY INDIAN RESERVATION,

Plaintiff,

v.

DAVID URE, MICHELLE MCCONKI,
MICHAEL STYLER, SPENCER COX,
JOEL FERRY, UTAH SCHOOL AND
INSTITUTIONAL TRUST LANDS
ADMINISTRATION, and UTAH
DEPARTMENT OF NATURAL
RESOURCES,

Defendants.

**MOTION TO DISMISS FIRST
AMENDED COMPLAINT AND
MEMORANDUM IN SUPPORT**

Case No. 2:23-cv-295-DBB-DAO

District Judge David B. Barlow
Magistrate Judge Daphne A. Oberg

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Defendant David Ure by and through counsel Andrew R. Hopkins and Philip S. Lott, Assistant Utah Attorneys General, move the Court to dismiss all claims against him.

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RELIEF SOUGHT AND GROUNDS FOR RELIEF

Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation's First Amended Complaint should be dismissed as to Defendant David Ure for the following reasons:

- David Ure, in his official capacity, is not a “person” who can be sued under the federal statutes invoked by Plaintiff.
- David Ure, in his individual capacity, is entitled to the affirmative defense of qualified immunity for all federal claims asserted against him because:
 - Plaintiff has not alleged a plausible violation of federal law. The Tribe's contract and property rights were not violated since no valid contract was ever formed; and
 - Any violation of federal law is not clearly established.
- Plaintiff's state law claims should be dismissed because:
 - Plaintiff failed to comply with the notice of claim requirements of the Governmental Immunity Act of Utah; and
 - Plaintiff lacks a certificate of sale, so no contract was ever entered into between the parties.

Plaintiff's entire suit should be dismissed as to Defendant Ure.

MEMORANDUM OF LAW

INTRODUCTION

This suit concerns the legality of the Utah School and Institutional Trust Lands Administration's (SITLA) sale and suspension of sale of a tract of land known as Tabby Mountain. However, Plaintiff's First Amended Complaint fails to state a claim as it relates to Defendant David Ure. While the First Amended Complaint contains a few changes from the prior pleading, it is largely a verbatim recitation of the earlier complaint. Indeed, many of the claims previously dismissed by the Court are still identical in the First Amended Complaint.

As a result of the similarity to the earlier complaint, a similar motion to dismiss legal analysis might be expected as well. However, there are important differences that merit a full and separate motion to dismiss as to the First Amended Complaint. For example, Plaintiff scrubbed any federal constitutional references from the First Amended Complaint, making it appear that any such claims are now abandoned. Apart from this, Defendant Ure also raises the affirmative defense of qualified immunity for the first time. Plaintiff cannot show that Defendant Ure violated any clearly established right. For all these reasons, as explained further below, all claims against David Ure should be dismissed with prejudice.

RELEVANT FACTS¹

1. SITLA is the Utah state entity established to manage lands that Congress granted to Utah for the support of common schools and other beneficiaries. [Utah Code Ann. § 53C-1-103](#).

2. Defendant David Ure was the director of SITLA during the events leading to this claim.²

3. This suit involves land north of Highway 40, south of Tabiona, and north of Fruitland, Utah.³ It is referred to throughout the First Amended Complaint and this memorandum as “Tabby Mountain.”

4. SITLA holds title to the surface rights (not mineral rights) of Tabby Mountain.⁴

5. In December 2018 SITLA issued a public notice that it planned to sell Tabby Mountain. (*Id.* ¶ 60.)

6. On December 19, 2018, the Tribe expressed to SITLA its interest in bidding.⁵

¹ For purposes of this motion only, all facts alleged in the First Amended Complaint are assumed to be true. Any facts omitted in the Relevant Facts are only omitted for brevity and Plaintiff may identify them in his opposition.

² 1st Am. Compl. ¶ 10.

³ *Id.* ¶ 31.

⁴ *Id.* ¶ 41.

⁵ *Id.* ¶ 61.

7. SITLA provided information regarding the bidding process, including notice that “All sales will be finalized on SITLA’s standard certificate of sale.”⁶

8. On February 22, 2019, SITLA issued a press release, providing public notice that it had voted to suspend the Tabby Mountain sale.⁷

MOTION TO DISMISS STANDARD

Defendant Ure seeks dismissal of Plaintiff’s First Amended Complaint pursuant to [Rule 12\(b\)\(1\) and \(6\)](#). Defendant Ure moves to dismiss Plaintiff’s state law claims based on the failure to comply with several provisions of the Utah Governmental Immunity Act (GIAU). Because this deprives the court of subject-matter jurisdiction over these claims, *Pinder v. Duchesne Cnty. Sheriff*, 2020 UT 68, ¶ 59, 478 P.3d 610, the [Rule 12\(b\)\(1\)](#) standard applies. See, e.g., *Osterkamp v. Salt Lake Cnty.*, No. 2:20-CV-00032-DAO, 2020 WL 5298866, at * 5–6 (D. Utah Sept. 4, 2020) (analyzing Utah Immunity Act defenses, including a defective notice of claim, under a [Rule 12\(b\)\(1\)](#) standard)).

[Federal Rule of Civil Procedure 12\(b\)\(1\)](#) permits the dismissal of cases for “lack of subject-matter jurisdiction.” Under a “factual” attack of subject-matter jurisdiction, as is made here, the Court may accept evidence, “weigh evidence and

⁶ *Id.* ¶ 71.

⁷ *Id.* ¶ 93.

make factual findings” without having to convert the motion to one for summary judgment. *Los Alamos Study Grp. v. U.S. Dep’t of Energy*, 692 F.3d 1057, 1064–65 (10th Cir. 2012); see also *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Additionally, when a motion made pursuant to Rule 12(b)(1) is a “facial” attack on the claims as pleaded the motion is reviewed applying the same standard as one made pursuant to Rule 12(b)(6). *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010). So, the analysis moves to the Rule 12(b)(6) standard. That standard also applies to Defendant Ure’s remaining substantive challenges to Plaintiff’s claims.

In reviewing a 12(b)(6) motion to dismiss, the Court assumes the truth of well-pleaded facts and draws reasonable inferences in a light most favorable to the plaintiff. E.g., *Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011). However, on a motion to dismiss, conclusory pleadings “are not entitled to the assumption of truth” and conclusory allegations without supporting factual averments need not be accepted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 510 (10th Cir. 1998); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). “The burden is on the plaintiff to frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief.” *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir.

2008) (citation omitted). Thus, accepting the allegations as true, they must establish that the plaintiff plausibly, not just speculatively, has a claim for relief.

Id.

In reviewing a motion to dismiss, the Court may rely on the facts as alleged in the complaint but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed. *See Fed. R. Civ. P. 10(c); Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007).

ARGUMENT

1. Defendant Ure in his official capacity is not a “person” under Plaintiff’s federal claims.

Plaintiff sues David Ure “in both his individual and official capacities.”⁸ However, all official capacity claims against him should be dismissed since his official capacity is not a person under the statute. § 1983 provides a remedy against “persons” who violate federal rights while “acting under color of state law.” 42 U.S.C. § 1983; *Jojoba v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995). Only a “person” as that term has been interpreted by federal case law may be a proper defendant. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). “Neither the state, nor a governmental entity that is an arm of the state . . . nor a state official

⁸ 1st Am. Compl., [Doc. 72](#) ¶ 10.

who acts in his or her official capacity, is a ‘person’ within the meaning of § 1983.” *Harris v. Champion*, 51 F.3d 901, 905–906 (10th Cir. 1995). This same interpretation of the word “person” applies to the §§ 1981, 1982, and 1985 that are all in the same subchapter of the U.S. Code. See *Hall v. United States*, 566 U.S. 506, 519 (2012) (quoting *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007)) (“‘identical words and phrases within the same statute should normally be given the same meaning.’ Absent any indication that Congress intended a conflict between two closely related chapters, we decline to create one.”) Because David Ure in his official capacity is not a ‘person’ for purposes of § 1983, or any other federal statute cited, any official capacity claims against him should be dismissed with prejudice.⁹

2. Defendant Ure is entitled to qualified immunity on all federal claims.

As to federal individual capacity claims alleged against Mr. Ure, they should also be dismissed since Mr. Ure is shielded by the affirmative defense of qualified immunity. Qualified immunity “shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law.” *Est. of*

⁹ The Court previously found that in the initial Complaint, Ure was sued only in his individual capacity ([Doc. 52 at 13](#)), but the First Amended Complaint makes clear that Plaintiff intends to bring individual and official capacity claims against Ure.

Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (cleaned up). The defense protects “all but the plainly incompetent or those who knowingly violate the law.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (cleaned up). It is important to note qualified immunity was not raised as a defense in the prior motion to dismiss briefing, and the Court must examine it for the first time in this motion.

A defendant is entitled to qualified immunity unless the plaintiff can (1) “make out a violation of a constitutional right,” and (2) show that “the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *see also Burke v. Regalado*, 935 F.3d 960, 1002 (10th Cir. 2019). Plaintiff bears the “heavy burden” of satisfying both parts of this test to overcome qualified immunity. *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017).

“Qualified immunity is ‘an immunity from suit rather than a mere defense to liability.’” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). “Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). *See also Hunter v. Bryant*, 502 U.S. 224,

227 (1991) (“we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”)

“Once a defendant raises the defense of qualified immunity, the burden shifts to the plaintiff to satisfy a heavy two-part burden. First, the plaintiff must demonstrate that the defendant violated a constitutional or statutory right. Second, he must show that the right at issue was clearly established at the time of the defendant’s unlawful conduct.” *Neal v. Lewis*, 414 F.3d 1244, 1247–48 (10th Cir. 2005) (cleaned up). Plaintiff has not met this burden because it has alleged neither a plausible violation of federal law by Ure, nor a violation of clearly established law as explained further below.

2.1. Plaintiff has not alleged a plausible violation of federal law.

Plaintiff alleges at least four federal causes of action against Defendant Ure, none of which meet the required plausibility threshold. This includes (1) an alleged denial of due process through 42 U.S.C. § 1981,¹⁰ (2) an alleged denial of equal protection through 42 U.S.C. § 1982,¹¹ (3) an alleged violation of 42 U.S.C.

¹⁰ 1st Am. Compl., [Doc. 72](#) ¶¶ 125-146.

¹¹ *Id.* ¶¶ 147-152.

§ 1983,¹² and an alleged violation of 42 U.S.C. § 1985.¹³ Plaintiff cannot succeed under any of these theories, even at the motion to dismiss stage.¹⁴

2.1.1. The §§ 1981 and 1982 claims must be read narrowly and through the lens of § 1983.

The First Amended Complaint reads the §§ 1981 and 1982 claims through § 1983.¹⁵ Therefore, Defendant Ure also analyzes these claims through the lens of § 1983, where the defense of qualified immunity is available.¹⁶ However, these §§ 1981 and 1982 claims are muddled, and the Court should read them narrowly. That is, the Court should not read in any sort of claim that is not contemplated by the text of these statutes. “Section 42 U.S.C. § 1981 guarantees the right of all persons to ‘make and enforce’ contracts. Section 42 U.S.C. § 1982 guarantees the

¹² *Id.* ¶¶ 153-155.

¹³ *Id.* ¶¶ 156-159.

¹⁴ Plaintiff also alleges a 42 U.S.C. § 2000(d) claim, that perhaps could be construed as only against the Division of Natural Resources (DNR). However, the claim’s use of the word “Defendants,” makes it unclear who this claim is alleged against. (Doc. 72 ¶ 163.) The Court previously dismissed this claim *with prejudice* as to all Individual Defendants, therefore Defendant Ure does not construe it as alleged against him, and in the event the Court reads it differently, this claim would be barred procedurally by the doctrine of collateral estoppel.

¹⁵ 1st Am. Compl., Doc. 72 ¶ 154 (“Section 1983 provides a remedy for the deprivation of any rights, privileges, or immunities secured by Sections 1981 and 1982 when such deprivation occurs under color of state law.”).

¹⁶ Additionally, “[a] defendant can raise a qualified immunity defense to a § 1981 claim.” *Perez v. Ellington*, No. CV 03-361 JP/LFG, 2004 WL 7337662, at *15 (D.N.M. June 28, 2004), *aff’d*, 421 F.3d 1128 (10th Cir. 2005).

right to ‘inherit, purchase, lease, sell, hold, and convey real and personal property.’” *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002). Accordingly, Plaintiff’s §§ 1981 and 1982 claims should be confined to these two categories – contracts and property rights.

Any claims of conspiracy, due process, or equal protection that Plaintiff grounds in §§ 1981 or 1982 should be dismissed since these statutes do not contemplate any such claims. Plaintiff is obligated to provide “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (omission in original); see also *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (“[T]he burden rests on the plaintiff[] to provide fair notice of the grounds for the claims made against each of the defendants.”).

The muddled nature of the §§ 1981 and 1982 claims is readily apparent. First, the § 1981 claim contains allegations related to conspiracy.¹⁷ Like the prior complaint, “[i]t is not clear whether the Complaint attempts to assert conspiracy claims under §§ 1981 and 1982 collectively against all Defendants or whether it asserts interference of contract claims under § 1981 and interference of property

¹⁷ 1st Am. Compl., [Doc. 72](#) ¶¶ 138-139.

rights under § 1982 against each Defendant.”¹⁸ However, the texts of §§ 1981 and 1982 do not contemplate conspiracy, and this is sufficient reason to not allow such a conspiracy claim.

Likewise, Plaintiff alleges violations of due process and equal protection through §§ 1981 and 1982 respectively.¹⁹ It is unclear whether Plaintiff is attempting to invoke constitutional protections through these claims. Indeed, the Amended Complaint scrubbed any direct references to constitutional provisions,²⁰ and they should not be read back in now. §§ 1981 and 1982 are solely concerned with contract and property rights, not due process or equal protection. Accordingly, to the extent conspiracy, due process, and equal protection claims are even alleged in Claims I and II, they should be dismissed.

Turning to the claims Plaintiff has clearly made, Plaintiff has not plausibly alleged that its rights under either statute were violated by Defendant Ure. Neither its contract nor property rights were violated by Mr. Ure.

¹⁸ Doc. 52 at 32 n.232.

¹⁹ 1st Am. Compl., Doc. 72 ¶¶ 125-146, 147-152.

²⁰ *Cf.* Compl., Doc. 1 at 19 (COUNT I alleging “Denial of Due Process and Equal Protection and Conspiracy to Violate Rights; United States Constitution 5th and 14th Amendment, 42 U.S.C. § 1981, 1982 1983, 1985, 2000d (all Defendants; federal law)) *with* 1st Am. Compl., Doc. 72 at 21, 24 (COUNT I alleging “Denial of Due Process, 42 U.S.C. § 1981,” and COUNT II alleging “Denial of Equal Protection, 42 U.S.C. § 1982”).

2.1.1.1. Plaintiff's contract rights were not violated.

Plaintiff has not plausibly alleged that Defendant Ure violated any of its rights protected by § 1981. For such a claim, “the plaintiff must show: (1) that the plaintiff is a member of a protected class; (2) that the defendant had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in § 1981.” *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1101–02 (10th Cir. 2001). Protected activities include the right “to make and enforce contracts.” 42 U.S.C. § 1981(a). Therefore, such a claim “must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities.” *Id.* (internal citations omitted).

Focusing solely on the third prong of the test, Plaintiff has not plausibly alleged Defendant Ure interfered with Plaintiff's right to make or enforce a contract. This is because there was never any contract that was formed. Under Utah law at the time, for a land contract to be final, there must be a certificate of sale, and it “shall not be final and no rights shall vest in the purchaser until the certificate is executed by the director. The agency reserves the right to cancel a sale of trust land for any reason prior to the execution of the certificate of sale by the director.” *Utah Admin. Code R.850-80-700(3)* (effective until October 31, 2020).

As previously recognized by the Court, “no contract could have formed,” since the Complaint (along with the First Amended Complaint) “never alleges that a certificate of sale was issued, let alone a certificate of sale executed by an authorized individual.”²¹ Since no contract was formed, Defendant Ure could not have violated Plaintiff’s contract rights, and its § 1981 claim should be dismissed.

2.1.1.2. Plaintiff’s property rights were not violated.

Likewise, Plaintiff has not plausibly alleged that its § 1982 rights were violated by Ure. For a § 1982 claim, a “plaintiff must allege that (1) she is a member of a racial minority; (2) defendants denied her rights or benefits connected with the ownership of property; and (3) defendants would not have denied these rights and benefits in the absence of racial discrimination.” *Zhu v. Countrywide Realty Co.*, 160 F. Supp. 2d 1210, 1232 (D. Kan. 2001) (citing *Reeves v. Carrollsburg Condominium Unit Owners Ass’n*, No. 96–2495RMU, 1997 WL 1877201, at *8 (D.D.C. Dec. 18, 1997)).

This claim fails for the same reason the § 1981 claim fails. There was no contract since there was no certificate of sale, and without a contract, Plaintiff does not have any ownership rights in Tabby Mountain. Accordingly, Plaintiff’s § 1982 claim should also be dismissed.

²¹ [Doc. 52 at 39](#).

2.1.2. Plaintiff has not plausibly alleged § 1985 conspiracy claim.

The last federal claim asserted against Defendant Ure is a conspiracy claim under 42 U.S.C. § 1985. However, this claim does not meet the plausibility threshold and should also be dismissed. Defendant Ure recognizes that the Court previously held the initial Complaint “plausibly asserts a constitutional conspiracy claim against Director Ure.”²² However, the Court’s Order is silent about whether such a conspiracy claim is grounded in § 1985. Since the First Amended Complaint “completely replaces the original complaint and renders the original complaint of no legal effect,” *Pierce v. Williams*, 2020 WL 4873516 (W.D.Okla., 2020)(citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991)), it is appropriate to examine anew whether a plausible § 1985 claim has been pled.

The First Amended Complaint quotes 42 U.S.C. § 1985(3),²³ thus Defendant Ure grounds his analysis in this part of the statute. “To state a claim under § 1985(3), a plaintiff must show: (i) a conspiracy, motivated by racially discriminatory animus; (ii) to deprive the plaintiff of equal protection or equal protections of the laws; (iii) an act in furtherance of the conspiracy; and (iv) an injury or deprivation resulting therefrom.” *Pueblo of Pojoaque v. New Mexico*, 214

²² Doc. 52 at 35.

²³ Doc. 72 ¶ 157.

F. Supp. 3d 1028, 1076 (D.N.M. 2016), *aff'd*, 863 F.3d 1226 (10th Cir. 2017) (citing *Paris v. Sw. Bell Tel. Co.*, 94 Fed. Appx. 810, 815 (10th Cir. 2004)(unpublished); *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993)).

Looking only at the second prong of this test, the First Amended Complaint does not allege any deprivation “of equal protection or equal protections of the laws.” Equal protection’s purpose is to ensure that “like cases are treated alike,” that classifications in the law are made “without respect to persons,” and that similarly situated people are treated similarly unless there is at least a rational reason for different treatment. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). There are no allegations that Plaintiff was treated differently than other similarly situated entities. For example, no other private entities placed a bid on the property, only public entities. Therefore Plaintiff’s § 1985 claim must fail for this reason.

2.2. Any federal right was not clearly established.

However, even if Plaintiff alleged a viable federal claim against Ure, the second element of the “qualified immunity” analysis requires courts to examine whether the allegedly violated right was a “clearly established” right. *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008). Plaintiff has not shown facts supporting the violation of a “clearly established” right. A “clearly established”

right is one that makes it apparent that the defendant's conduct is unlawful "in light of preexisting law." *Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (10th Cir. 1998). This burden is often satisfied by a plaintiff "showing that there is a Supreme Court or Tenth Circuit opinion on point, or that his or her proposition is supported by the weight of authority from other courts." *Id.*

Qualified immunity must be granted "if a reasonable officer might not have known for certain that the conduct was unlawful." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). It "does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (cleaned up). The United States Supreme Court has repeatedly told lower courts "not to define clearly established law at a high level of generality." *City and Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015) (cleaned up). "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79. That is, "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 586 U.S. 38, 42 (2019).

There is no precedent demonstrating Ure violated a clearly established right, and this was never argued in the prior motion to dismiss briefing. Indeed, as

it relates to the §§ 1981 and 1982 claims there is no caselaw that suggests they could be violated by a public official's decision to rescind a sale of a property. Likewise, the § 1985 claim lacks any supporting case law that clearly shows a violation of the law. Plaintiff's claims are novel, and it is its burden to provide precedent that clearly establishes Mr. Ure's conduct violated the law. Without showing a clearly established violation, federal claims cannot be maintained against Defendant Ure. Plaintiff cannot do so, thus all federal claims against Mr. Ure should be dismissed for this reason as well.

3. The Utah state law claims should also be dismissed.

Claims VI through VIII are all derived from Utah state law.²⁴ The Court previously dismissed these claims (albeit without prejudice), and their substance is the same in the Amended Complaint. Accordingly, the Court should dismiss them for the same reasons they were dismissed before.²⁵ These state-law claims can be grouped into two categories: (1) non-breach of contract claims,²⁶ and (2) a breach of a contract claim.²⁷ Both categories fail as a matter of law.

²⁴ 1st Am. Compl. ¶¶ 164-195.

²⁵ Doc. 52 at 36-41.

²⁶ This would include Count VI – Breach of Trust; and Count VII – Fraud and Conspiracy to Commit Fraud. (1st Am. Compl. ¶¶ 164-174, 175-183.)

²⁷ Count VIII – Breach of Contract/Estoppel/Equitable Conversion. (1st Am. Compl. ¶¶ 184-195.)

3.1. Non-breach of contract claims.

The non-breach of contract claims should be dismissed because Plaintiff did not file a statutorily required notice of claim. [Utah Code Ann. § 63G-7-101](#) *et. seq.*, provides the framework with which a litigant must comply when filing a claim against a governmental entity.²⁸ Under the Governmental Immunity Act of Utah (GIAU), “[a]ny person having a claim against a governmental entity . . . shall file a written notice of claim with the entity before maintaining an action” [Utah Code Ann. § 63G-7-401\(2\)](#). A claim against a governmental entity is barred unless a notice of claim is properly filed within one year after the claim arises regardless of whether the function giving rise to the claim is characterized as governmental. [Utah Code Ann. § 63G-7-402](#). And the GIAU requires that the plaintiff commence the action within two years of the cause of action. [Utah Code Ann. § 63G-7-403\(b\)](#).

Compliance with the GIAU is a prerequisite to vesting a court with subject matter jurisdiction over claims against governmental entities. *Wheeler v.*

McPherson, 2002 UT 16, ¶ 9, 40 P.3d 632; *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 18, 977 P.2d 1201. Noncompliance with the Act deprives a court of subject

²⁸ Generally, Plaintiff could only bring a claim against the governmental entity and not Mr. Ure. [Utah Code Ann. § 63G-7-202\(3\)\(a\)](#).

matter jurisdiction over a claim against a governmental entity. “Thus, failure to comply with the [GIAU] requires a court to dismiss a complaint.” *Greene v. Utah Transit Auth.*, 2001 UT 109 ¶ 16, 37 P.3d 1156. Utah courts have “consistently and uniformly held that suit may not be brought against the State or its subdivisions unless the requirements of the Governmental Immunity Act are strictly followed.” See, e.g., *Greene*, 2001 UT 109, ¶ 12, 37 P.3d 1156 (subject matter jurisdiction lacking when notice of claim not delivered to UTA president or board secretary despite actual knowledge of the notice of claim).

The First Amended Complaint does not allege compliance with the notice provisions of the GIAU. Indeed, the Court previously found that Plaintiff had not complied with the notice of claim requirement and dismissed Plaintiff’s non-breach of contract state law claims without prejudice.²⁹ Despite the Court’s previous ruling, Plaintiff has not made any attempt to serve a notice of claim, nor could it do so in a timely manner. As such, these claims should now be dismissed with prejudice.

3.2. Breach of contract claim.

The breach of contract claim also fails even though it is exempt from the notice of claim requirements. *Utah Code Ann. § 63G-7-301(b)*. However, it should

²⁹ [Doc. 52 at 37-38.](#)

still be dismissed since there are no allegations that a certificate of sale was issued. Without a certificate of sale, “no contract could have formed.”³⁰ Likewise, the estoppel claim fails because “the [First Amended] Complaint avers no fact making it plausible that the Tribe reasonably relied on SITLA’s stated proposal to award the Tabby Mountain property to the highest bidder”³¹ And the equitable conversion claim fails because no contract was formed.³² Accordingly, all the state law claims must be dismissed against Mr. Ure.

CONCLUSION

For the foregoing reasons, Plaintiff’s First Amended Complaint should be dismissed with prejudice against David Ure.

³⁰ [Doc. 52 at 39](#).

³¹ *Id.* at 40-41.

³² *Id.* at 41.

RESPECTFULLY SUBMITTED THIS 24th day of March, 2025.

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WORD COUNT CERTIFICATION

*I, Andrew R. Hopkins, certify that this Motion to Dismiss contains 4,583 words
and complies with DUCivR 7-1(a)(4).*