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CALVARY OPEN BIBLE CHURCH,
MARK WOOD AND ANTHONY LEE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMBER DUTRO, GLENDA STRIPES, SARAH DUTRO, MARTHA McKNELLY, FRANCES SMITH, and CHRISTINA MOORE,

Plaintiffs,

vs.

COUNTY OF CONTRA COSTA, CALVERY OPEN BIBLE CHURCH, CITY OF ANTIOCH, ART ACOSTA, DEMETREE BARAKOS, WILLIAM DEE, JACK ROGERS, TOM POTTS, MARK WOOD, ANTHONY LEE, and ROES 11 TO 100,

Defendants.

CASE NO. CV-12-2972

DEFENDANT ANTHONY LEE'S NOTICE OF AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

F.R.C.P. 12(b)(6)

DATE: August 1, 2012
TIME: 9:00 a.m.
CTRM.: A
JUDGE: Magistrate Judge Nathanael Cousins

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ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 1, 2012, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom A of the above-entitled court located at 450 Golden Gate Avenue, San Francisco, CA 94102, defendant Anthony Lee will, and hereby does, move this Court to dismiss the First Amended Complaint of Amber Dutro, Glenda Stripes, Sarah Dutro, Martha McKnelly, Frances Smith and Christina Moore pursuant to Federal Rule of Civil Procedure 12 (b)(6).

Defendant Anthony Lee moves to dismiss the First Amended Complaint on the following grounds:

1. The entire action is time-barred under the applicable statutes of limitations; and

2. Plaintiffs fail to state any plausible claims against Anthony Lee;

This motion is based on this Notice of and Motion, the Memorandum of Points and Authorities filed herewith and all other evidence as the Court may receive at the hearing of this motion.

BOWMAN & BERRETH

/S/

DATED: June 15, 2012 By: _____
Mark Charles Bowman, Attorney for
Defendant Anthony Lee

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiffs' action is time barred. The Complaint explicitly reveals that the applicable statute of limitations has run and could not possibly have been tolled. Plaintiffs' ages, as alleged in their Complaint, cannot now be contravened by a future pleading alleging different ages. Consequently, the complaint is fatally defective and cannot be amended. Additionally, the Complaint offers no facts showing that defendant Anthony Lee engaged in any wrongful conduct. For these reasons, Anthony Lee's Motion to Dismiss should be sustained without leave to amend.

II. STANDARD FOR MOTION TO DISMISS.

As the Supreme Court recently clarified, Rule 12(b)(6) is not a toothless tiger, simply incanting the elements of a claim is not sufficient to survive a pleading challenge. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added)). Rejecting the oft-cited myth that a complaint may only be dismissed if it is "beyond doubt" that no set of facts would support the claims, the Supreme Court admonished, "the phrase [no set of facts] is best forgotten as an incomplete, negative gloss on the accepted pleading standard." *Twombly*, 550 U.S. at 563. A simple "formulaic recitation of the elements of a cause of action will not do"; rather, an adequate pleading must contain particularized factual allegations that are "enough to raise a right to relief above the speculative level." *Id.* at 555.

In *Iqbal*, the Supreme Court reinforced this focus on the adequacy and plausibility of pleading by emphasizing two important principles of *Twombly* : (1) "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice … [and (2)]

where the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1949-50 (internal citations omitted). Consistent with these admonitions, this Court need not "accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences." *Oestreicher v. Alienware Corp*., 544 F. Supp. 2d 964, 968 (N.D. Cal. 2008), *aff'd*, 322 Fed. Appx. 489 (9th Cir. Apr. 2, 2009).

III. STATEMENT OF FACTS.

A. Facts Pertaining to the Statute of Limitations.

The First Amended Complaint ("Complaint") states that plaintiffs were all adults at the time their lawsuit was filed on December 7, 2011, and that their abuse started in 1982. Complaint ¶¶ 1 and 14. Plaintiffs were therefore all at least 29 years old when they filed this action.

B. Facts Pertaining to the Conduct of Defendant Anthony Lee.

The Complaint states only that :

> "In or about 2002, the full history of abuse was reported to Pastor ANTHONY LEE, then a pastor at the CHURCH. Defendant ANTHONY LEE failed to make the required reporting of the abuse." Complaint ¶ 37.

IV. ISSUES TO BE DECIDED

A. An action against a child care custodian for failure to report abuse must be brought before the plaintiff's 26th birthday. Does the Delayed Discovery Rule toll the statue of limitations for actions against non-abusers?

B. A complaint must allege facts necessary to state a claim for failure to report abuse under Penal Code § 11164. Can plaintiffs prosecute their claim without stating what Anthony Lee was told and in what capacity he received information?

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V. ARGUMENT

A. Plaintiffs' Complaint Against Anthony Lee is Time Barred Because They Failed to File Their Action Before They Turned 26 And There Is No Delayed Discovery.

A Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery: "If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F3d 778, 783, fn. 1. Specifically, where the facts and dates alleged in the complaint indicate the claim is barred by the statue of limitations, a motion to dismiss for failure to state a claim lies. The complaint fails to state a claim because the action is time-barred. *Jablon v. Dean Witter & Co.* (9th Cir. 1980) 614 F2d 677, 682; *ALA, Inc. v. CCAIR, Inc*. (3rd Cir. 1994) 29 F3d 855, 859.

1. Plaintiffs' Action is Time Barred Because They Failed To Sue Before Their 26th Birthday.

The Complaint identifies Anthony Lee as a child care custodian who had a duty to report abuse allegedly told to him by Sarah Dutro. The statute of limitations for bringing an action against mandatory reporters in California is set forth in Code of Civil Procedure § 340.1 which provides that:

> (a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions:
>
> > (1) An action against any person for committing an act of childhood sexual abuse.

> (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.
>
> (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.
>
> (b) (1) *No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday.* (emphasis added)

Lee is a C.C.P. § 340.1 (a)(2) defendant. In regards to C.C.P. § 340.1 (a)(2) defendants, § 340.1(b)(1) states that "[n]o action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday." Under §340.1(a)(2), plaintiffs were required to bring their action before they turned 26.

To the extent that plaintiffs are asserting that their claim is timely because they did not recognize any connection between their emotional injury and the sexual abuse suffered as a child until they were adults, the court in *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759, 766 (*Hightower*) has already rejected this reasoning. In *Hightower*, one of the arguments made by the plaintiff was that his complaint against nonabusers was timely, despite having been filed after age 26, because he did not discover the cause of his psychological injuries until 2003, and he filed his complaint in 2004, which was within three years of discovering the injury. *Hightower*, *supra*, 763, 767. The *Hightower* court explained that originally there was a one-year statute of limitations. In 1998, the Legislature first applied the delayed discovery for claims against nonabusers and the statute of limitations was tolled from the discovery of the connection between the psychological injury suffered as an adult and the sexual abuse. *Id*. at p. 767. However, such claims were subject to the outer limit of the plaintiff's 26th birthday. *Ibid*. Under the reasoning of *Hightower*, claims for psychological injury resulting from sexual molestations against nonabusers

that had lapsed under the statute of limitations operating at the time had to be filed by the plaintiff's 26th birthday or the end of the special one year window that ended in 2003.

Since plaintiffs' lawsuit was filed at least 3 years after their 26th birthday, (1982 to 2011 spanned 29 years), any earlier claims that were barred by the statute of limitations in effect at the time those claims accrued were not revived by the Delayed Discovery Rule. This was the same result in *K.J. v. The Roman Catholic Bishop of Stockton* (2009) 172 Cal. App. 4th 1388, 1401. Since Lee is a § 340.1(a)(2) defendant, plaintiffs are prevented by law from claiming the statute of limitations is tolled by the 3 year Delayed Discovery Rule identified in § 340.1(a). Because plaintiffs were at least 29 years old when this action was filed on September 23, 2011 (1982 to 2011 spanned 29 years), they filed well after the applicable statute of limitations had run.

2. Plaintiffs' Action is Time Barred Because They Were Aware Since at Least 1995 That They Were Abused.

The language of § 340.1 shows that the three-year limitations period is triggered by the discovery that psychological injury is the result of childhood sexual abuse – not by discovery that a particular third party might be liable for the injury. Under the Delayed Discovery Rule, the statute of limitations begins to run when an injured party suspects, or a reasonable person in his or her position would have suspected, that wrongful conduct had occurred. *Fox v. Ethicon Endo-Surgical, Inc.* (2003) 112 Cal.App 4th 1572, 1580-81. "This rule sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring *actual suspicion* by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that *a reasonable person would have suspected* the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period." *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391.

(emphasis added) As discussed below, plaintiffs were certainly aware since 1995 that they had been abused by their parents.

To avail themselves of the Delayed Discovery Rule, plaintiffs must demonstrate their inability to have made earlier discovery despite exercising reasonable diligence. *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 161. Fatal to plaintiffs' lawsuit is the factual admission that they were well aware – from at least 1995 – that their injuries were caused by their parents' sexual abuse. The Complaint states that:

> "…representatives of CPS (COUNTY employees) JACK ROGERS and TOM POTTS visited their home *in August 1995*. Each of the plaintiffs were interviewed while Glenda Lea Dutro sat next to them holding their hand and squeezing their hand anytime there was a question that could implicate Zion Dutro or Glenda Lea Dutro. The interviews were conducted with Zion Dutro in the house in a position that the plaintiffs could see him watching them. Plaintiffs were terrified and believed from the brainwashing that had occurred that their fate would be even worse *if they told the truth about what had occurred. Consequently, plaintiffs lied to CPS about the conduct of Zion Dutro and Glenda Lea Dutro*.
>
> These interviews were conducted in a manner contrary to procedures set forth in regulations and DSS directives. *Plaintiffs had very much wanted the opportunity to ask CPS what would happen to them if they had been abused and to find out if what their parents had told them was true.* They never had that opportunity because none were ever alone with any CPS worker." *** * ***
>
> If CPS had conducted the interviews individually in 1995 plaintiffs would have informed CPS of their physical, sexual, and psychological abuse. Complaint ¶¶ 28, 29, 30. (emphasis added)

It is impossible for plaintiffs to have "*lied to CPS* " in 1995 or "*wanted the opportunity to ask CPS what would happen to them if they had been abused* " unless they were aware they had suffered from sexual abuse in 1995. And if plaintiffs were aware in 1995 that they were suffering sexual abuse, they could not have "discovered" more than eight years after they turned eighteen that their injury or illness was caused by sexual abuse.

It is clear from their complaint that plaintiffs knew — from 1995 forward — that someone had done something wrong to them in 1995. They had been abused since 1982. The abuse was being investigated by law enforcement. Plaintiffs admit they wanted to "tell the truth" about their sexual abuse to authorities in 1995. Plaintiffs expressly describe in their complaint that they appreciated the wrongfulness of their parents' conduct. At a minimum, they suspected or reasonably should have suspected in August, 1995, that their injury was caused by wrongdoing because they lied about it to CPS. Plaintiffs were aware of —and able to appreciate— the wrongfulness of the actions of their parents when they became adults which, according to their complaint, was at least as early as 2000. Under either the subjective or objective test, this would serve as the accrual date and would make their tort claim filing of December 7, 2011, time barred.

Despite claiming that they wanted to speak to CPS about the ramifications of their parents' abuse as early as August, 1995, plaintiffs allege that they did not learn of "some obligations of CPS" until March 7, 2011, when their sister had contact with CPS relating to another matter. Complaint ¶ 47. Plaintiffs seek to invoke delayed discovery alleging they did not know who to sue. However, identifying potential defendants is not the test for determining the accrual date under the delayed discovery rule. As it pertains to sexual abuse, "[T]he Legislature drafted the delayed discovery provisions of . . . section 340.1 to provide that the limitations period begins to run only after the victim, who is then an adult, appreciates the wrongfulness of the abuser's conduct." *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1242. The allegation that plaintiffs did not obtain the Antioch police report until July or August of 2011 (indicating that Antioch officers did not immediately report her sister's reports of abuse to CPS in 1995) is not a basis for tolling found in § 340.1 and, furthermore, does not implicate Anthony Lee.

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3. The Complaint is Fatally Defective and Cannot be Amended.

Plaintiffs have pled particulars that show they have no legal claim. They are not saved by having pled legal conclusions that would support the claim where the facts pleaded are inconsistent with those legal conclusions. *Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F3d 778, 783, fn. 1. The court cannot consider "new" facts alleged in plaintiff's opposition papers. See *Schneider v. California Dept. of Corrections* (9th Cir. 1998) 151 F3d 1194, 1197 — such allegations are irrelevant for Rule 12(b)(6) purposes.

Here, there is no reasonable possibility that the defects in plaintiffs' lawsuit (that they were all at least 26 when they filed their action and had been aware since 1995 that they had been abused) can be amended; these are factual allegations that cannot now be contradicted by a future pleading.

B. The Complaint Fails to Plead Negligence Against Anthony Lee.

To state a cause of action under the negligence per se doctrine, the plaintiff must plead four elements: (1) the defendant violated a statute or regulation, (2) the violation caused the plaintiff's injury, (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent, and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect. Evid.Code, § 669; *Alejo v. City of Alhambra* (1999) 89 Cal. Rptr. 2nd 768, 771. In 2002, Penal Code § 11166(a) required that:

> "any child care custodian … who has knowledge of or observes a child, in his or her professional capacity or within the scope of his or her employment, whom he or she knows or reasonably suspects has been the victim of child abuse, shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident."

In the present case, plaintiffs fail to offer the particularized factual allegations that are "enough to raise a right to relief above the speculative level" as required in *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007).

C. Lee Had No Information that Plaintiffs Were Being Molested.

The Complaint reveals that, in 2002, Lee only had knowledge of abuse by Zion Dutro which had already been reported and publically adjudicated seven years earlier in 1995. While it was "common knowledge" to Calvary pastors that "Zion was on Megan's Law," (Complaint ¶ 40) the Complaint fails to cite a single specific instance of post-1995 abuse that was reported to Lee by Sarah Dutro or anyone else.

Sarah Dutro specifically states she informed the Antioch Police Department —in 2003— that she was "being molested." Complaint ¶ 38. However, the allegation of current abuse is absent from Sarah Dutro's report to Lee in 2002. Complaint ¶ 37. Sarah Dutro's report to Lee of "the full history of abuse" does not include specific information that there had been abuse during the time between Zion Dutro's criminal conviction in 1995 and Sarah Dutro's report to Lee in 2002. On its face, the Complaint merely establishes that Lee was informed only of what was already public knowledge. Specific information that plaintiffs were abused after Zion Dutro's conviction in 1995 would be necessary for Lee to conclude under P.C. § 11166(a) that he was required to make a report.

The Complaint lumps all of the plaintiff sisters' abuse "collectively" leaving absent any specifics that were communicated to Lee. Furthermore, there is no allegation that Sarah Dutro was even aware of her sister's abuse. To the contrary, the Complaint states that plaintiffs were "isolated" and "not allowed to talk with each other." Complaint 7:14, 15. Consequently, there is no description of what Sarah Dutro told Lee because the Complaint never describes what abuse Sarah Dutro actually suffered —especially between 1995 and 2002—when she allegedly reported to Lee.

D. Lee Was Not a Mandated Reporter in 2002.

Pastors were not per se mandated reporters in 2002. The Complaint fails to identify Lee as a mandated reporter defined in The Child Abuse and Neglect Reporting Act as amended in 2002. PC § 11165.7 (Stats. 2002, c. 936, § 1).

E. Lee Was Not in His Professional Capacity or Within the Scope of His Employment When He Received Dutro's Report.

P.C. § 11166(a), as it read in 2002, required the recipient of information of child abuse to be more than an "employee." The statute expressly required that the recipient be "in his or her professional capacity or within the scope of his or her employment" at the time the abuse is reported. The Complaint alleges only that Lee "was at all relevant times employed by defendant Church" (Complaint ¶ 11)… "then a pastor at the Church" (Complaint ¶ 37). These allegations are insufficient to impose liability on Lee under P.C. § 11166(a) because there is no indication Lee received Sara Dutro's report when he was "in his professional capacity or within the scope of his employment."

VI. CONCLUSION

Plaintiffs' allegations concerning Anthony Lee's conduct are wholly conclusory and fail to state facts under the Supreme Court's standard set forth in *Iqbal*. Furthermore, because the Complaint clearly identifies that the applicable statute of limitation has run, the Motion to Dismiss should be sustained without leave to amend and the Third Amended Complaint be dismissed with prejudice.

Respectfully submitted.

BOWMAN & BERRETH

/S/

DATED: June 15, 2012 By: _____
Mark Charles Bowman, Attorney for
Defendant Anthony Lee