

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

MUSCOGEE (CREEK) NATION, et al.,

Plaintiffs,

VS.

POARCH BAND OF CREEK INDIANS, et
al.,

Defendants.

Civil Action Number:
2:12-cv-01079-MHT-CSC

**PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE
TO INDIVIDUAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED
COMPLAINT AND SUPPLEMENTAL COMPLAINT**

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I. INTRODUCTION

Plaintiff Mekko George Thompson (“Mekko Thompson”) has stated a plausible claim for outrage. The claim must not be dismissed on the basis of legislative immunity, not only because it would be premature, but also because legislative immunity does not attach to the conduct alleged. The outrage claim is timely. It is a continuing tort that is not time barred and, in any event, it relates back to the filing of the original Complaint in this matter, which was unquestionably timely. For these reasons and the additional reasons laid out in more detail below, this Court should deny the Individual Defendants’ Motion to Dismiss.

II. BACKGROUND

The circumstances most relevant to Mekko Thompson’s outrage claim are discussed below. A more complete discussion of the factual background is set forth in the Plaintiffs’ Brief in Response to the Tribal Defendants’ Motion to Dismiss filed contemporaneously herewith.

A. Hickory Ground Is A Historic Burial Site Sacred To Muscogee (Creek) Nation.

Defendants Stephanie A. Bryan, Robert R. McGhee, Sandy Hollinger, Keith Martin, Arthur Mothershed, and Garvis Sells are members of Tribal Council of the Poarch Band of Creek Indians (“Poarch”). Dkt. No. 190 at 8, ¶ 19. Defendants Eddie L. Tullis, Buford Rolin, and David Gehman are former members of the Poarch Tribal Council. *Id.* at 9, ¶ 24. Collectively, these current and former Tribal Council members are hereinafter referred to as the “Individual Defendants.”

Over an extended period of time, the Individual Defendants intentionally and outrageously caused the desecration of the Hickory Ground Site. *Id.* at 50, ¶ 223. The Hickory Ground Site is a sacred site that is also listed on the National Register of Historic Places. *Id.* at 5, ¶¶ 2-3. Historically, the Hickory Ground Site was home to the Hickory Ground Tribal Town of the Muscogee (Creek) Nation. *Id.* at 5, ¶ 2. It was the last capital of the Muscogee (Creek) Nation before the Muscogee (Creek) Nation, including Hickory Ground Tribal Town, was forcibly removed from Alabama. *Id.* at 5, 7, ¶¶ 2, 12. George Thompson is the Mekko, or chief,

of the current Hickory Ground Tribal Town, which has resided in Oklahoma since its forced removal. *Id.* at 7, ¶¶ 12, 14. His ancestors have served as Mekko of Hickory Ground Tribal Town since time immemorial. *Id.* at 13, ¶ 46. As Mekko, he has heightened moral and religious obligations to care for the graves and bodies of the deceased members of Hickory Ground Tribal Town, and failing in that duty is considered to be a failure to his ancestors, Hickory Ground Tribal Town, clan, and culture. *Id.* at 50, ¶ 225.

Among the spiritual and religious beliefs of Mekko Thompson, Hickory Ground Tribal Town, and the Muscogee (Creek) Nation are: that burial and ceremonial grounds are sacrosanct and must not be entered, let alone disturbed, without the proper religious protocol, *id.* at 17, ¶ 55; that ancestors must be left at peace in their final resting places, together with their possessions/funerary items, *id.* at 17, ¶ 56; that their descendants have a religious duty to care for the graves and remains of the deceased, *id.* at 17, ¶ 57; that certain burial protocols must be followed, *id.* at 17, ¶ 58; that archaeological examination violates the sanctity of the ancestors and destroys their spiritual existence until they are put back at peace using appropriate religious protocol, *id.* at 32, ¶ 127; that the soil that surrounds a body is considered part of the body, and separating it from the body is akin to removing a limb, *id.* at 32, ¶ 128; and that it is sacrilegious to have alcohol near ceremonial grounds, *id.* at 73, ¶ 328. As Poarch tribal members and Tribal Council members, the Individual Defendants were presumably at least somewhat familiar with some or all of these beliefs. *See, e.g., id.* at 37, ¶ 162 (describing a letter from Individual Defendant Rolin acknowledging that “the beliefs and customs of the [Hickory Ground ceremonial grounds leadership]” required “reinterment in [the original resting] place”); *id.* at 51-52, ¶ 229 (stating that the “Muscogee (Creek) Nation trusted Poarch and Poarch’s leadership, who claim to be Creek people, to understand the Muscogee (Creek) members’ religious and cultural duties to their ancestors.”).

B. Poarch Promised To Preserve Hickory Ground, But Then Desecrated It For Money.

Human burials, associated funerary objects, other cultural items, remains of ceremonial grounds, and remains of various structures are located almost everywhere throughout the Hickory Ground Site. *Id.* at 15-17, 30-31, ¶¶ 54, 116. Poarch had long promised to preserve the Hickory Ground Site, acknowledging that destruction of the Hickory Ground Site would destroy the cultural history of Creek people. *Id.* at 18-20, ¶¶ 67-71. Nevertheless, sometime between 2000 and 2011, Poarch¹ directed excavations at the Hickory Ground Site. *Id.* at 28, ¶¶ 100-102. Poarch failed to direct appropriate protocols, such as keeping remains and surrounding soil together. *Id.* at 32, ¶ 129. At least 57 sets of human remains and associated funerary objects were exhumed during this period. *Id.* at 31, ¶ 117. These are the direct lineal ancestors of Mekko Thompson and other Hickory Ground Tribal Town members. *See id.* at 31, ¶ 118. Numerous other cultural items were removed as well. *Id.* at 31, ¶¶ 119-20. Poarch directed the storage of these ancestors and their possessions in a manner that is abhorrent in the Muscogee (Creek) religion (*e.g.*, separated from their surrounding soil and associated funerary objects, stored in newspaper and plastic bins in a non-air conditioned shed, etc.). *Id.* at 31, 50-51, ¶¶ 120-124, 226.

Mekko Thompson and the other Plaintiffs engaged in extensive traditional dispute resolution efforts and other efforts to stop Poarch's outrageous conduct, but their efforts were to no avail. *Id.* at 33-35, ¶¶ 139-49. In April 2012, Poarch abruptly, without appropriate notice to Mekko Thompson and the Muscogee (Creek) Nation and in a manner abhorrent to their religion, reinterred most of the ancestors' remains and possessions *away* from their original and intended final resting places. *Id.* at 35-36, ¶¶ 150-159. Needless to say, the appropriate religious

¹ As Mekko Thompson's outrage claim demonstrates, Mekko Thompson believes that the Individual Defendants bear responsibility for all acts relevant to the outrage claim, whether because they authorized, directed, conducted, or participated in the acts. To the extent that the Plaintiffs have been able to determine, through their own investigatory efforts, which Individual Defendants have committed specific acts, they have so alleged. But further development of the record will be necessary in order to determine all specific acts taken by each Individual Defendant.

protocols were not followed. *Id.* at 37, ¶ 164. To add insult to injury, Poarch then issued a false and misleading press release about these events. *Id.* at 37, ¶¶ 166-67.

Poarch then proceeded to build a casino and hotel right on top of the sacred and historic Hickory Ground Site—on top of remains and funerary items left behind by the excavations, historic remains of structures, and other cultural items. *Id.* at 39-43, ¶¶ 179-183. The main entrance of the facility directly abuts the principal ceremonial site. *Id.* Construction of the casino likely destroyed many other cultural items forever. *Id.* at 28, ¶ 105. Poarch did not ensure that construction activity was stopped when cultural items were discovered, and did not ensure that adequate records were kept of such discoveries. *Id.* at 33, ¶¶ 134-35. Sometime during construction, Individual Defendant Bryan again added insult to injury by distributing a false and misleading letter about the events to other tribes *nationwide*. *Id.* at 37-39, ¶¶ 168-178. Poarch's motivation for this shocking conduct is simple: the casino generates hundreds of millions of dollars in gambling and resort revenue each year for Poarch and its members. *Id.* at 46, 48, ¶¶ 202, 211.

The exhumations and construction may have since stopped (at least for now), but the injury to Mekko Thompson and the other Plaintiffs continues. Some of their ancestors' remains and cultural items remain in storage (in plastic bins in Wetumpka and in forgotten boxes at Auburn University) others remain beneath the casino, others remain improperly reinterred, and others are at risk of being disinterred at the whim of the Individual Defendants. Meanwhile, the Individual Defendants continue to desecrate the Hickory Ground Site by allowing the general public access to the site, and authorizing/directing the service of alcohol at the site. *See id.* at 50-52, 73; Dkt. 179-1 at PDF pp. 6-7. And not only are Muscogee (Creek) Nation members prevented as a practical matter from accessing the site by the presence of the casino, they have even been arrested for attempting to perform ceremonies at the Hickory Ground Site. Dkt. 190 at 39-43, 73, ¶¶ 179-183, 325. Moreover, the Individual Defendants have never corrected the false and misleading information they distributed in the public realm. The Individual Defendants

could reverse, stop, or at least mitigate, the harm they have caused and continue to cause, but they have consistently refused to do so.

These events have caused Mekko Thompson to fail in his moral and religious duties, and have caused him “abject pain, sorrow, anguish, torment, suffering, helplessness, grief, and anger.” *Id.* at 50, ¶ 225. He lives with an “enduring feeling of helplessness and fear...that this will happen again, *id.* at 51, ¶ 227, and the “irreparable anguish of knowing that the ancestors were wrenched from what was intended to be their final resting places, disrespected, and grotesquely mistreated.” *Id.* at 51-52, ¶ 229. Together with the other Plaintiffs, he has filed this lawsuit, in part, so that the Individual Defendants will be held accountable for their egregious actions. *See id.* at 51, ¶ 227.

C. Individual Defendants Had Timely Notice Of These Claims.

Each of the Individual Defendants was named as a defendant in the original Complaint and the First Amended Complaint filed in this matter. Dkt. Nos. 1, 57. Accordingly they have always had notice of this matter, and have always been parties to this matter. The Second Amended Complaint merely clarifies that they were named as defendants in their individual capacities as well. *Compare* Dkt. No. 57 at 5, ¶ 13, *with* Dkt. No. 190 at 8-9, ¶¶ 19, 24. *See also* Dkt. No. 159-4 at 2. The Second Amended Complaint arises out of the same conduct and series of occurrences as alleged in the original Complaint, but it adds additional specificity and clarification. For example, the original Complaint stated:

Defendants’ actions proximately caused and **continue to cause harm to Plaintiffs**. Plaintiffs are experiencing severe emotional distress because of the violation of the burial sites of their ancestors and the violation of their religious and cultural beliefs, including but not limited to their inability to respect their ancestors, pray on the ceremonial ground, and keep Hickory Ground sacred.

Dkt. No. 1 at 10, ¶ 39 (emphasis added). It also stated that the ground-disturbing activities (which ultimately continued with respect to excavation until 2011, and with respect to construction activities until 2014, *see* Dkt No. 190 at 28, 32, ¶¶ 100-02, 132, “are damaging

the Plaintiffs including but not limited to causing severe emotional, spiritual and dignitary harm.” Dkt. No. 1 at 16, ¶ 67. The Second Amended Complaint more clearly states an express claim of outrage against the Individual Defendants. Dkt. No. 190 at 49-52, ¶¶ 221-29, 233-35. The outrage claim is asserted as a continuing tort. The Individual Defendants now move to dismiss the outrage claim. Dkt. Nos. 204, 205. For the reasons that follow, their motion must be denied.

III. STANDARD FOR MOTION TO DISMISS

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 12(b)(6) allows a party to assert by motion a defense of “failure to state a claim upon which relief can be granted.” To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Twombly*, 550 U.S. at 563.

“Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the...claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (alteration in original) (quoting *Twombly*, 550 U.S. at 555). “In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Id.* at 93-94. The court must assume that the factual allegations set forth in the complaint are true and must construe them in the light most favorable to the plaintiff. *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1215 (11th Cir. 2012); *Arthur v. Thomas*, 974 F. Supp. 2d 1340, 1343 (M.D. Ala. 2013). All reasonable inferences must be

drawn in the plaintiff's favor. *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1043 (11th Cir. 2019).

A motion under Rule 12(b)(6) does not pose the question of whether the plaintiff can ultimately prevail on the merits—"a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556; *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2020) ("Whether the plaintiff ultimately can prevail on the merits is a matter properly determined on the basis of proof, which means on a summary judgment motion or at trial by the judge or a jury, and not merely on the face of the pleadings."). The burden of persuasion is on the party moving under Rule 12(b)(6) to demonstrate that no legally cognizable claim for relief exists. *Cohen v. Bd. of Trs. of the Univ. of the D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) (quoting 5B Wright & Miller, *supra* § 1357) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists.").

IV. ARGUMENT

Mekko Thompson need only state a claim that is plausible on its face, and that gives the Individual Defendants fair notice of the grounds upon which it rests. With respect to his claim of outrage, he has done this, while the Individual Defendants have not met their burden of showing that he has not.

Nor are the Individual Defendants entitled to a dismissal at the pleading state of the case based on their affirmative defenses. Dismissal on the basis of the affirmative defense of legislative immunity would be premature, and legislative immunity does not apply to the facts and conduct alleged in the Second Amended Complaint. Dismissal on the basis of the affirmative defense of the statute of limitations would also be inappropriate. In a case like this, outrage is a continuing tort that is not time barred. Moreover, the outrage claim relates back to

the filing of the original Complaint, which was unquestionably timely. Accordingly, the Individual Defendants' motion to dismiss must be denied.

A. Mekko Thompson has pleaded facts supporting a plausible claim for outrage.

The tort of outrage was first recognized by the Alabama Supreme Court in *Am. Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980). The Court stated:

we now recognize that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

Id. (internal citations omitted). The elements of the tort are, accordingly:

- (1) that the defendants either intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from their conduct;
- (2) that the defendants' conduct was extreme and outrageous; and
- (3) that the defendants' conduct caused emotional distress so severe that no reasonable person could be expected to endure it.

Callens v. Jefferson Cty. Nursing Home, 769 So. 2d 273, 281 (Ala. 2000); *see also, e.g., Exford v. City of Montgomery*, 887 F. Supp. 2d 1210, 1230 (M.D. Ala. 2012).

Courts often repeat the maxim that the Alabama Supreme Court has only recognized the tort of outrage in three circumstances: "(1) wrongful conduct in the family-burial context; (2) barbaric methods employed to coerce an insurance settlement; and (3) egregious sexual harassment." *Little v. Robinson*, 72 So. 3d 1168, 1172 (Ala. 2011) (internal citations omitted) (quoting *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000)). But other circumstances may also give rise to a viable claim of outrage. *Ex parte Bole*, 103 So. 3d 40, 53 (Ala. 2012) ("That is not to say, however, that the tort of outrage is viable in only the three circumstances noted in *Potts*."); *Yeldell v. Wells Fargo Bank*, No. 09-01584, 2011 WL 13287064, at *19 (N.D. Ala.

Mar. 2, 2011) (unpublished) (stating that “no court has specifically held that a plaintiff may recover for outrage only in these three circumstances”).²

Courts applying Alabama law have found that the tort of outrage was sufficiently pled and/or supported by sufficient evidence in numerous circumstances involving the improper treatment of human remains. In one case with hauntingly familiar facts, a mortuary that inappropriately disinterred, desecrated, and reinterred/disposed of human remains was held liable for \$2 million. *Gray Brown-Service Mortuary, Inc. v. Lloyd*, 729 So. 2d 280, 284, 286 (Ala. 1999) (affirming a \$2M general verdict for claims including outrage). An outrage claim was also upheld when a portion of an old cemetery was damaged by the defendants conduct, which included clearing of the land and knocking down a fence and tombstones. *Whitt v. Hulsey*, 519 So. 2d 901, 905-06 (Ala. 1987). In another case in which an outrage claim was asserted, a funeral home was held liable for refusing to turn over a family member’s body until the family paid for services it claimed it had already rendered. *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63, 64-65 (Ala. 1986) (affirming judgment in favor of plaintiffs, albeit without analysis of the outrage claim). Liability for outrage was also upheld when a cemetery operator refused to allow burial in a particular cemetery lot just 30 minutes before the scheduled funeral, which required the plaintiffs to procure a different lot in the same cemetery. *Cates v. Taylor*, 428 So. 2d 637, 640 (Ala. 1983).

Given the powerful emotional, cultural, religious, and personal interests surrounding the handling of human remains, it is no surprise that outrage claims have been recognized in these circumstances or that conduct like that alleged in the Second Amended Complaint has been determined to be outrageous. As shown below, Mekko Thompson has pleaded a plausible claim

² Alabama courts and federal courts applying Alabama law have recognized outrage claims in a wide range of contexts. *See, e.g., Edwards v. Hyundai Motor Mfg. Alabama, LLC*, 603 F. Supp. 2d 1336, 1355 (M.D. Ala. 2009) (supervisor’s sexual harassment of an employee); *Holmes v. Oxford Chem., Inc.*, 672 F.2d 854, 857 (11th Cir. 1982) (90% reduction in disability payment); *O’Rear v. B.H.*, 69 So. 3d 106, 119 (Ala. 2011) (doctor providing addictive drugs in return for sex), *abrogated on other grounds by Ex parte Vanderwall*, 201 So. 3d 525 (Ala. 2015); *Cont’l Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208, 1212-13, 1221-22 (Ala. 1990) (insurer’s improper withholding of funds to force a settlement); *Rice v. United Ins. Co. of Am.*, 465 So. 2d 1100, 1102 (Ala. 1984) (firing of pregnant employee for refusing to take disability leave).

for outrage. Such a claim should not be dismissed at the pleading stage “because reasonable [people] could differ as to the outrageousness of [a] defendant’s conduct, [and] it [is] for the jury to determine whether the conduct was sufficiently extreme and outrageous to result in liability.” *Rubin v. Matthews Int’l Corp.*, 503 A.2d 694, 699 (Me. 1986). Accordingly, the Individual Defendants’ motion to dismiss for the outrage claim should be denied.

1. The Individual Defendants either intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from their conduct.

The Individual Defendants concede that Mekko Thompson has alleged “that the Individual Defendants collectively committed outrageous acts intentionally.” Dkt. No. 205 at 11. And they reference Mekko Thompson’s allegations regarding excavation of the Hickory Ground Site, desecration of what they disrespectfully term the “archaeological findings,” the continued storage of some of the human remains and cultural items excavated, *id.* at 12, and the oversight of the reinterment of some excavated remains and funerary objects, *id.* at 12-13. While the Individual Defendants’ characterization of these events is obviously much different than Mekko Thompson’s is, it is Mekko Thompson’s version of events that must be presumed to be true and given the benefit of all reasonable inferences at this point. *See Reese*, 678 F.3d at 1215. The Individual Defendants’ recognition of these allegations shows that they have fair notice of what the claim is and the grounds upon which it rests. That should be the end of the court’s inquiry as to the first element of Mekko Thompson’s claim of outrage.

The court need not, and should not, proceed further in order to find that Mekko Thompson’s allegations are sufficient to state a claim with respect to this element. But if it does, the court should find that the allegations are, indeed, sufficient. Among other things, Mekko Thompson alleges:

The Individual Defendants, knowing that Hickory Ground and the human remains and funerary objects buried there were sacred in the culture and traditional religion of Mekko Thompson, intentionally and outrageously caused the desecration of Hickory Ground by ordering that the bodies and funerary objects

buried there be exhumed, disassociated, dismantled, analyzed, and reinterred in a manner considered abhorrent in the Muscogee (Creek) traditional religion.

Dkt. No. 190 at 50, ¶ 223. Accepting these allegations as true and drawing all reasonable inferences in favor of the Plaintiff, as the court must (*see* Section III, above), it would be impossible to conclude that knowing something is sacred to someone, yet intentionally proceeding to desecrate it, does not meet the intent element for a claim of outrage.

Mekko Thompson also alleges various other acts by Individual Defendants that a reasonable person would know, or should know, were likely to result in emotional distress. Without limitation, these acts include that the construction at Hickory Ground, authorized and directed by the Individual Defendants, “likely destroyed many cultural items forever,” Dkt. No. 190 at 28, ¶ 105; that Poarch (necessarily via the Individual Defendants) directed the storage of Mekko Thompson’s ancestors and their possessions in an “abhorrent” manner, *id.* at 31, 50-51, ¶¶ 120-124, 226; that they wrongfully reinterred the remains and funerary objects of Mekko Thompson’s ancestors, without appropriate notice to Mekko Thompson, in a location and manner that they knew violated Mekko Thompson’s religious beliefs, *id.* at 35-37, ¶¶ 153-58, 162, 164; that they intentionally concealed their conduct from Mekko Thompson, *id.* at 51, ¶ 227; and that they affirmatively and repeatedly lied about their conduct (including on a nationwide scale), *id.* at 37-39, 51, ¶¶ 166-178, 228.

The Individual Defendants’ argument that Mekko Thompson should be required to allege specific actions by each Individual Defendant is unavailing. The authority they cite for this proposition is easily distinguishable. That case, *Hughes v. City of Montgomery*, No. 12-1007, 2013 WL 146397 (M.D. Ala. Jan. 14, 2013) (unpublished), involved a claim of outrage brought against private citizens but premised solely on allegedly improper acts by a police officer, with only the threadbare allegation that the police officer was acting at the “behest” of the private citizens (which the private citizens, moreover, denied). *Id.* at *1-2. The plaintiff alleged no actions whatsoever by the private citizens. *Id.* at *2. Here, by contrast, Mekko Thompson has alleged that the Individual Defendants authorized, directed, conducted, and/or participated in

various actions. And unlike in *Hughes*, where private citizens have no authority to direct the actions of police officers, Tribal Council members do have the authority, or at least the apparent authority, for the authorizations and directions complained of here (although that does not necessarily mean that they were acting in that capacity, or within the scope of that authority, or otherwise properly).

There is no obligation to plead the facts showing the Individual Defendants' intent with specificity. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Nor is it reasonable to expect Mekko Thompson to be able to identify with specificity all of the acts of each Individual Defendant at this point in the proceedings, or what their intent was, when no discovery has taken place. To the extent the Plaintiffs have been able to identify, through their own investigational efforts, specific acts by specific Individual Defendants, they have alleged those acts with specificity. *E.g.*, Dkt. No. 190 at 35-37, ¶¶ 153-158, 162 (describing specific actions and acknowledgments by Individual Defendant Buford Rolin concerning the wrongful reinterment of Mekko Thompson's ancestors); *id.* at 37-39, ¶¶ 168-178 (describing a "false and misleading" letter that Individual Defendant Stephanie Bryan mailed to tribal leaders nationwide regarding the circumstances in question). Having pleaded a plausible claim for outrage, Mekko Thompson is entitled to proceed with discovery to obtain the information that is necessarily within the Individual Defendants' sole control to determine which Individual Defendants took which actions, and what their intent was in taking those actions. *See, e.g., Schultes v. Kane*, 856 N.Y.S.2d 684, 687 (N.Y. App. Div. 2008) (reversing the dismissal of a claim for intentional infliction of emotional distress with respect to a defendant because the question of that defendant's intent "cannot be resolved without further development of the record").

At this stage in the proceedings, Mekko Thompson is not required to prove all of the elements of his outrage claim, but merely to state a plausible claim, giving defendants fair notice of what the claim is and the grounds upon which it rests; specific facts are not necessary, *see* Section III, above. Mekko Thompson has done so with respect to the intent element.

2. The Individual Defendants' conduct was extreme and outrageous.

“The sentiment of all civilized peoples regards the resting place of the dead as hallowed ground.” *Smith & Gaston Funeral Dirs, Inc. v. Dean*, 80 So. 2d 227, 232 (Ala. 1955) (quoting 10 Am. Jur. *Cemeteries* § 22). “The tenderest feelings of the human heart center around the remains of the dead.” *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949). “Who so disturbs a dead body merely to suit his own convenience does so at his own risk. He may do a wrong for which he should be punished. He knows what he is doing.” *Gostowski v. Roman Catholic Church of the Sacred Hearts*, 186 N.E. 798, 800 (N.Y. 1933). Accordingly, “[l]egal authorities have long acknowledged the likelihood of mental anguish resulting from the mishandling of dead bodies.” *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 433 (Ohio Ct. App. 1986). Alabama courts too have recognized viable claims of outrage in a number of circumstances involving damage to burial grounds; improper disinterment, desecration, and/or reinterment of human remains; and other conduct involving the dead and their burial rites resulting in severe emotional distress. *See* Section IV.A above.

Most relevant of the Alabama precedent is *Whitt*, 519 So. 2d 901. In that case, the plaintiffs were unspecified “descendants” of an ancestor who had died in 1853—more than 130 years ago at the time of the lawsuit. *Id.* at 902. They alleged that in 1983, the defendant damaged a portion of the old family cemetery in which their ancestor was buried, including by clearing a portion of the land and knocking down a fence and several tombstones. *Id.* at 902, 904-906. They sued for outrage, among other claims. The Alabama Supreme Court affirmed judgment in the plaintiffs’ favor, stating with respect to the outrage claim:

We are persuaded that sufficient evidence was presented to support the submission of the outrageous conduct count to the jury. The evidence at the very least supports an inference that Whitt acted recklessly in clearing the land around the cemetery where relatives of the plaintiffs were buried. We realize that there may be differences of opinion regarding the dividing line between merely offensive conduct and conduct that is atrocious and intolerable in a civilized society. Great respect is afforded the resting place of the dead....“Our decisions lay much stress upon the sacredness of the resting ground of the dead ..., and the

exclusive right of interment and possession being shown, guard the spot against unlawful invasion and give a right of action for any illegal interference....” Under the particular facts of this case, and in view of the deep human feelings involved, we find the evidence sufficient to support the claim of outrageous conduct, where the alleged act was the desecration and destruction of a portion of a family burial ground.

Id. at 906 (internal citations omitted) (second and third alterations in original).

Substantial persuasive precedent from other jurisdictions is in accord. *E.g.*, *Ceasar v. Shelton Land Co.*, 646 S.E.2d 689, 690-91 (Ga. Ct. App. 2007) (reversing grant of summary judgment in favor of defendants on plaintiffs’ claims, which included claim for intentional infliction of emotional distress,³ where defendants had bulldozed over an old cemetery containing children of plaintiffs’ indirect ancestors, even though plaintiffs did not know the children’s names, nobody had been buried there in many years, and the family did not tend the area); *Contreras v. Michelotti-Sawyers*, 896 P.2d 1118, 1121 (Mont. 1995) (“[W]e hold that one who negligently removes, withholds, mutilates, embalms, provides funeral, burial, or crematory services, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to the deceased person’s close relatives for resulting emotional distress.”); *Carney*, 514 N.E.2d at 431, 433 (affirming denial of defendants’ motion for directed verdict after jury verdict in favor of plaintiffs on plaintiffs’ claim for emotional distress resulting from disturbance of ancestor’s gravesite and improper disposal of some of ancestor’s remains); *Scarpaci v. Milwaukee Cty.*, 292 N.W.2d 816, 820, 835 (Wis. 1980) (concluding that plaintiffs’ complaint for performing an autopsy on their deceased child without their permission and after they had made it known they did not want an autopsy states a claim upon which relief can be granted); *Papieves v. Lawrence*, 263 A.2d 118, 121 (Pa. 1970) (“We conclude that recovery may be had for serious mental or emotional distress directly caused by the intentional and wanton acts of mishandling a decedent’s body which are here alleged.”); *Codell Constr. Co. v. Miller*, 202

³ Other jurisdictions may use other terms, such as “intentional infliction of emotional distress.” This is equivalent to the tort of outrage. *Archie v. Enter. Hosp. & Nursing Home*, 508 So. 2d 693, 694-95 (Ala. 1987) (explaining that the tort of outrage is often referred to as the intentional infliction of emotional distress, and that they state the same cause of action).

S.W.2d 394, 397, 399 (Ky. 1947) (stating that descendants' allegations regarding highway project's destruction of ancestor's graves were sufficient to state a cause of action, even though descendants had not visited graves in 40 or more years, did not know their ancestors, and did not remember them; but reversing jury verdict based on erroneous jury instructions); *Gostowski*, 186 N.E. at 799-800 (affirming a jury verdict that included damages for mental suffering and anguish where funeral flowers were moved to another grave and the body was reinterred in another lot without notice).

Even less egregious conduct, such as failing to deliver a memorial stone on time, or removing foliage from a burial ground, may constitute outrage, according to persuasive precedent. *E.g.*, *Rubin*, 503 A.2d at 696, 700 (finding that the complaint stated a cause of action for intentional infliction of emotional distress where the defendant failed to deliver a memorial stone in time for an unveiling ceremony as promised); *O'Neal v. Veazey*, 84 S.E. 962, 963 (Ga. 1915) (affirming verdict for plaintiffs and stating that damages for injury to the peace and happiness of the plaintiffs are recoverable where defendant removed trees and bushes from burial ground of plaintiffs' ancestors).

The West Virginia Supreme Court of Appeals case of *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438 (W. Va. 1985), is particularly instructive as persuasive precedent. In that case, the defendant undertook to relocate bodies buried in a cemetery in preparation for construction of a new highway. *Id.* at 439. The plaintiff alleged that the remains of her sister and two aunts were lost or misplaced after removal, that the defendant failed to remove all of the remains of her cousin, and that the remains of her uncle and father were left behind and presumably now rest under the new highway. *Id.* Moreover, the defendant failed to notify her of the disinterment so that she could be present, despite its assurances that it would do so. *Id.* at 440. The Court found the failure to notify the plaintiff of the disinterment was actionable, as was the losing of bodies, and parts of bodies, after disinterment, thereby preventing reinterment. *Id.* at 442. Accordingly, the Court reversed the dismissal of the plaintiff's complaint for failure to state a claim upon which relief could be granted. *Id.* at 444. Notably, this was the result even

though the defendant had the lawful authority to disinter and reinter the remains—the issue was the *manner* in which the acts were performed. *Id.* at 440.

Mekko Thompson has alleged conduct by the Individual Defendants that was similarly extreme and outrageous, including, without limitation, the improper exhumation of his ancestors and their possessions, in violation of his and the Muscogee (Creek) Nation’s religious beliefs, Dkt. No. 190 at 17, ¶¶ 55-56, 60; the removal of his ancestors and their possessions from their final resting places, in violation of his and Muscogee (Creek) Nation’s religious beliefs, *id.*; the archaeological study of his ancestors and their possessions in violation of his and Muscogee (Creek) Nation’s religious beliefs, *id.* at 32, ¶ 127; the storage, at Poarch’s direction (necessarily via the Individual Defendants), of his ancestors and their possessions in a manner abhorrent to the Muscogee (Creek) religion, *id.* at 31, ¶¶ 120-124; the failure to instruct personnel not to separate the surrounding soil from remains, in accordance with Muscogee (Creek) Nation religious beliefs, *id.* at 32, ¶ 128; the reinterment of some of the ancestors’ remains without appropriate notice to Mekko Thompson, and in a location and manner that violated Mekko Thompson’s and Muscogee (Creek) Nation’s religious beliefs, *id.* at 35-37, ¶¶ 150-59, 164; and the subsequent nationwide issuance of false and misleading press releases and other communications regarding their actions,⁴ *id.* at 37-39, 51, ¶¶ 166-178, 228. The damage done in *Whitt* was minor in comparison to the damage in this case. And the subsequent treatment of the ancestors’ remains and lack of appropriate notice of the reinterment should be actionable as in *Whitehair*.

⁴ The Individual Defendants reference some of these communications and assert that they do not “relate to or give rise to the outrage claim.” Dkt. No. 205 at 10 n.4. Not so. The outrage claim specifically incorporates by reference all of the factual allegations stated previously. Dkt. No. 190 at 49, ¶ 221. And the communications they reference do relate to the outrage claim—they involve the lack of appropriate notice of the reinterment (which is actionable as outrage, per *Whitehair*, 327 S.E.2d at 442), the knowledge that the location of the reinterment violated Mekko Thompson’s religious beliefs (which is relevant to the intent element of the outrage claim), and the harmful propaganda campaign subsequent to the reinterment (which supports the claim of outrage, in accordance with *Rice*, 465 So. 2d at 1102).

Additionally, several circumstances further support the conclusion that Mekko Thompson has sufficiently pled this element of his outrage claim. First, Mekko Thompson has alleged a pattern of activity encompassing an extended period of time, which the *Rice* court cited as a distinguishing factor supporting a claim of outrage. *Rice v. United Ins. Co. of Am.*, 465 So. 2d 1100, 1102 (Ala. 1984). Second, the Individual Defendants’ alleged behavior involved a great many persons (including Auburn University, federal government agencies and officials, construction companies, press releases to the general public, and false and misleading communications to other tribes *nationwide*) in addition to Mekko Thompson and the Individual Defendants, which the *Rice* court also cited as a distinguishing factor. *Id.* Third, the outrageous actions alleged by Mekko Thompson were allegedly directed toward an illegal purpose—violation of federal laws,⁵ which the *Rice* court also cited as a distinguishing factor. *Id.* Finally, because they were acting under the cloak of federal delegated authority,⁶ the Individual Defendants were in a position of elevated trust and had a greater responsibility to observe the law, as there were essentially no checks on their conduct concerning the Hickory Ground Site. Taken together, these factors strongly support denial of their motion to dismiss. *See Woodley v. City of Jemison*, 770 So. 2d 1093, 1096 (Ala. Civ. App. 1999) (stating that a police officer is in a position of heightened public trust, and holding that the question of whether conduct that breached that public trust was outrageous should go to the jury).

The Individual Defendants’ disingenuous attempt to characterize their conduct as “archaeological excavation and study of the remains of unknown individuals,” Dkt. No. 205 at 13, falls far short of their burden to prove that no legally cognizable claim for relief exists. Only their actions actually relating to the exhumation and study of Mekko Thompson’s ancestors and their possessions and historic Tribal Town could even arguably qualify as archaeological excavation and study. Yet as alleged in Plaintiffs’ Second Amended Complaint and discussed

⁵ *See* Plaintiffs’ Brief in Response to Tribal Defendants’ Motion to Dismiss for discussion of the alleged federal law violations.

⁶ *See* Plaintiffs’ Brief in Response to Tribal Defendants’ Motion to Dismiss for discussion of delegated federal authority, which is beyond the scope of the instant Brief.

further in Plaintiffs’ Brief in Response to the Tribal Defendants’ Motion to Dismiss, this so-called “archaeological excavation and study” was conducted in violation of federal law. *See, e.g.*, Dkt. No. 190 at 26-27, ¶¶ 91-99.

Even if this conduct were lawful (which it was not), that would not defeat Mekko Thompson’s claim. As in *Whitehair*, 327 S.E.2d at 440-41, the *manner* in which the acts in question were performed would still give rise to a viable claim of outrage. And as discussed above, Mekko Thompson has alleged numerous other actions by the Individual Defendants that in no way relate to any “archaeological excavation and study,” including, without limitation, destruction of cultural items with the construction of the casino; building the casino over cultural items; reintering Mekko Thompson’s ancestors without appropriate notice to Mekko Thompson, in a location they knew violated Mekko Thompson’s religious beliefs, and in a manner abhorrent to those beliefs; issuing false and misleading press releases to the general public; and sending a false and misleading letter to other tribes *nationwide*.

Finally, Mekko Thompson’s ancestors are not “unknown individuals.” Regardless of whether he might or might not know all of their names currently, he knows that they are his ancestors, and he is their lineal descendent, according to their (and his) traditional kinship system. Dkt. No. 190 at 55, ¶ 251. In some cases, the individuals may be even more closely identifiable as his direct ancestors based on the location of their burial. *E.g., id.* at 13-14, ¶¶ 46, 52 (describing how Mekko Thompson’s ancestors have served as Mekko of Hickory Ground Tribal Town since time immemorial, and how *mekkos* are buried in a certain location). No finding of direct descendancy or recency of death is necessary in order to allege a viable claim of outrage. In *Whitt*, 519 So. 2d 901, there was neither a finding of direct descendancy, nor a finding that the grave of the ancestor in question was one of those damaged. And the ancestor in question had passed away 130 years ago at the time of the desecration. *Id.* at 902. Persuasive precedent from other jurisdictions supports this proposition as well. *E.g., Ceasar*, 646 S.E.2d at 690-91 (reversing grant of summary judgment in favor of defendants on plaintiffs’ claims, which included claim for intentional infliction of emotional distress, where defendants had bulldozed

over an old cemetery containing children of plaintiffs' indirect ancestors, even though plaintiffs did not know the children's names, nobody had been buried there in many years, and the family did not tend the area); *Codell Constr.*, 202 S.W.2d at 397, 399 (stating that descendants' allegations regarding highway project's destruction of ancestor's graves were sufficient to state a cause of action, even though descendants had not visited graves in 40 or more years, did not know their ancestors, and did not remember them; but reversing jury verdict based on erroneous jury instructions)

At this stage in the proceedings, Mekko Thompson is not required to prove all of the elements of his outrage claim, or to show that he will ultimately prevail on the merits, *see* Section III, above. Mekko Thompson has alleged extreme and outrageous conduct by the Individual Defendants sufficient to defeat their motion to dismiss.

3. Mekko Thompson has stated a plausible claim that the Individual Defendants' conduct caused emotional distress so severe that no reasonable person could be expected to endure it.

Mekko Thompson has alleged that the Individual Defendants' actions have caused him to fail in his moral and religious duties, and have caused him "abject pain, sorrow, anguish, torment, suffering, helplessness, grief, and anger." Dkt. No. 190 at 50, ¶ 225. He lives with an "enduring feeling of helplessness and fear...that this will happen again, *id.* at 51, ¶ 227, and the "irreparable anguish of knowing that the ancestors were wrenched from what was intended to be their final resting places, disrespected, and grotesquely mistreated," *id.* at 51-52, ¶ 229. He has alleged that his emotional distress (which is continuing) is so severe that no reasonable person could be expected to endure it. *Id.* at 52, ¶ 233.

This is more than sufficient to survive a motion to dismiss for failure to state a claim. *Thomas v. Williams*, 21 So. 3d 1234, 1240 (Ala. Civ. App. 2008) ("We further conclude that Thomas's cursory statement that she was 'subjected to severe emotional distress' was sufficient to survive a motion to dismiss."); *Papieves*, 263 A.2d at 122 (reversing dismissal, holding that plaintiffs had stated a cause of action by averring "that they have suffered emotional disturbance,

mental anguish, embarrassment, and humiliation as a direct consequence of the defendants' intentional acts in withholding the body of their son from them and burying it without authorization"); *cf. Edwards v. Hyundai Motor Mfg. Alabama, LLC*, 603 F. Supp. 2d 1336, 1355 (M.D. Ala. 2009) (denying summary judgment and stating that it is for a jury to decide whether the defendant's behavior was outrageous and had caused the plaintiff to suffer extreme emotional distress where the plaintiff had presented evidence that the defendant's behavior "caused her significant emotional distress; she broke down in tears, lost sleep, and even sought medical help because of depression"); *Carney*, 514 N.E.2d at 432-33 (affirming denial of defendants' motion for directed verdict on plaintiffs' claim for emotional distress resulting from disturbance of ancestor's gravesite and improper disposal of some of ancestor's remains where the relatives "testified that they were horrified, angry, and saddened, and that they wept and were unable to sleep").

Even if some additional proof of reasonableness were necessary at this stage in the proceedings (which it is not), Mekko Thompson's emotional distress is reasonable. *Contreraz*, 896 P.2d at 1122 ("It is reasonable that a family member would become emotionally distressed after learning of, but not seeing, a debasing, humiliating, or disrespectful act committed to the decedent's body."). The results favorable to the plaintiffs in *Whitt* and similar cases from other jurisdictions discussed above (*e.g.*, *Ceasar*, *Codell Constr.*, and *Whitehair*) also support the reasonableness of Mekko Thompson's emotional distress. Indeed, the circumstances in a number of the cases discussed above were less egregious than the outrage Mekko Thompson has alleged.

Finally, the reasonableness of Mekko Thompson's emotional distress cannot be determined in accordance with an ethnocentric worldview that does not respect Mekko Thompson's religious beliefs (including the importance of religious connection with ancestors) and ignores the impact of historical traumas such as forced relocation and centuries of desecration of Indian graves, theft of cultural patrimony, and horrific practices in the name of archaeology, scientific study, and museology. The Individual Defendants' attempt to minimize

their conduct as “archaeological removal and study of unidentified remains and artifacts,” Dkt. No. 205 at 14, and hence suggest that the severity of Mekko Thompson’s emotional distress is not reasonable, comes dangerously close to urging the adoption of just such an ethnocentric standard.

Mekko Thompson’s allegations of severe emotional distress are more than sufficient to survive a motion to dismiss. Although he does not need to prove reasonableness at this time, the severity of his emotional distress is reasonable. A finding that his emotional distress is not reasonable would be premature at this time, when there has been no opportunity to develop the record in order to prove the outrageousness of the Individual Defendants’ conduct, the nature of Mekko Thompson’s religious beliefs, and the reasonableness of his emotional distress, *inter alia*. In summary, Mekko Thompson has adequately pled each element of his outrage claim and the Individual Defendants’ motion to dismiss must, accordingly, be denied.

B. The outrage claim should not be dismissed on the basis of legislative immunity.

Dismissal of the outrage claim on the basis of legislative immunity would be inappropriate for two reasons. First, it would be premature. Second, as a substantive matter, legislative immunity does not attach to the conduct alleged.

1. It would be premature to dismiss on the basis of legislative immunity.

Dismissal on the basis of legislative immunity would be premature for several reasons. First, analysis of legislative immunity as an affirmative defense under Rule 12(b)(6) is generally limited to the face of the complaint, and the complaint in this case contains no allegations of legislative acts. Second, the Individual Defendants have failed to meet their burden because they have identified no legislative acts to which legislative immunity would attach. Third, dismissal at this stage is not advisable where the law on an issue is not settled, as is the case regarding the question of legislative immunity for Tribal Council members. And fourth, the record is not

sufficiently developed to support a determination as to whether the Individual Defendants are entitled to legislative immunity.

Legislative immunity is an affirmative defense, not a jurisdictional bar. *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir 2007) (“It is well-settled that legislative immunity is not a jurisdictional bar, but is rather a personal defense.”); *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005) (referring to legislative immunity, in passing, as “a personal defense”). In considering whether to grant a motion to dismiss on the basis of an affirmative defense under Rule 12(b)(6), analysis is generally limited to the face of the complaint and attachments thereto. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). Nowhere in the Second Amended Complaint do the Plaintiffs allege or identify legislative acts by the Individual Defendants (*see* Section B.2, below, for discussion of what constitutes a legislative act). For that reason alone, dismissal is not proper on the basis of legislative immunity. *Cf. Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) (noting that an affirmative defense generally will not support dismissal on a rule 12(b)(6) motion unless the defense “clearly appears on the face of the complaint”); *Marx v. Gumbinner*, 855 F.2d 783, 788-89 (11th Cir. 1988) (if a government official moves to dismiss under Rule 12(b)(6) on the basis of absolute immunity, the court must determine only whether the allegations of the complaint disclose activities protected by absolute immunity and grant or deny the motion on that basis), *abrogated on other grounds by Burns v. Reed*, 500 U.S. 478 (1991).

Moreover, the Individual Defendants, who have the burden of persuasion on this issue, have not identified any legislative acts to which they claim legislative immunity attached (*see* Section B.2, below, for discussion of what constitutes a legislative act). They begin their argument regarding legislative immunity with the general assertion that the allegations stem from their “collective action” as Council Members, and end their argument with the conclusory statement that their actions “are plainly legislative in nature.” Dkt. No. 205 at 9, 11. Yet nowhere in between do they identify any legislative actions they claim to have taken. Accordingly, by failing to identify any legislative acts, the Individual Defendants have failed to

show that they are entitled to legislative immunity, and dismissal also should not be granted on that basis.

The Individual Defendants have asserted no Constitutional or legislative basis for their claimed legislative immunity. Therefore, Mekko Thompson can only assume they assert common law legislative immunity. The United States Supreme Court has long extended legislative immunity to federal legislators, but has only more recently extended it to state and regional legislators, in 1951 and 1979, respectively. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). Not until 1998 did it extend legislative immunity to local legislators. *Id.* at 49, 54. And it has not yet extended legislative immunity to Tribal Council members. The question of whether Tribal Council members are entitled to legislative immunity appears to have been addressed by only a handful of tribal courts, three federal district courts, and the Eighth Circuit (this case law is discussed in Section B.2, below). No federal court in the Eleventh Circuit has considered the issue, nor have the Alabama courts. With no binding precedent on this issue, and very little persuasive precedent, the law regarding this question remains unsettled. Where, as here, the law is not settled regarding a claimed governmental immunity, it is not advisable to dismiss a complaint at this early stage of the proceedings. *See Sass v. Dist. of Columbia*, 316 F.2d 366, 366-68 (D.C. Cir. 1963); *cf. Likes v. DHL Express*, No. 10-2989, 2011 WL 13230347, at *6 (N.D. Ala. July 26, 2011) (unpublished) (denying a motion to dismiss for failure to state a claim where the Eleventh Circuit law on the issue in question was unsettled); *L.D.G., Inc. v. Robinson*, 290 P.3d 215, 222 (Alaska 2012) (stating, albeit with regard to a different legal issue, that where the law is unsettled, there is at least a viable claim, such that Rule 12(b)(6) dismissal is inappropriate).

Likewise, a case like this should not be dismissed on grounds of legislative immunity at such an early stage of the litigation, based upon the sparse record. *See N.Y. State Corr. Officers & Police Benevolent Ass'n v. New York*, 911 F. Supp. 2d 111, 136 (N.D.N.Y. 2012) (“At this stage of the litigation, based upon the sparse record, the Court cannot state as a matter of law, that defendants are entitled to legislative immunity.”); *cf. Stock W. Corp. v. Taylor*, 942 F.2d

655, 664-65 (9th Cir. 1991) (concluding that it was premature for the district court to have granted summary judgment on the basis of tribal official immunity when “we cannot say on the record before us whether Taylor was acting within his representative capacity, and whether he was within the scope of his delegated authority”); *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. Ct. App. 1994) (affirming the district court’s denial of summary judgment in favor of tribal official because a factual dispute remained over whether the official’s position with the tribe was sufficient to provide him with the claimed immunity and/or privilege); *Likes*, 2011 WL 13230347, at *5 (noting the “underdeveloped record,” in combination with unsettled law in the Eleventh Circuit on the issue in question, in denying the defendant’s motion to dismiss for failure to state a claim). To determine whether any immunity applies, it will be necessary to analyze the precise nature of the Individual Defendants’ actions to determine whether they constitute legislative acts (and, then, whether there is some reason to qualify or limit it). The record is simply not developed enough to undertake that analysis at this time. Dismissal on the basis of legislative immunity would be premature.

2. Legislative immunity does not attach to the conduct alleged.

Legislative immunity only attaches to actions taken “in the sphere of legitimate legislative activity.” *Bogan*, 523 U.S. at 54 (citation omitted). “Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.” *Id.* Speech and debate in the legislature is the heart of what is protected, and other elements of the legislative process such as committee reports, resolutions, and the act of voting are also protected. *Gravel v. U.S.*, 408 U.S. 606, 617, 625 (1972). But the fact that legislators perform certain acts in their official capacity as legislators does not necessarily make all such acts legislative in nature. *Id.* at 625. For example, a legislator’s communications with the executive branch and administrative agencies is not protected legislative activity. *Id.* The Eleventh Circuit draws a line between legislative actions and administrative actions. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392-93 (11th Cir. 1993). For example, acts of zoning enforcement,

rather than rulemaking, are not legislative. *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1485 (11th Cir. 1991). “If the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative.” *Id.* “Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature.” *Id.*

Accordingly, the *Bogan* Court found that the actions of City Council members in introducing, voting for, and signing an ordinance were legislative because they were integral steps in the legislative process. 523 U.S. at 55-56. But a Senator’s private publication of materials he had introduced into a subcommittee record was not legislative. *Gravel*, 408 U.S. at 625-26. In *Corn*, 997 F.2d 1369, a City Council’s adoption of three ordinances which affected a property was protected by legislative immunity, but its decision to deny the site plan for the property was not. *Id.* at 1371, 1393. The Eleventh Circuit has characterized the following types of acts as legislative: “voting, speech making on the floor of the legislative assembly, preparing committee reports, and participating in committee investigations and proceedings.” *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992) (internal citations omitted). By contrast, it has characterized the following types of acts as non-legislative: “the public distribution of press releases and newsletters, the acceptance of bribes in return for votes on pending legislative business, the administration of penal facilities, and the denial of licenses.” *Id.* In addition, the *Yeldell* court held that personnel decisions are administrative, not legislative, acts. *Id.* at 1062-63.

The very few courts that have considered the question of legislative immunity for Tribal Council members have also recognized (or denied) legislative immunity depending on whether the actions in question were legislative in nature. Indeed, the cases support the proposition that tribal lawmaking activity must be directly at issue in order for legislative immunity to attach. The only federal appellate court to consider the question is the Eighth Circuit in the case of *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985). Directly at issue in that case was the validity of two Tribal Council resolutions precluding certain tribal members from running for positions on the Tribal Council. *Id.* at 348-49. The Eighth Circuit affirmed the district court’s

dismissal of the complaint for a number of reasons, including legislative immunity, stating: “we believe that the individual members of the Tribal Council would enjoy absolute legislative immunity from liability . . . for official actions taken when acting in a legislative capacity. . . . Here, the two Tribal Council resolutions at issue are essentially legislative acts.” *Id.* at 354-355. *Runs After* accordingly illustrates the type of case in which legislative immunity is appropriate—where adoption of tribal laws was directly at issue—which is not this type of case.

In *Wisconsin v. Baker*, 464 F. Supp. 1377 (W.D. Wis. 1978), the Tribal Council passed, and intended to enforce, ordinances to regulating hunting, fishing, ricing, trapping, and boating. *Id.* at 1379. The State of Wisconsin sought a judgment against Tribal Council members declaring that the “promulgation and enforcement” of the laws was invalid. *Id.* The Tribal Council members asserted legislative immunity, but the court found that legislative immunity did not bar the claim because, “[d]espite the reference to promulgation of the codes, the action is clearly directed toward defendants’ enforcement of the codes.” *Id.* at 1387. The court implied that the enforcement of the codes was an exercise of executive powers, not legislative powers. *Id.* The court also noted that the State did not seek to compel any legislative action. *Id.* *Baker* accordingly illustrates that even some involvement of tribal lawmaking activity may not be sufficient for the protection of legislative immunity to apply—if the action is primarily directed toward something outside the legislative sphere, and does not seek to compel legislative action, then legislative immunity may not be a bar.

Also instructive is *Tohono O’Odham Nation v. Ducey*, No. 15-01135, 2016 WL 3402391 (D. Ariz. June 21, 2016) (unpublished). In *Ducey*, a state official sought to compel the production of notes, minutes, and agendas from closed sessions of two tribal legislative bodies, and to compel witnesses to testify about discussions at those closed sessions. *Id.* at *1. The tribe asserted legislative privilege. *Id.* at *3. In analyzing the question of legislative immunity for the first tribal legislative body, the court found the following factors relevant: (1) that the closed sessions involved ad hoc decision making (*i.e.*, actions taken for a particular purposes rather than for the general public good) rather than legislative action; (2) that the actions were narrowly

focused—on efforts to purchase land to develop a casino; (3) that the actions were not legislative in nature (the court noted that the tribe had not identified a single piece of relevant legislation); and (4) that there were no hallmarks of traditional legislation—all that was revealed was that the tribal legislative bodies discussed the project in closed session. *Id.* at *4-5. The court found that the tribe had not shown that the relevant actions were legislative. *Id.* With respect to the other tribal legislative body, two resolutions were potentially relevant, so the court concluded that it would need to review notes pertaining to the two resolutions *in camera* to determine whether they were entitled to legislative privilege. *Id.* at *5. The *Ducey* court also discussed the possibility that it may be appropriate to qualify or limit legislative immunity in certain circumstances. *Id.* at *5-6.⁷ *Ducey* accordingly illustrates what types of tribal actions may be legislative—those specifically relating to resolutions—and what types may not—ad hoc decision making, project-specific administrative actions, etc. It also illustrates the careful analysis, specificity, and care that should go into these determinations (which, as discussed above, would make dismissal at this stage inappropriate).

The Second Amended Complaint neither alleges nor references any legislative acts—no Tribal Council resolutions, no ordinances, no speech/deliberation regarding the same, no reports regarding the same, nothing that would normally be construed as falling within the legislative sphere. Nor have the Individual Defendants identified any such legislative acts. Thus, the Individual Defendants have not shown that they are entitled to the protection of legislative immunity.

Nor does it appear that they can. While it is possible that the Individual Defendants may have passed certain resolutions or laws that relate to the allegations in this case that could ultimately be found entitled to the protection of legislative immunity, Mekko Thompson has also alleged numerous other actions that are not of the type normally considered legislative, such as ad hoc decision-making, administrative actions with respect to the casino project, failing to give

⁷ This issue may become relevant if the Individual Defendants identify any actions that they claim are entitled to legislative immunity.

appropriate notice of the reinterment of his ancestors, conducting the reinterment with “ceremonies” that violate the Muscogee (Creek) Nation religion,⁸ issuing of press releases and other non-legislative communications, and more. *See, e.g.*, Dkt. 190 at 35-39, 47-48. These are not legislative acts, so legislative immunity does not attach. In summary, dismissal on the basis of legislative immunity would be premature, and legislative immunity does not attach to the conduct alleged in any event.

C. Dismissal on the basis of the statute of limitations would not be appropriate, but even if it were, the outrage claim is timely.

Dismissal on the basis of the statute of limitations would not be appropriate, but even if it were, Mekko Thompson’s outrage claim is timely. The outrage claim is asserted as a continuing tort, alleging a pattern of extreme and outrageous conduct by the Individual Defendants continuing up to (and past) the filing of the original Complaint, and even the Second Amended Complaint. As such, it is timely filed. Even if that were not the case, however, it relates back to the filing of the original Complaint and is, accordingly, timely.

1. The outrage claim is timely.

“The statute of limitations is an affirmative defense, so ‘a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred.’” *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872 (11th Cir. 2017) (citation omitted). Yet instead of meeting their burden of showing that it is apparent from the face of the complaint that the claim is time barred, the Individual Defendants concede that “outrage sometimes can be a continuing tort under Alabama law,” Dkt. No. 205 at 18, and that Mekko Thompson has alleged conduct “concluded by 2014 at the latest,” *id.* at 19. While

⁸ Note that even prayer opening a legislative session should not be considered legislative. *Doe v. Pittsylvania Cty.*, 842 F. Supp. 2d 906, 916 (W.D. Va. 2012) (stating that “legislative immunity only applies to activities integral to the legislative process and does not embrace non-legislative acts such as opening prayers”). *But see Dobrich v. Walls*, 380 F. Supp. 2d 366, 376-77 (D. Del. 2005) (holding that school board members were entitled to legislative immunity in connections with policies and practices adopted regarding opening prayers for meetings).

Mekko Thompson disputes that the conduct in question concluded in 2014, these concessions by the Individual Defendants demonstrate that dismissal is not appropriate because it is not apparent from the face of the complaint that the claim is time barred. Moreover, as the following discussion will illustrate, that is not the case here. Accordingly, the statute of limitations is not currently an appropriate basis for dismissal.

The outrage claim is timely. The statute of limitations begins to run upon the Individual Defendants' last tortious act. Here, Mekko Thompson has alleged a pattern of outrageous conduct, continuing up to (and past) not only the filing of the original Complaint, but the Second Amended Complaint as well. This constitutes a continuing tort of outrage that is not time barred. Even if the statute of limitations were deemed to have begun running earlier (which it should not be), the Second Amended Complaint relates back to the original Complaint, as discussed below, and is therefore timely. The Alabama Supreme Court has held that the statute of limitations for the tort of outrage is two years. *Archie v. Enter. Hosp. & Nursing Home*, 508 So. 2d 693, 695 (Ala. 1987). The statute of limitations normally begins to run not from the date of a defendant's actions, but rather from the date of the plaintiff's injury. *Payne v. Ala. Cemetery Ass'n*, 413 So. 2d 1067, 1072 (Ala. 1982) (holding that where bodily remains and a casket went missing in 1975, the statute of limitations did not begin to run until 1979, when it was discovered that the remains and casket were missing and the injury to the plaintiff actually occurred); *see also Stephens v. Creel*, 429 So. 2d 278, 280 (Ala. 1983) (explaining in dicta that "in the tort context a showing of injury or damage is an integral part of the cause of action").

However, the Alabama Supreme has also recognized that the tort of outrage may be a continuing tort. *Cont'l Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208, 1216 (Ala. 1990). This term describes "a defendant's repeated tortious conduct which has repeatedly and continuously injured a plaintiff." *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983). For statute of limitations purposes, "an action such as this, arising from continuing dealings between the parties, will not be barred until ***two years after the last tortious act by the defendant***, particularly

where the defendant's conduct does not cross the threshold and become an actionable tort until it is demonstrably extreme and outrageous.” *McDonald*, 567 So. 2d at 1216 (emphasis added).

In *McDonald*, the plaintiff alleged an ongoing pattern (going back five years or more, and continuing until he filed suit) by an insurance company of delaying payments and refusing to pay for medically necessary items in an attempt to get him to settle his medical claim. *Id.* at 1210, 1212, 1215-17, 1220. The defendant argued that the plaintiff’s outrage claim was barred by the statute of limitations. *Id.* at 1215. The court held that it was not, because it was a “continuing tort,” with the conduct “continuing even up to the time the action was filed.” *Id.* at 1217. Citing the relatively high standard for an outrage claim, the court explained its reasoning as follows:

Thus, there is clearly a threshold beyond which an insurance company's recalcitrance must go before it crosses into outrageous conduct. If we were to hold that McDonald was barred from bringing this action upon the expiration of...two years after the first time he suffered severe emotional distress over CNA’s handling of his claim, we would place plaintiffs in the untenable position of not knowing whether their claim is premature and thus subject to summary judgment for lack of a genuine question of material fact,...or has been in existence long enough for the period of limitations to run, as CNA argues here. The better policy would be to encourage cooperation and attempts to work out differences, like McDonald's attempts in this case, and to preserve the cause of action should those attempts prove futile.

Id. at 1216. *McDonald* is the case most similar to the instant case, as well as the most instructive. And it clearly contemplates that a plaintiff could suffer severe emotional distress as a result of a defendant’s actions on numerous occasions, without the statute of limitations beginning to run until the last of those occasions.

By contrast, in *Jennings v. City of Huntsville*, 677 So. 2d 228 (Ala. 1996), the plaintiff alleged actions by the defendants that culminated in, and ended with, the plaintiff’s arrest and conviction. *Id.* at 230. The plaintiff sought to characterize the defendants’ actions as “continuous torts,” claiming that their injuries to him continued and renewed every day he was in jail and every day afterwards that the defendants remained silent about their actions. *Id.* Unsurprisingly, the court disagreed. *Id.* Likewise, in *Moon*, 435 So. 2d 218, the plaintiff alleged personal injuries arising from a pharmacy selling the wrong insulin. *Id.* at 219. The court held

that the injury occurred, and the cause of action accrued, when the plaintiff became ill from taking the insulin, not when she later discovered she was taking the wrong insulin. *Id.* at 220. Thus, the claim was time barred. *Id.* In an attempt to get around the statute of limitations, the plaintiff attempted to argue that the pharmacy's negligence constituted a "continuous tort," beginning on the date of the sale and continuing on every occasion when she injected herself with the insulin. *Id.* at 221. This argument, if successful, would have brought the claim within the statute of limitations. But the court rejected this plaintiff's "continuous tort" argument as well. *Id.* These cases are easily distinguishable from the present case. Both *Jennings* and *Moon* involve one action, or a discrete set of actions, by the defendants with a definite end date, followed by no further actions by the defendants, and expiration of the statutory limitations period. Thus, the plaintiffs had to resort to artifice in their unsuccessful attempts to evade the statute of limitations—that each day in jail, or each injection of insulin continued the defendants' torts. As discussed below, that is not at all the case here, where the Individual Defendants' conduct continued (and still continues) over an extended period.

Here, as in *McDonald*, the Mekko Thompson has alleged an ongoing pattern of outrageous behavior by the Individual Defendants that has repeatedly and continuously caused him severe emotional distress going back numerous years, and continuing until (and past) the filing of the original Complaint, as well as the Second Amended Complaint. That is the very definition of a continuing tort of outrage.

The allegations in both the original Complaint and the First Amended Complaint emphasize the continuing nature of the outrage. The original Complaint specifies that:

Defendants' actions proximately caused and **continue to cause harm to Plaintiffs**. Plaintiffs are experiencing severe emotional distress because of the violation of the burial sites of their ancestors and the violation of their religious and cultural beliefs, including but not limited to their inability to respect their ancestors, pray on the ceremonial ground, and keep Hickory Ground sacred.

Dkt. No. 1 at 10, ¶ 39 (emphasis added); Dkt. No. 57 at 10, ¶ 39. The ground-disturbing activities (which ultimately continued with respect to excavation until 2011, and construction activities until 2014, *see* Dkt. No. 190 at 28, 32-33, ¶¶ 100-102, 132-133, “are damaging the Plaintiffs including but not limited to causing severe emotional, spiritual and dignitary harm,” Dkt. No. 1 at 16, ¶ 67; Dkt. No. 57 at 16, ¶ 67. The Second Amended Complaint alleges that “Poarch’s construction of a casino over the Plaintiffs’ sacred burial grounds, its removal of the Plaintiffs’ ancestors from what was intended to be their final resting place, and its mistreatment of the remains and artifacts has caused, and **continues to cause, harm to the Plaintiffs,**” who “bring this lawsuit to remedy past damage and stop further damage.” Dkt. No. 190 at 6, ¶¶ 6, 9 (emphasis added). The Second Amended Complaint likewise specifies that the harm and emotional distress from the outrageous conduct “is, and will be, **continuing** until such time as Poarch is required to take appropriate remedial measures.” *Id.* at 52, ¶ 233 (emphasis added). It further alleges that some remains of Plaintiffs’ ancestors and other sacred items have still not been reinterred and are being mistreated and damaged, and that all remains located outside of their original burial locations will not be at peace until they are back in their intended final resting places. *Id.* at 17, 31, 50-52, ¶¶ 55-56, 60, 117-124, 223, 225-233. All of these are atrocities in the Muscogee (Creek) religion that continue to cause severe emotional distress to Mekko Thompson. *Id.* at 50-52, ¶¶ 225-233. As then-Poarch chairman and Tribal Defendant Buford Rolin acknowledged in 2010, “the beliefs and customs of the [Hickory Ground ceremonial grounds leadership]” require “reinterment in [the original resting] place.” *Id.* at 37, ¶ 162. Both complaints seek an injunction to stop the continuing harm. *See* Dkt. No. 1 at 24-25, ¶¶ 100-106; *id.* at 25 (requesting injunction enjoining Defendants from “disturbing the Hickory Ground premises” and “restor[ing] Hickory Ground to its pre-excavation condition and to reinter the remains and objects at the sacred places where they were excavated” in order to “stop such activities and prevent the harms [Plaintiffs] suffer.”); Dkt. No. 57 at 25-26, ¶¶ 100-106; Dkt. No. 190 at 58, 79-80, ¶ 261.

Accordingly, Mekko Thompson asserts that the Individual Defendants' tortious acts continue to the present. Even if the court were to adopt the Individual Defendants' approach (which it should not)—that the last allegedly tortious act concluded in 2014, with the completion of construction of the Tribe's hotel and gaming facility—the original Complaint (to which the Second Amended Complaint relates back) was actually filed *before* that so it is not time barred. The only other possible approach (which the court should not adopt either) would be to determine that the statute of limitations began to run at some earlier date of injury. However, as *McDonald* instructs (and as the discussion regarding elements of outrage in Section A, above illustrates), that would involve an analysis and determination of precisely when, in the extended course of continuing dealings between the parties, the threshold for the tort of outrage was met. In other words, when did the Individual Defendants' conduct become sufficiently outrageous, and Mekko Thompson's emotional distress become sufficiently severe, to establish the elements of the tort of outrage? Such an analysis is not appropriate here for several reasons. First, as discussed above, it goes beyond what is permitted for analysis of an affirmative defense in the context of a Rule 12(b)(6) motion. Second, as discussed and illustrated in Section A, above, the record is simply not yet developed enough to undertake such an analysis. And third, it would be inconsistent with the *McDonald* court's instruction that "[t]he better policy would be to encourage cooperation and attempts to work out differences...and to preserve the cause of action should those attempts prove futile." 567 So. 2d at 1216. That is exactly what the Plaintiffs in this case did, both before and after filing suit, *see* Dkt. No. 190 at 33-34, ¶¶ 139-144 (describing extensive traditional dispute resolution efforts); Dkt. No. 156 (staying case in January 2018 pending settlement negotiations); Dkt. No. 161 (lifting the stay approximately a year and a half year later, when settlement discussions were unsuccessful), and they should not now be penalized for it. In summary, the outrage claim is timely.

2. Although it does not need to, the outrage claim relates back to the filing of the original Complaint.

It does not actually matter whether the outrage claim relates back to the filing of the original Complaint because, as discussed in Section C.1 above, the outrage claim is a continuing tort that continued up to (and past) even the filing of the Second Amended Complaint. Assuming for the sake of argument that relation back was required, the outrage claim does properly relate back to the filing of the original Complaint because (1) it arises out of the same conduct, transaction, or occurrence set out in the original pleading; and (2) the Individual Defendants were already parties to the case, and the Second Amended Complaint merely clarifies that they are being sued in the individual capacities, as well as their official capacities.

a) *Change in capacity is not a change in parties.*

Rule 15(c)(1) of the Federal Rules of Civil Procedure⁹ provides, in relevant part, that an amendment to a pleading relates back to the date of the original pleading when:

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

- (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
- (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

⁹ Mekko Thompson agrees with the Individual Defendants' assessment that that law is unsettled as to whether Alabama or Federal Rules of Procedure govern relation back in cases like this one, but that the rules and their interpretations are substantially similar. *Chumney v. U.S. Repeating Arms Co.*, 196 F.R.D. 419, 428 (M.D. Ala. 2000) (noting that the language of Alabama Rule of Civil Procedure 15(c) is "virtually identical to its federal counterpart," and that an Alabama state court would have "presumably reached a result identical to the one which a federal court would reach in applying Rule 15(c) of the Federal Rules of Civil Procedure."); *Ex parte Novus Utils., Inc.*, 85 So. 3d 988, 996 (Ala. 2011) ("We note that federal decisions construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure because the Alabama Rules were patterned after the Federal Rules.").

(emphasis added). Mekko Thompson asserts that a mere change in capacity, for a defendant who is already a party, does not constitute a change in party for purposes of Rule 15(c)(1)(C). 6A Wright & Miller, *supra* § 1498.2. (“An amendment by which plaintiff seeks to change the capacity in which defendant is being sued also does not change the parties before the court and typically will relate back without needing to meet the other requirements in Rule 15(c)(1)(C).”); *cf. First Nat’l Bank of Birmingham v. Chichester*, 352 So. 2d 1371, 1373 (Ala. Civ. App. 1977) (“Though the amendment here was designated as an addition of parties defendant, it was in fact and effect a mere change in the capacity of the defendants.... Of course, the amendment related back....”). The cases cited by the Individual Defendants are not to the contrary. For example, in the case of *Powers v. Graff*, 148 F.3d 1223 (11th Cir. 1998), on which the Individual Defendants primarily rely, the issue was not merely a change in capacity, but rather a change in parties. The plaintiffs in that case originally sued a corporation then, in their Fourth Amended Complaint three years later, added control persons of the corporation as defendants. *Id.* at 1225. Notably, these defendants were not previously parties to the case *in any capacity*—they were entirely new defendants. *Id.* at 1227-28. Therefore, Rule 15(c)(1)(C) did not apply in *Powers*.

Accordingly, the outrage claim need only assert a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading, which it does. An amended complaint relates back to the original complaint when “the same substantial facts are pleaded merely in a different form.” *Prior v. Cancer Surgery of Mobile, P.C.*, 959 So. 2d 1092, 1095 (Ala. 2006). In *Prior*, a plaintiff’s amended complaint made new factual allegations, and attempted to hold a defendant vicariously liable for the actions of a different doctor, on a different day, from what she had alleged in the original complaint. *Id.* at 1097. The court found that the amended complaint did not relate back. *Id.* By contrast, in *Callens*, 769 So. 2d 273, the plaintiff amended her complaint to add claims for personal injury and negligent hiring, training, and supervision. *Id.* at 276. The plaintiff alleged that the new claims arose out of the same events as the claims in the original complaint. *Id.* at 278. The court reversed the trial court’s dismissal of the new claims, stating that it was possible that the

negligent acts alleged could have related back to the date of the original complaint. *Id.* Here, the Individual Defendants do not dispute that the outrage claim “arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading” as required by Rule 15(c)(1)(B). Therefore, the court should conclude that the outrage claim relates back to the filing of the original Complaint.

b) ***The outrage claim relates back to the initial filing.***

Even if the change in capacity did constitute a change in party (which it did not), the outrage claim should still relate back under Rule 15(c). “The purpose of the relation back concept is to permit a claim to be tried on its merits rather than being dismissed based on a technicality so long as the purpose underlying the statute of limitations has been satisfied.” *Ex parte Novus Utils., Inc.*, 85 So. 3d 988, 997 (quoting *Mitchell v. CFC Fin., LLC*, 230 F.R.D. 548, 549–50 (E.D. Wis. 2005)); *see also* James Wm. Moore, *Moore's Federal Practice* § 15.19(3)(a) (3d ed. 2020).

The primary purpose of statutes of limitation is to ensure that defendants have notice of an action against them before evidence has been lost or becomes unavailable and with enough time to prepare an adequate defense. Thus, if a party has been notified of litigation involving a specific factual occurrence, it has received the protection that the statute of limitations requires. Under such circumstances, courts should freely grant leave to amend.

Ex parte Novus Utils., 85 So. 3d at 997 (internal citations omitted). Even the case primarily relied upon by the Individual Defendants, *Powers*, notes that “the relation back provisions of Rule 15 are to be somewhat liberally applied.” 148 F.3d at 1226.

The sole basis for the Individual Defendants’ argument that the outrage claim does not relate back is that it is levied against “newly-added” defendants. Dkt. No. 205 at 6, 16-18. While their argument might hold water if these defendants were truly brand new to the litigation and did not have notice of the claims against them, under Rule 15(c), amendments to the capacity in which *existing* defendants are named *do* relate back and are timely if the original complaint against such defendants was timely.

Here, all nine Tribal Council defendants that Plaintiffs name in their *individual and official* capacities in the Second Amended Complaint were *already named* in the First Amended Complaint in their *official* capacities. Compare Dkt. No. 57 at 5, ¶ 13, with Dkt. No. 190 at 9, ¶ 24.¹⁰ Relation back under Rule 15(c) focuses on whether defendants were aware of the claims asserted against them in an amended complaint within the statute of limitations. Tellingly, the only cases cited by the Individual Defendants involve addition of entirely new parties to the lawsuit, and not amendments like this one that are limited to the capacity in which *existing* defendants are named. See, e.g., *Powers*, 148 F.3d at 1225 (involving the addition of control persons of a corporation as defendants, when they had not been previously made defendants in any capacity).

Numerous courts have rejected the Individual Defendants' argument that a proposed amendment to the capacity in which an existing defendant is named does not relate back because the initially-named capacity should be deemed an affirmative choice by the plaintiff not to name the correct defendant. In *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983), the Eleventh Circuit held that an amendment adding a company owner as a defendant related back because the original complaint named his company as a defendant. *Id.* at 1258. The court held that as owner of the company, he "was on notice as to the action when it was first filed," and "knew or should have known, but for a mistake by [the plaintiff], that he would have been named as a defendant when the complaint was filed." *Id.* The Individual Defendants seize on the word "mistake," arguing that the outrage claim cannot relate back

¹⁰ As the Supreme Court made clear in *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010), "focusing on [Plaintiffs'] knowledge" regarding defendants' identities, as the Individual Defendants do here, is "the wrong starting point." *Id.* at 548. "Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known..., not what the *plaintiff* knew or should have known at the time of filing her original complaint." *Id.* Furthermore, "[n]othing in the case law or in the text of Rule 15(c) limits its applicability to unsophisticated plaintiffs, particularly in light of the Supreme Court's repeated statements in *Krupski* that it is a defendant's knowledge that is relevant for Rule 15(c) analysis." *Patrick v. Garlick*, 66 F. Supp. 3d 325, 328 (W.D. N.Y. 2014) (quoting *Gerloff v. Hostetter Schneider Realty*, No. 12-9404, 2014 WL 1099814, at *5 (S.D.N.Y. Mar. 20, 2014)).

because it was not a “mistake” not to name the Individual Defendants in their individual capacities originally. *See, e.g.*, Dkt. No. 205 at 14-17. However, the *Itel* court also instructs that “we read the word ‘mistake’ in Rule 15(c) liberally.” *Itel*, 707 F.2d at 1258 n.9.

In *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991), the Seventh Circuit found that an amendment naming a defendant police officer in his individual capacity related back where the prior complaints did not identify a capacity. *Id.* at 1377-78. The Seventh Circuit reversed the district court’s grant of summary judgment on statute of limitation grounds, concluding that:

[the plaintiff’s] amendment relates back to the filing of the suit because [the officer] was already before the court and the effect of the amendment was merely to correct the capacity in which he was sued. Since there was no surprise to defendant, and because plaintiff satisfied the requirements of Rule 15(c), it is fair and wholly consistent with the spirit of the Rule to permit relation back.

Id. at 1378. The court added that “[e]ven if [the plaintiff’s] first complaint named [the officer] in his official capacity rather than in no capacity at all, it would be entirely consistent with Rule 15(c) to permit relation back” because the plaintiff sought redress for alleged injuries the officer personally inflicted on the plaintiff and alleged that the officer bore responsibility for using excessive force. *Id.*

Indeed, “[i]t would be a bizarre result were this Court to hold that a plaintiff could amend his complaint under Rule 15(c) when he identified the wrong defendant, but could not amend his complaint when the right defendant is named in the wrong capacity.” *Id.* at 1377. “The very purpose underlying relation back is to permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced,” and a mere amendment to capacity “greatly reduces the risk that a party will be without notice, because the party itself has already been identified correctly and has received notice.” *Id.* Because “Rule 15(c) is a liberal pleading rule designed to prevent parties from nipping legitimate grievances in the bud by asserting formal objections,” preventing amendment “would carve out a restrictive exception to Rule 15(c), inconsistent with its broad purposes.” *Id.*

Similar facts have resulted in the same outcomes in the Fourth, Fifth, and Eighth Circuits. *See Robinson v. Clipse*, 602 F.3d 605, 609-10 (4th Cir. 2010) (finding amendment related back where plaintiff sought to replace defendant police department with police officer in his individual capacity); *Sanders-Burns v. City of Plano*, 594 F.3d 366, 379-80 (5th Cir. 2010) (amendment naming police officer in individual capacity related back where officer was already a defendant by virtue of being named in his official capacity; “relation back is appropriate because the defendant is already before the court” (internal citation and quotation omitted)); *Sunkyong Int’l, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1251-52 (8th Cir. 1987) (plaintiff’s proposed amendment related back where plaintiff sought to name defendants in their individual capacities *and* as trustees, and original complaint named defendants only in individual capacity; “[a]n amendment which simply changes the capacity in which a person is sued, without changing the ultimate liability sought to be imposed, relates back to the date of filing the original complaint” (internal citations and quotation marks omitted)).

Here, the nexus for purposes of notice is identical to the nexus in *Hill* and much closer than the nexus in *Itel*. All the individual Council members of the Poarch Band—and not just the Poarch Band itself—were named in the original complaint. Furthermore, in the original complaint, Plaintiffs alleged that, given Defendants’ knowledge that Hickory Ground “contained the burial sites of Plaintiffs’ ancestors” and has “historical, cultural, and spiritual significance to Plaintiffs,” “[i]t was for[e]seeable that excavating the human remains and associated funerary objects of Plaintiffs’ ancestors would cause emotional harm to Plaintiffs.” Dkt. No. 1 at 10, ¶ 38; Dkt. No. 57 at 10, ¶ 38. Plaintiffs also alleged that “Defendants’ actions proximately caused and continue to cause harm to Plaintiffs,” who “are experiencing severe emotional distress because of the violation of the burial sites of their ancestors and the violation of their religious and cultural beliefs, including but not limited to their inability to respect their ancestors, pray on the ceremonial ground, and keep Hickory Ground sacred.” Dkt. No. 1 at 10, ¶ 39; Dkt. No. 57 at 10, ¶ 39.

The Tribal Defendants responded by asserting that Poarch tribal officials “retain sovereign immunity when acting in their official capacity.” Dkt. No. 101 at 3. Thus, the Tribal Defendants knew, or should have known, that the emotional distress claims were intended to be against them in their individual capacities. *See, e.g., Hill*, 924 F.2d at 1378 (holding that even if plaintiff had expressly named the defendant in his official capacity in plaintiff’s original complaint (rather than not specifying capacity), the fact that plaintiff sought a remedy unavailable in an official capacity suit effectively notified defendant that the lawsuit was against him personally); *Sanders-Burns*, 594 F.3d at 378 (5th Cir. 2010) (finding that defendant was sufficiently notified because “[t]he inclusion of the affirmative defense of qualified immunity...suggests that the attorney representing [the defendant] in his official capacity, is likely to have communicated to [the defendant] that he may have been sued in his individual capacity”). Thus, the Tribal Defendants’ response indicated that they were on notice that, but for misnomer by Plaintiffs, they would have been named in their individual capacities.

The Tribal Defendants cite no case in which amended pleadings to make a change in capacity has been held to bar relation back under Rule 15(c). Instead, the overwhelming weight of authority allows relation back where the amendment merely changes the capacity in which the defendant is named. Furthermore, “[c]onstrutive notice satisfies Rule 15(c)’s requirements and can be imputed to a new defendant through her attorney if that attorney also represents the parties originally sued.” *Lindley v. Birmingham*, 652 F. App’x 801, 804 (11th Cir. 2016). Thus, Mekko Thompson’s outrage claim relates back.

V. CONCLUSION

Mekko Thompson has stated a plausible claim for outrage. And neither legislative immunity nor the statute of limitations provides an appropriate basis for dismissal. Accordingly, the Court should deny the Individual Defendants’ motion to dismiss in its entirety. If the motion is granted to any extent, Plaintiffs request that the Court condition such dismissal on the ability

of Plaintiffs to submit a revised complaint. This is consistent with the liberal policy in favor of allowing amendments under Fed. R. Civ. P. 15(a)(2) (the “court should freely give leave when justice so requires.”). *See also Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984).

Respectfully submitted this 6th day of July, 2020.

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Certificate of Service

I hereby certify that on the 6th day of July, 2020, I caused to be electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties entitled to receive notice.

s/ Lauren J. King

Lauren J. King, Of Counsel