Mitra Ebadolahi (SBN 275157)
mebadolahi@aclusandiego.org
David Loy (SBN 229235)
davidloy@aclusandiego.org
Melissa Deleon (SBN 272792)
mdeleon@aclusandiego.org
Zoë McKinney (SBN 312877)
zmckinney@aclusandiego.org
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

Luis Li (SBN 156081)
luis.li@mto.com
Tamerlin J. Godley (SBN 194507)
tamerlin.godley@mto.com
Lauren C. Barnett (SBN 304301)
lauren.barnett@mto.com
C. Hunter Hayes (SBN 295085)
hunter.hayes@mto.com
Ashley D. Kaplan (SBN 293443)
ashley.kaplan@mto.com
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for Plaintiff/Counter-Defendant ALTON JONES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

vs.

U.S. BORDER PATROL AGENTS GERARDO HERNANDEZ, JODAN JOHNSON, DAVID FAATOALIA, JOSEPH BOWEN, and JOHN KULAKOWSKI, each sued in their individual capacities; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; and UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

vs.

ALTON JONES,

Counter-Defendant.

Case No. 16-cv-1986-W (WVG)

**COUNTER-DEFENDANT ALTON JONES'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Date: March 5, 2018
Court: Hon. Thomas J. Whelan

[No oral argument; L.R. 7.1(d)(1)]

## I. INTRODUCTION

As the government does not dispute, federal law prohibits it from filing suit based on claims that expired before they were assigned to the United States ("USA"). *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 141–42 (1938); *Bresson v. C.I.R.*, 213 F.3d 1173, 1176 (9th Cir. 2000). The USA allowed Agent Johnson's claims to expire without seeking a timely assignment to preserve the federal right to prosecute a "cause of action assigned to the United States." 5 U.S.C. § 8131(c). This undisputed fact resolves the motion. Because the claims expired before they were assigned to the USA, the USA cannot pursue them.

The USA now attempts to salvage its right to pursue damages for the expired claims by contending the commencement of this action "tolled the limitations period." Dkt. 87 ("Opp.") at 1:4. Both of its arguments in support of that contention are wrong.

First, contrary to the government's assertion, federal tolling law governs this federal case, not "California's tolling law." Opp. at 1:12. The USA brings claims solely under federal law—the Federal Employees Compensation Act ("FECA")—which provides its authority to obtain assignment of an employee's claim and "prosecute or compromise any cause of action so assigned." *United States v. Lorenzetti*, 467 U.S. 167, 175 (1984). When prosecuting such a claim "for the benefit of the United States," *id.*, the federal government is governed by federal law. Indeed, by definition, a claim brought by the USA, based on assignment or otherwise, is a federal matter controlled by federal law. Hence, the USA is subject to "the federal statute of limitations" even when it is "standing in the shoes" of a "private party." *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 922 (9th Cir. 2009). Under federal law, the USA enjoys unique benefits that limit its liability and protect its interests, and it must bear the burdens of federal law in seeking to impose liability on Mr. Jones. This Court must therefore apply federal law to determine whether the USA's counterclaim is time-barred.

Second, offensive counterclaims for affirmative relief do not relate back to when the complaint was filed. Contrary to the government's assertion, there is no reasoned split of authority on this point. The government has simply assumed away the issue, citing cases that either do not apply federal law or do not distinguish between offensive and defensive counterclaims. Under all reasoned authority on this point, *defensive* counterclaims seeking only to reduce the plaintiff's recovery relate back, while *offensive* counterclaims that seek affirmative relief against the plaintiff do not. The USA cannot sleep on its rights, wait until Mr. Jones files suit, belatedly obtain assignment of expired claims, and then seek damages against him.

Mr. Jones is entitled to judgment as a matter of law that the counterclaim is time-barred, because it is based on expired claims and does not relate back to the filing of the complaint.

## II. ARGUMENT

### A. Federal Law Bars the Counterclaim, and Federal Law Determines Whether the Counterclaim is Time-Barred Because the USA Pleaded Claims Grounded in a Federal Statute..

Federal law is clear. If a claim has expired before it is assigned to the United States, the United States cannot revive it. *Guar. Trust Co.*, 304 U.S. at 141–42 (1938); *Bresson*, 213 F.3d at 1176. The government does not dispute that it accepted assignment of Agent Johnson's claims after they expired. That undisputed fact resolves this motion.

The government cannot seek refuge in state law. This is a federal case governed by federal law. Mr. Jones pleads claims under the Federal Tort Claims Act ("FTCA"), which creates the right to sue the USA for torts. 28 U.S.C. § 1346(b)(1); *DSI Corp. v. Sec'y of Hous. & Urban Dev.*, 594 F.2d 177, 180 (9th Cir. 1979). Although the FTCA imports "state law for the purpose of defining the actionable wrong for which the United States shall be liable," a court must look "to federal law for the limitations of time within which the action must be brought." *Poindexter v. United States*, 647 F.2d 34, 36 (9th Cir. 1981); *Knox v. U.S. Customs*

*& Border Prot.*, No. 18-cv-0030-AJB-AGS, 2018 WL 747830, at *4 (S.D. Cal. Feb. 7, 2018) (quoting *Poindexter*).

The USA likewise pleads its claims under a federal statute, Dkt. 19 ¶ 4 (citing FECA), which creates the right to require an injured employee to "assign to the United States any right of action he may have" and authorizes the government to "prosecute or compromise a cause of action assigned to the United States" in an effort to recover compensation paid to the employee. 5 U.S.C. § 8131(a)(1), (c). The counterclaim arises under original jurisdiction. 28 U.S.C. §§ 1345, 1346(c).

When the federal government brings a claim grounded in federal statute under original federal jurisdiction, the claim is governed by federal law. *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366–67 (1943); *U.S. on Behalf & for the Benefit of Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1385 (9th Cir. 1986); *United States v. California*, 655 F.2d 914, 916 (9th Cir. 1980). Federal law establishes the statute of limitations for the USA to bring tort claims and prohibits the USA from pursuing claims that expired before they were assigned to the government. 28 U.S.C. § 2415(b); *Guar. Trust Co.*, 304 U.S. at 141–42; *Bresson*, 213 F.3d at 1176. "The rights and duties of the United States" to prosecute claims for compensation under FECA have their "origin in the Constitution and the statutes of the United States," and federal law thus controls the counterclaim's validity. *Clearfield Tr. Co.*, 318 U.S. at 366.

Federal law borrows "state limitations law," Opp. at 5:1, only when federal law provides no "specific statute of limitations."[1] *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). That is not the case here. Federal law is clear on when the USA can and cannot bring a tort claim. Although federal courts sometimes borrow "state law to fashion the federal rule of decision" on the merits of claims brought by the USA,

[1] The counterclaim does not implicate any "state statute which provides a time limitation as an element of a cause of action or as a condition precedent to liability," such as a tort claims act. Opp. at 5:2-4.

*United States v. California*, 655 F.2d at 917, federal law determines whether such a claim is time-barred, *Bresson*, 213 F.3d at 1176–77; Opp. at 4:8 (acknowledging counterclaim is subject to federal "limitations period"). Because "tolling rules" are "integrally related to statutes of limitations," *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011), federal tolling law determines whether the USA's counterclaim is time-barred.

The USA remains bound by federal statute of limitations law when it is "standing in the shoes" of a "private party." *Park Place Assocs.*, 563 F.3d at 922 (where government acquired rights and duties of "private party" as majority owner of business, court found "no merit" in contention that "California statute of limitations" applied to state law claim against USA as successor to private party). Therefore, federal law determines whether the counterclaim is time-barred.

In defending and prosecuting tort claims, the USA enjoys the unique benefits of federal law, and therefore it must bear the burdens as well. The FTCA is a limited "waiver of sovereign immunity." *Smith v. United States*, 507 U.S. 197, 201 (1993). It confines tort claims against the USA to federal court; makes them the exclusive remedy for torts committed by federal employees; requires exhaustion of administrative remedies; denies plaintiffs the right to jury trial, punitive damages, and prejudgment interest; and protects the government from liability for numerous claims. 28 U.S.C. §§ 1346(b), 2402, 2674, 2675(a), 2679, 2680. When prosecuting state-created claims that were valid at the time of assignment, the USA is exempt from state statutes of limitations. *Bresson*, 213 F.3d at 1176. In reaping these benefits, the USA must also bear the burdens of federal law on the question whether the counterclaim is time-barred. *See Park Place Assocs.*, 563 F.3d at 922 (rejecting "the United States' contention that such a result is unfair where the statutes of limitations differ," because "the federal statute of limitations governs" state-created claim against USA as successor to private party "even when the state period of limitations is longer or shorter").

In contending California tolling law salvages the USA's counterclaim, the government incorrectly analogizes to claims by nonfederal parties under "supplemental jurisdiction." Opp. at 5:7. When a nonfederal party brings a claim that falls within diversity or supplemental jurisdiction, the *Erie* doctrine requires federal courts to apply state law in determining whether the claim is tolled. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Albano*, 634 F.3d at 530; *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 n.2 (9th Cir. 2000). However, the *Erie* doctrine does not apply to claims brought by the USA under original federal jurisdiction.[2] *Clearfield Tr. Co.*, 318 U.S. at 366–67; *Reliance Ins. Co.*, 799 F.2d at 1385; *United States v. California*, 655 F.2d at 916. Therefore, federal tolling law determines whether the counterclaim is time-barred, because the federal government is bound by federal law.

Although a claim brought under FECA imports the "state created right of action" assigned by the employee, *Boeing Airplane Co. v. Perry*, 322 F.2d 589, 591 (10th Cir. 1963), it remains grounded in federal law and does not fall within diversity or supplemental jurisdiction. The USA is not subject to diversity jurisdiction. *Gen. Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 703 (7th Cir. 1991); *Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Corp.*, 492 F.2d 1325, 1329 (9th Cir. 1974). Nor is the counterclaim subject to supplemental jurisdiction. "When a federal district court has original jurisdiction over a civil cause of action, [28 U.S.C.] § 1367 determines whether it may exercise supplemental jurisdiction over other claims that do not independently come within its jurisdiction." *Jinks v. Richland Cty.*, 538 U.S. 456, 458 (2003). Because the USA's counterclaim independently comes within the Court's jurisdiction, 28 U.S.C. §§ 1345, 1346(c), it cannot qualify for supplemental jurisdiction. Given that the USA brings the

[2] Nor does it apply to FTCA claims. *Richards v. United States*, 369 U.S. 1, 7 (1962); *Cibula v. United States*, 551 F.3d 316, 321 (4th Cir. 2009).

counterclaim based on a federal statute under original federal jurisdiction, federal law controls whether the counterclaim is time-barred.

Accordingly, decisions under "California's tolling law" are irrelevant, because they concern claims by nonfederal parties under diversity or supplemental jurisdiction governed by the *Erie* doctrine, which does not apply here. *See* Opp. at 6:1-28 (citing cases). If such claims are filed in state court or arise under diversity or supplemental jurisdiction, the court applies state law on tolling and relation back. But when the federal government brings a FECA claim for its own benefit, it is bound by federal law, which determines whether the counterclaim is time-barred.

**B. The USA's Offensive Counterclaim for Affirmative Relief Is Not Tolled and Does Not Relate Back to the Filing of the Complaint.**

The government mischaracterizes "the majority view" of federal law by ignoring the critical issue: whether an offensive counterclaim seeking affirmative relief relates back. Opp. at 7:20. On that point, there is no reasoned dispute. Although a *defensive* counterclaim seeking to reduce plaintiff's recovery may relate back, an *offensive* counterclaim seeking affirmative relief beyond reducing plaintiff's recovery does not relate back and must be brought within the applicable statute of limitations.

Every circuit applying federal law that has provided a reasoned decision on this issue is in accord.[3] *See N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 206–07 (5th Cir. 2015) (holding "compulsory counterclaims seeking affirmative relief are not tolled"); *Hurst v. U.S. Dep't of*

[3] The Ninth Circuit has not decided whether offensive counterclaims relate back under federal law. *N. Cty. Commc'ns Corp. v. Sprint Commc'ns Co., L.P.*, 691 F. App'x 466, 467–68 (9th Cir. 2017) ("*Sprint*") (case governed by state law in which plaintiff waived relation back issue); *Klemens v. Air Line Pilots Ass'n, Int'l*, 736 F.2d 491, 501 (9th Cir. 1984) (defensive counterclaim for recoupment not barred); *Trotter v. Int'l Longshoremen's & Warehousemen's Union, Local 13*, 704 F.2d 1141, 1143 (9th Cir. 1983) ( "state law governs the limitations period in this case").

*Educ.*, 901 F.2d 836, 837 (10th Cir. 1990) (under federal law, "[i]t is fairly well established … that a counterclaim for affirmative relief … is subject to the operation of pertinent statutes of limitation"); *In re Smith*, 737 F.2d 1549, 1554 (11th Cir. 1984) (party could not assert "time-barred affirmative claim as a counterclaim"); *Wells v. Rockefeller*, 728 F.2d 209, 215 (3d Cir. 1984) ("Although expiration of the limitations period may not be used to deny the assertion of an affirmative defense, a claim for affirmative relief that relies on the same factual basis nevertheless comes within the limitations ban."); *Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1027 (7th Cir. 1980) (unlike "pure defenses, such as recoupment," a "counterclaim for affirmative relief may not be asserted if barred by the statute of limitations").

This Court has adopted the dominant view. *40235 Washington St. Corp. v. Lusardi*, No. CIV. 90-1472-R, 1999 WL 33633157, at *5 (S.D. Cal. Jan. 19, 1999) (noting "'defensive' claims generally relate back to the filing of the original complaint, while affirmative claims must satisfy the applicable statute of limitations"). The Central District has done so as well. *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, No. CV 14-03053 MWF (VBKx), 2015 WL 12778355, at *13 (C.D. Cal. Oct. 23, 2015) (holding that "counterclaims seek[ing] affirmative rather than defensive relief … will not relate back"). As pleaded, the USA's counterclaim "seeks money damages from Jones" regardless of whether he recovers anything. Dkt. 19 ¶ 2. Accordingly, the counterclaim is "subject to the operation of the statute of limitations" and does not relate back to the filing of the complaint because it seeks the "affirmative relief" of "damages." *Vari-Build, Inc. v. City of Reno*, 622 F. Supp. 97, 99 (D. Nev. 1985).

The government incorrectly relies on decisions that fail to address the issue at hand because they ignore the distinction between offensive and defensive counterclaims. These cases often cite *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380 (4th Cir. 1982). In holding that antitrust counterclaims related back to filing of

the complaint, *Burlington* merely cited a treatise without discussing the line of precedent distinguishing between offensive and defensive counterclaims. *Id.* at 389 (citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1419 (cited in Opp. at 7:22-23)); *Kirkpatrick v. Lenoir County Board of Education*, 216 F.3d 380 (4th Cir. 2000) (court faced with defensive counterclaim cited *Burlington* without discussion); *Employers Insurance of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (citing *Burlington* without analysis); *cf. Murray v. Mansheim*, 779 N.W.2d 379, 388–89 (S.D. 2010) (rejecting sources that ignore distinction between offensive and defensive counterclaims and following "majority view" of 3-13 *Moore's Federal Practice—Civil* § 13.93).

Those cases do not apply here because they ignore whether the counterclaims were offensive or defensive and thus do not hold that offensive counterclaims relate back.[4] It is well settled that a case is not precedent for issues that were not specifically passed on by the Court. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (per curiam); *Sethy v. Alameda Cty. Water Dist.*, 545 F.2d 1157, 1160 (9th Cir. 1976).

The USA also incorrectly relies on cases between private parties governed by state law under the *Erie* doctrine, which does not apply to the USA's counterclaim. *Sprint*, 691 F. App'x at 466 ("contract dispute"); *Hartford v. Gibbons & Reed Co.*,

---

[4] The same is true for other cases cited by the USA. *N. Cty. Commc'ns Corp. v. Verizon Glob. Networks, Inc.*, 685 F. Supp. 2d 1112, 1119 (S.D. Cal. 2010); *Yates v. Washoe Cty. Sch. Dist.*, No. 03:07-CV-00200-LRH-RJJ, 2007 WL 3256576, at *2 (D. Nev. Oct. 31, 2007); *Orange Cty. Health Care Agency v. Dodge*, 793 F. Supp. 2d 1121, 1129 (C.D. Cal. 2011); *Bryant v. Mattel, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 11463865, at *9 (C.D. Cal. Oct. 5, 2010). The USA wrongly cites *Canned Foods, Inc. v. United States*, 140 F. Supp. 771 (Ct. Cl.), which was vacated on rehearing, 146 F. Supp. 470 (Ct. Cl. 1956). The court withdrew its ruling that the USA's counterclaim related back. *See* 146 F. Supp. at 472.

617 F.2d 567, 568 (10th Cir. 1980) (vehicle damage and personal injury); *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9059-DOC (RNBX), 2013 WL 12122577, at *2 (C.D. Cal. Dec. 17, 2013) ("trade secret misappropriation"); *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1044 (C.D. Cal. 2011) (same); *Esilicon Corp. v. Silicon Space Tech. Corp.*, No. C -11-06184 EDL, 2012 WL 12920837, at *1 (N.D. Cal. Oct. 3, 2012) ("reformation or revision" of contract).[5]

The tolling of counterclaims might properly be "allowed for defensive relief," but "[s]ound policy reasons support enforcing statutes of limitations" against "counterclaims seeking affirmative relief." *N. Cypress*, 781 F.3d at 206–07 & n.154 (noting "policy of finality underlying the statute of limitations" prevents "revival of claims that have been allowed to slumber") (citation and quotation marks omitted). The government should not be allowed to threaten Mr. Jones with a money judgment after allowing claims to expire. If it had wished "to proactively bring suit to preserve" its FECA rights, Opp. at 9 n.5, the USA could have obtained timely assignment of Agent Johnson's claims before they expired, in which case it would have retained the option to pursue them for three years. 28 U.S.C. § 2415(b); *Bresson*, 213 F.3d at 1176. With a timely assignment in hand, the government may wait for presentment of a tort claim "within two years after such claim accrues" before deciding whether to litigate any FECA claims arising from the same incident. 28 U.S.C. § 2401(b). Instead, the government slept on its rights.

Indeed, the assignment was executed after Mr. Jones filed suit, only two weeks before the government filed its answer and counterclaim, Dkt. 16, 17, 82-1 Ex. A, and it was apparently signed by defense counsel instead of a Labor Department official, 5 U.S.C. § 8131(a); 20 C.F.R. § 10.705(b). This unusual

---

[5] As an unpublished decision, *Religious Technology Center v. Scott*, 82 F.3d 423, 1996 WL 171443 (9th Cir. 1996), is "not precedent" and "may not be cited." 9th Cir. Rule 36-3. In any event, *Scott* is also a private case governed by *Erie*. *See* 1996 WL 171443 at *8 ("emotional distress claim").

scenario suggests the counterclaim may have been primarily intended to retaliate against Mr. Jones rather than compensate the USA, especially where the Labor Department "clos[ed] the subrogation file" and acknowledged the "statute of limitations to pursue the third-party in this case has expired." Loy Decl. Ex. A.[6] But even if the counterclaim was not improperly motivated, it remains time-barred under a long line of federal precedent holding that counterclaims for affirmative relief do not relate back to the filing of the complaint.

This Court should follow that well-reasoned line of precedent, as the Ninth Circuit certainly would, in light of the policies of finality and repose underlying statutes of limitations, including certainty about "potential liabilities" facing a party. *Rotella v. Wood*, 528 U.S. 549, 555 (2000). The USA cannot resuscitate expired claims by relying on cursory, irrelevant, or vacated decisions. The USA slept on its rights and should not be allowed to threaten Mr. Jones with a judgment for damages based on claims it negligently allowed to expire. Under applicable federal precedent, the USA's offensive counterclaim is time-barred as a matter of law.

## III. CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Plaintiff on the USA's counterclaim, because the undisputed facts establish that the counterclaim is time-barred and Plaintiff is entitled to judgment as a matter of law.

DATED: February 26, 2018 BY: */s/ David Loy*

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

---

[6] This document was created on November 17, 2017, and available as of that date. Even though it is relevant and responsive to Plaintiff's discovery requests, the government failed to produce it. Plaintiff received it pursuant to a subpoena on February 5, 2018, after filing this motion, and disclosed to defense counsel on February 12, before the opposition was filed. *See* Loy Decl. ¶¶ 2-5.