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IN THE CIRCUIT COURT
FOR THE COUNTY OF MANISTEE

JOSEPH HENRY MARTIN,

Plaintiff,

v. **Case No. 10- 13845-CZ**

LRBOI TRIBAL COUNCIL, by and through:
STEVE PARSONS, Tribal Council Speaker,
individually and in his official capacity,
JANINE SAM, Tribal Council Recorder,
individually and in her official capacity,
ROBERT WHITELOON, Tribal Councilor,
individually and in his official capacity,
CANDACE CHAPMAN, Tribal Councilor,
individually and in her official capacity,
VIRGIL JOHNSON, Tribal Councilor,
individually and in his official capacity,
LORETTA BECARRIA, Tribal Councilor,
individually and in her official capacity,
PAT RUITER, Tribal Councilor,
individually and in her official capacity,
SANDRA MEZESKE, Tribal Councilor,
individually and in her official capacity,
LARRY ROMANELLI, Tribal Ogema,
individually and in his official capacity,
David Giampetroni, Esq.,
STATE OF MICHIGAN,
JENNIFER M. GRANHOLM, Governor of the State of Michigan,
JOHN WERNET, Deputy Legal Counsel for the Governor of the State of Michigan

Defendants.

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PLAINTIFF'S REPLY BRIEF TO DEFENDANTS' BRIEF IN SUPPORT OF THE MOTION TO DISMISS BASED ON PURPORTED IMMUNITIES FROM SUIT

I. INTRODUCTION

Brief in Response to Plaintiff's Verified Complaint filed by Defendants Little River Band of Ottawa Indians and David Giampetroni (collectively "Defendants") is based largely upon a single premise: that the Court must treat this action in its entirety as an action affecting the Defendants' sovereignty. Treated as such, Defendants argue, Defendants are immune from suit. For the reasons stated below, Plaintiff contends that the Court should reject the false premise(s) of the Defendants' response and, because Defendants have not denied the facts averred in Plaintiff's complaint and there exist no issues of material fact, grant judgment in this case in favor of Plaintiff.

II. ARGUMENT

1. The Court Should Decline Defendants' Invitation To Treat Their Actions in This Case As Sovereign Acts Subject to Sovereign Immunity.

The Defendants' response brief is an extension of some of the arguments contained in their briefs opposing Plaintiff's claims in related cases in the tribal court, and is a blatant attempt at obfuscation designed to engage Plaintiff, and in turn this Court, in arguments not at issue. Here, the Defendants ask the Court not only to accept the notion that the Plaintiff's action is not what it

says it is, but to apply a simple laundry list of the statutes and/or case law pertaining to "sovereign immunity" to find that this Court lacks jurisdiction to hear the underlying action.

Defendants' attempts should be disregarded by this Court as nothing more than futile attempts to deflect from the real issue in this case, which is that Defendants veered so far away from traditional notions of sovereignty delineated by the United States Supreme Court so as to render all claims of "sovereign immunity" by Defendants as moot. In Plaintiff's Complaint there is great reference to Defendants' actions extending far beyond their scope of authority, yet Defendants try to engage in such arguments to attempt to stymie this Court from proceeding in that direction, and even goes so far as to claim that it is somehow fatal to Plaintiff bring this action.

(It should not be lost on this Honorable Court that Defendants consciously decided to treat their supposed "absolute" and "inherent" defenses as secondary in nature (coming after their inane and far-fetched immunity defenses based on state laws), but Plaintiff will deal with the sovereign immunity issue first in order to dispose of "absolute" bars to bringing this case at the outset.)

Defendants' claims based on a laundry list of cases that Indian tribes possess "absolute" immunity from suit is fiction. This is not to say that tribal sovereign immunity doesn't exist. Instead, one must look at the context within which tribal actions take place to determine whether immunity attaches. The truth is that in all of the cases cited by Defendants' purportedly stating "absolute" immunity, the U.S. Supreme Court was dealing with issues that fell within, or had some reasonable and meaningful nexus to, sovereign functions. To be sure, the Supreme Court has "simply never considered whether a tribe is immune from a suit that has no meaningful nexus

to the Tribe's land or its sovereign functions." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 524 U.S. 751, 764 (Stevens, J. dissenting) (1998). Further, the Court has consistently held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States,* 440 U.S. 544 (1981) (citing *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148; *Williams v. Lee,* 358 U.S. 217, 219; *U.S. v. Kagama,* 118 U.S. 375, 381-382; *see McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 171). While *Montana* was a case regarding tribal jurisdiction and sovereignty, its findings are crucial to many sovereignty, and in turn, sovereign immunity cases. Additionally, the Court has consistently held that it has "retained the doctrine . . . on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency," but that "tribal immunity extends beyond what is needed to safeguard tribal self-governance." *Kiowa,* 524 U.S. at 565. The reasoning in *Kiowa* not only shows that the Court is troubled by the aspect of sovereign immunity, but also clearly shows that should the Court continue to recognize tribal sovereign immunity, it will be confined solely to activities promoting economic development and/or tribal self-sufficiency, and that the Court continues to see the jurisdictional outline of *Montana* as at least one aspect to consider in adjudicating tribal sovereign immunity.

Defendants' actions in this case do not fall within the realm of "tribal self-government," "economic development," "tribal self-sufficiency," or controlling "internal relations" and, like in the letter to the Illinois Attorney Registration and Disciplinary Commission ("IARDC"), Defendants do not and cannot point to the idea that they were protecting such aspects of tribal

sovereignty. Instead, the very fact that Defendants have enacted the *Protection Against Defamation Act of 2006*, which is a waiver of sovereign immunity and provides that a "forum and action is necessary to *allow (tribal) members and those under the jurisdiction of the Tribe* to have some ability to recover damages" shows that even the Tribe is cognizant of the limitations of its own authority. (emphasis added) Enactment of the act further shows the Tribe's knowledge that "those under the jurisdiction of the Tribe" (which includes the Tribal Government) can sue and be sued outside of tribal court, precisely because it cannot be seen as a sovereign act when dealing with the outside world.

Thus, their action in defaming Plaintiff does not fit into the paradigm of tribal sovereignty, and sovereign immunity does not apply in this case. Plaintiff is not a Tribal Member, does not live on tribal land, had no consensual relationship with the Tribe, and was not subject to the jurisdiction of the Tribe when Defendants undertook to maliciously defaming Plaintiff. Thus their actions were not a part of "self-government" and/or controlling "internal relations" when Defendants published the statements to a third party. To decide otherwise in a case such as this would be to allow Defendants to engage in unfettered defamation of any person or entity anywhere, not only within Michigan but throughout the country. Certainly, the law cannot and does not allow for that prospect and it would be safe to assume that even their co-defendant, the State of Michigan, would agree since the Tribe would be given license to go to Muskegon or elsewhere and defame persons and business owners and force businesses to close, all to pad the Tribe's coffers.

2. Defendants Aren't Entitled to Immunity Under Either the Laws of Illinois or The Laws of Michigan.

Defendants' arguments that they are entitled to immunity from suit under either the laws of Illinois or Michigan (or both) are so inane and far-fetched that they border on the absurd and seriously beg the question of whether they are deserving of a response for the simple reason that any high school graduate who took a basic government class, let alone an attorney, knows that one sovereign cannot grant immunity for an action that took place and/or is filed with another sovereign.

Defendants' intimations that they may be somehow entitled to immunity under the laws of Illinois have absolutely no basis in law. The complained of action of Defendants took place when they composed the letter with the malicious and defamatory lies and placed it in the mail to the IARDC regarding an attorney with whom at that time they had no consensual relationship. It is clear that the immunity Defendants assert is reserved for those actions which take place within the jurisdiction of the Illinois Bar and by those persons under the jurisdiction. Finally, to say that the State of Illinois can say who can or cannot be sued in Michigan Courts is inane. To look at it any other way would stand the laws of jurisdiction, not to mention logic, on its head.

Similarly, the State of Michigan cannot grant immunity for a request for investugation filed with a foreign jurisdiction, a fact that is especially true when the State of Michigan Bar has had absolutely no role in this case. The legal actions within which the facts of the instant case took place happened within the tribal court (over which, contrary to Defendants' assertions, the State of Michigan has no jurisdiction). Further, Plaintiff is not, nor has ever been, a member of

the Michigan Bar, and therefore the State of Michigan Bar has no jurisdiction over the actions (again, contrary to Defendants' assertions, which Mr. Giampetroni's other tribal clients would say are absolutely repugnant to tribal sovereignty).

Finally, for the reasons outlined herein, Defendants' arguments that go along the lines of "Illinois allows for immunity and Michigan allows for immunity, so immunity must attach" must fail under even the basest of laws of jurisdiction.

In sum, each state can only grant immunity from suit being brought *within its jurisdiction* and based upon the facts of a filing with that state's bar against an attorney under that state's jurisdiction by a person under that state's jurisdiction. Like in the case at hand, if one aspect does not exist, immunity cannot attach, and thus Defendants' arguments must likewise fail, no matter if both states somehow grant immunity.

3. Since the Tribe is Not Entitled to Sovereign Immunity, David Giampetroni Is Not Entitled to Sovereign Immunity.

It comes as no surprise that, given their actions to date, the tribal defendants are willing to throw their attorney, David Giampetroni, under the bus under the guise of asserting his sovereign immunity in this action (although as shown above, neither he nor the Tribe is entitled to sovereign immunity). To assert sovereign immunity for him and his law firm, Defendants must assert that he was intimately involved in the submission to the IARDC. Unfortunately, that puts Mr. Giampetroni in a tenuous position and his law license in serious jeopardy, since sovereign immunity does not apply to state bar investigations, and Mr. Giampetroni will be found by the Bar of the State of Michigan as having submitted blatant and defamatory lies to the Supreme

Court of another state. And unlike court submissions, whereby the parties can argue their cases and tend to fudge on the facts, in going after another attorney's license, the leash on arguments is infinitely tighter and state bars do not take kindly to blatant outright lying by the complaining party, particularly when that party is himself or herself an attorney (even of another state).

However, Defendants' assertions beg another serious question: why Mr. Giampetroni didn't sign the letter to the IARDC if Plaintiff's actions were so egregious. As an officer of the court, Mr. Giampetroni's duty is infinitely higher than that of the Tribe. As a matter of fact, Mr. Giampetroni is *mandated* by law and ethical rules to report alleged violations. And yet he didn't sign the letter even though he was intimately involved in the matter. That he didn't sign the letter speaks volumes, as it is clear to the most objective observer that, because Mr. Giampetroni knows that he is definitely subject to the punishment(s) meted out by state bars, he wilfully didn't sign the letter because of its defamatory statements. However, in the process, Mr. Giampetroni inadvertently allowed his client to be subject to greater liability. While it is not for this Honorable Court to dispense that type of justice (and Mr. Giampetroni's day will still come before the state bar, particularly after his actions leading to this case), it speaks to the motives, principles, and actions of the tribal defendants in this series of cases.

CONCLUSION

In bringing their Motion for Summary Disposition, Defendants Little River Band of Ottawa Indians and David Giampetroni bear the burden of proof in support of said Motion. Because Defendants have failed in that regard, Plaintiff respectfully requests that this Honorable Court reject the false premises of the Defendants' response and, because Defendants have not 1)

denied the facts averred in Plaintiff's complaint; and 2) there exist no issues of material fact, grant judgment in this case in favor of Plaintiff.

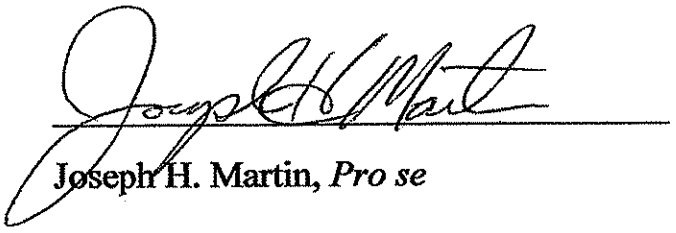
Respectfully submitted,

Date: 7/6/10

Joseph H. Martin, *Pro se*

CERTIFICATION OF MAILING

I certify that a copy of Plaintiff's Reply Brief to Defendants' Motion for Summary Disposition was mailed from the Manistee Branch of the US Post Office on July 6, 2010, by Priority Mail to the named defendants' attorney of record at the address on file with the Court.



Joseph H. Martin, *Pro se*

7/6/10

Date