LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COURT
3031 Domres Road, Manistee, Michigan 49660

JOSEPH HENRY MARTIN,

Plaintiff

v.

LITTLE RIVER BAND OF OTTAWA INDIANS, *ET AL.*

Defendants,

DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW IN SUPPORT

Case No. 09-248-GC

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TRIBE'S MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION

The Little River Band of Ottawa Indians, its Council and Ogema (collectively, the "Tribe") respectfully MOVE this Court for an order granting dismissal and/or summary disposition of Plaintiff's Complaint.[1]

II. FACTUAL BACKGROUND

On September 10, 2007, Plaintiff and the Tribe entered a contract for Plaintiff's services as Chief Legislative Counsel for the Tribal Council. The Attorney Standing provision of the

[1] This motion and brief are submitted on behalf of the named defendants except Judge Sherigan.

contract required Plaintiff to obtain membership in the Michigan bar by March 10, 2008, and to maintain good standing in the state bars of Illinois and Michigan for the duration of the contract.

On April 14, 2008, the Tribal Ogema served Plaintiff with a notice of termination of his contract, citing Plaintiff's breach of the Attorney Standing provision of the contract.

On April 15, 2008, the Tribal Court issued an order temporarily restraining the Ogema from effectuating the April 14, 2008, notice of termination (pending judicial determination of the Ogema's constitutional authority to terminate Plaintiff's contract).

On April 16, 2008, the Tribal Council filed an action in Tribal Court against the Tribal Ogema to determine whether the Ogema possessed the constitutional authority to terminate Plaintiff's contract. *See Tribal Council v. Tribal Ogema*, Case No. 08-093-GC.

On January 22, 2009, the Tribal Court resolved Case No. 08-093-GC, holding that the Ogema possessed the constitutional authority to terminate Plaintiff's contract. *See* Plaintiff's Exhibit A (January 22, 2009, Ruling).

On July 16, 2009, the Tribal Ogema and the Tribal Council Speaker met with the Court seeking clarification of the Court's January 22, 2009, Ruling. The Court subsequently issued a clarification ("July 16, 2009, Clarification") of its January 22 Ruling, stating that the ruling "does not give the Ogema the sole authority to terminate the contract on behalf of the Tribe. Both the Ogema and the Council have the authority to terminate the contract[.]" *See* Plaintiff's Exhibit C.[2]

Plaintiff filed this suit on November 6, 2009. In summary, Plaintiff's action rests on the following assertions:

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[2] In his Complaint, Plaintiff identifies the July 16, 2009, Clarification as "Order of July 17, 2009"). The correct date of that document is July 16, 2009. *See* Plaintiff's Exhibit C.

- The Court's July 16, 2009 Clarification changed the holding of the Court's January 22, 2009, Ruling, and as a result, Plaintiff was deprived of a property right in his contract.
- Because Plaintiff was deprived of a property right by the Court's July 16, 2009, Clarification, he was entitled to notice of and participation in the July 16, 2009, meeting between the Judge, the Speaker and the Ogema that gave rise to the Clarification.
- Because Plaintiff was not notified of, or invited to participate in, the meeting that gave rise to the July 16, 2009, Clarification, he was denied due process and equal protection of the laws in violation of the Indian Civil Rights Act ("ICRA") and the Tribal Constitution.
- Plaintiff further asserts that because no transcript was made of the July 16, 2009, meeting, the Tribe violated Section 7.03 of Tribal Court Ordinance No. 97-300-01, which provides that "a record of all official proceedings in the Tribal Courts shall be made[.]"

III. ARGUMENT

Plaintiff's equal protection and due process claims under ICRA are barred by the Tribe's sovereign immunity and should therefore be dismissed as having no basis in law and for lack of jurisdiction. Plaintiff's claims under the Equal Protection and Due Process clauses of the Tribal Constitution and under Section 7.03 of the Tribal Court Ordinance should be dismissed as having no basis in the law and for failure to state a claim for which relief can be granted.

A. Legal Standards

The Tribal Court Rules of Civil Procedure ("TRCP") provide that a court may dismiss a plaintiff's action where "there is no basis for action in laws or claim[.]" TRCP 4.3(2). *See Dorian Ross v. Little River Band of Ottawa Indians*, Case No. 03-089-GC at 8 (Nov. 8, 2004). Additionally, this Court applies the Michigan Court Rules of Civil Procedure where such rules are not superseded by procedural rules enacted by the Tribal Courts. *See* Tribal Court Ordinance

No. 97-300-01 ("TCO"), § 9.01. Under Michigan Court Rule ("MCR") 2.116(C)(8), a court may grant summary disposition dismissing a complaint where the plaintiff has failed to factually allege a claim for which relief can be granted. *See Beaudrie v. Henderson*, 465 Mich. 124, 129-30 (2001). When ruling on a motion under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5). Written instruments on which a claim is based must be attached to the complaint and are considered part of the pleadings for all purposes. MCR 2.113(F)(1). A court accepts well-pleaded *factual* allegations as true; however, "[t]he mere statement of a pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *Kramer v. Dearborn Heights*, 197 Mich. App. 723, 725 (1992); *Churella v. Pioneer State Mut. Ins. Co.*, 258 Mich. App. 260, 272 (2003) (same). When testing the sufficiency of a complaint, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" and "may disregard" that conclusion. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). *See also Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

B. Plaintiff's claims under ICRA are barred by sovereign immunity

Plaintiff has asserted equal protection and due process claims under ICRA. As a self-governing sovereign, the Tribe has incorporated civil rights provisions, including rights to equal protection and due process, in its own Constitution. *See* Tribal Const. Art. III (discussed below). However, the Tribe has not consented to being sued in its own courts for claims arising under ICRA and thus possesses sovereign immunity with respect to such claims. This Court accordingly lacks jurisdiction over Plaintiff's ICRA claims and should dismiss them.

It is elementary that "no sovereign may be sued in its own courts without its consent." *Alden v. Maine*, 527 U.S. 706, 738 (1999). While "[m]any tribes have facilitated enforcement of ICRA claims in tribal court through full or partial waivers of sovereign immunity," COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.04[2] fn. 459 (2005 ed.), the Little River Band is not one of those tribes. *See also id.* ("Enforcement depends on tribal waivers of sovereign immunity in tribal court for purposes of [ICRA] claims.").

The scope of the Tribe's consent to be sued in its own courts is set forth in Article XI (Sovereign immunity) of the Tribal Constitution. That provision provides, in pertinent part, that the Tribe and its officials "shall be subject to suit for declaratory or injunctive relief in the Tribal Court System for the purpose of enforcing rights and duties *established by this Constitution and by the ordinances and resolutions of the Tribe*." Const. Art. XI § 2(a) (emphasis added). That provision makes no mention of ICRA, and the Constitution recognizes no other waiver or limit on the Tribe's sovereign immunity "except as authorized by tribal ordinance or resolution or in furtherance of tribal business enterprises." *Id.* at § 1. Plaintiff has pointed to no ordinance or resolution consenting to suits against the Tribe or its officials under ICRA. *See United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (a sovereign's consent to be sued "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires" (quotations omitted)); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) ("[T]he terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit" (quotations omitted)).[3]

[3] Plaintiff's citation to the United States Supreme Court's decision in the *National Farmers Union* case as a basis for this Court's jurisdiction, *see* Complaint ¶ 4, is without force. That case addressed federal court jurisdiction under 28 U.S.C. § 1331. The Court did not address the merits of any argument regarding the existence or waiver of a Tribe's sovereign immunity with respect to ICRA suits in its own courts.

Because the Tribe has not consented to be sued in its own courts under ICRA, this Court should dismiss Plaintiff's ICRA claims under TRCP 4.3(2). *See, e.g.*, *Dorian Ross* at 11 n.1 (dismissing claim against Tribe and stating that "[s]ince this Court does not have jurisdiction based upon sovereign immunity, pursuant to TRCP 4.3, this Court does not consider the merits of Plaintiffs' claim"); *Sam v. Tome Celani-Manistee Gaming and Little River Casino Resort*, Case No. 05-043-GC (June 10, 2005) (dismissing claim where "there is no subject matter jurisdiction for this court as it is barred by Sovereign Immunity of the Tribe").[4]

C. Plaintiff Fails to State a Claim under the Equal Protection Clause of the Tribal Constitution

Article III of the Tribal Constitution provides in part that the Tribe "shall not . . . [d]eny to any person within its jurisdiction the equal protection of its laws[.]" Const. Art. III § 1(h). Plaintiff alleges that the Court's July 16, 2009, Clarification and the circumstances that led to its issuance violated his right to equal protection of the laws. *See, e.g.*, Complaint ¶¶ 31-33.

Plaintiff has failed to allege the most fundamental element of an equal protection claim. "The basis of any equal protection claim is that the [government] has treated similarly-situated individuals differently." *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992).[5] A plaintiff's burden in this regard is clear. To state an equal protection claim for which relief can be granted (*i.e.*, to survive a motion to dismiss), a plaintiff must factually allege the existence of other persons who were treated more favorably than the plaintiff and who "are

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[4] If the Court does not agree that the Tribe possesses sovereign immunity with respect to suits under ICRA, the following two sections addressing Plaintiff's equal protection and due process claims under the Tribal Constitution are analytically applicable to Plaintiff's equal protection and due process claims under ICRA. The Equal Protection and Due Process provisions in the Tribal Constitution are materially identical to those codified in ICRA.

[5] The Tribe relies in part on substantive federal case law. *See* Tribal Court Ordinance No. 97-300-01, § 8 (courts of the Little River Band shall apply Tribal and applicable federal substantive law).

'*similarly situated' to the plaintiff in every material respect*." *Ross v. Duggan*, 402 F.3d 575, 588 (6th Cir. 2004) (emphasis in original). *See also Brewer v. Cleveland Mun. Sch. Dist.*, 84 Fed. Appx. 570, 572 (6th Cir. 2003) ("Although [Plaintiff] used the term[] 'equal protection' . . . in her complaint, she did not allege that she was treated differently from any other similarly situated employee. Accordingly, she failed to allege a prima facie case"); *Leeds v. City of Muldraugh*, 174 Fed. Appx. 251, 255 (6th Cir. 2006) (upholding dismissal of claim because "plaintiffs fail to allege in their equal protection claim how they were treated differently from others similarly situated"); *Jones v. Smolinski*, 2009 WL 3352804, *6-*7 (W.D. Mich. 2009) (stating that "a plaintiff must include in his complaint *facts* that demonstrate disparate treatment of similarly situated individuals" and dismissing equal protection claim because "Plaintiff does not present any allegations regarding similarly situated [persons]. . . . Conclusory allegations of unconstitutional conduct without specific factual allegations fail to state a claim") (emphasis added) (citing *Vill. of Willowbrook*, 528 U.S. 562, 564 (2000) and *Ross v. Duggan*, 402 F.3d at 587-88)). Moreover, Plaintiff will not be able to state an equal protection claim merely by alleging that he was subject to a certain action and others were not. *See, e.g., Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986) ("The equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class receiving better treatment than a plaintiff").

Plaintiff's equal protection claims are purely conclusory allegations of unconstitutional conduct. His Complaint is devoid of allegations, factual or otherwise, that he was treated differently from *any* other individuals, much less individuals "'similarly situated' to the plaintiff in every material respect." *Ross*, 402 F.3d at 588. Accordingly, Plaintiff's equal protection

claims should be dismissed under TRCP 4.3 as lacking any basis in the law and/or under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted.

D. Plaintiff Fails to State a Claim under the Due Process Clause of the Tribal Constitution

Article III of the Tribal Constitution provides, in part, that the Tribe "shall not . . . deprive any person of liberty or property without due process of law[.]" Const. Art. III § 1(h). To state a claim that one's due process rights have been violated, a plaintiff must adequately allege (1) a deprivation of (2) a liberty or property interest (3) without due process. *See Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999).[6]

Plaintiff alleges that the Court's July 16, 2009, Clarification deprived him of a property interest in his contract. *See, e.g.*, Complaint ¶¶ 25-26. Plaintiff fails to state a claim under the Due Process clause because he has not factually alleged that the Court's July 16 Clarification "deprived" him of anything. He likewise has not alleged that he possessed an interest in the aspect of his contract on which his claim is based sufficient to qualify as "property" under the Due Process clause. In other words, because the July 16 Clarification did not "deprive" Plaintiff of any interest, much less a due process "property" interest, he was not "due" any process of law under the Due Process clause of the Tribal Constitution.

1. Plaintiff has not adequately alleged the "deprivation" of a property interest

Plaintiff claims that the Court's July 16 Clarification deprived him of property rights under his contract "by allowing the Ogema and Tribal Council . . . to have equal rights in terminating Plaintiff's Contract with the Tribe, whereas in the Order of the Court of January 22, 2009, *only the Ogema* possessed such powers." Complaint ¶ 25 (emphasis added).

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[6] *See* Tribal Court Ordinance No. 97-300-01, § 8 (courts of the Little River Band shall apply Tribal and applicable federal substantive law).

First, this is not a factual allegation sufficient to state a claim. It is a legal conclusion unaccompanied by even the barest attempt at factual support. *See Kramer*, 197 Mich. App. at 725 ("The mere statement of a pleader's conclusions, *unsupported by allegations of fact upon which they may be based*, will not suffice to state a cause of action." (emphasis added)). Plaintiff points to no language in the Court's January 22, 2009, Ruling to support his allegations, and this Court certainly is not required to accept Plaintiff's unsupported characterizations of that ruling. *Papasan*, 478 U.S. at 286 (when testing the sufficiency of a complaint, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" and "may disregard" that conclusion). Rather, the meaning and effect of the Court's January 22 Ruling and its July 16 Clarification are questions for this Court to determine as matters of law.

Plaintiff's claim that he was deprived of a property interest by the July 16 Clarification rests entirely on his assertion that the January 22 Ruling established that "*only* the Ogema" could terminate his contract. *See* Complaint ¶ 25. But the ruling established no such thing and Plaintiff has pointed to nothing in it to the contrary. The question at issue was not *which* entity, as between the Ogema and the Council, had the authority to terminate the contract. The question was "specifically, does the Ogema have the authority to terminate the contract." Plaintiff's Exhibit A (January 22 Ruling at 2). The Court's ruling was that "the Ogema does have the authority to terminate the contract[.]" *Id.* at 3. *Nowhere* in the ruling does the Court indicate that the Ogema's authority was sole and exclusive or that Council otherwise lacked authority to terminate the contract. *Nowhere* in the ruling is there indication that the Court viewed the power to terminate the contract as mutually exclusive between the Council and the Ogema. These simply were not issues before the Court. "The *only issue* before the Court in this case is whether or not the Ogema has the authority to terminate this contract." *Id.* at 2 fn.1 (emphasis added).

As Plaintiff concedes, "[n]owhere in the Order of January 22, 2009, does Judge Sherigan rule on . . . the Tribal Council's powers" to terminate the contract. Complaint ¶ 17.

Thus, it cannot be said that the January 22 Ruling established that "*only* the Ogema" could terminate the contract, or that the Council otherwise lacked such authority. Accordingly, it cannot be said that the July 16 Clarification deprived Plaintiff of any right (much less a due process property right, discussed below) that he enjoyed under the January 22 Ruling. Plaintiff therefore cannot state a claim under the Due Process clause of the Constitution. His claims under that provision should be dismissed under TRCP 4.3 as lacking any basis in the law and/or under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted.

2. Plaintiff has not adequately alleged a constitutionally protected "property" interest

Even if Plaintiff could factually allege that the Court's January 22 Ruling provided that "only the Ogema" could terminate his contract, his Complaint would still fail to state a claim under the Due Process clause.

Plaintiff's claim that he was deprived of a property interest is based on his employment contract. He alleges that the July 16, 2009 Clarification "affected Plaintiff's rights, property and otherwise, under the Contract . . . . As a party to the Contract, Plaintiff possessed *sufficient property interests* affected by any decision in Case #08-093-GC." Complaint ¶ 25 (emphasis added). Such allegations are patently inadequate to state a claim under the Due Process clause.

First, Plaintiff's assertions that the Court's July 16 Clarification deprived him of property rights are, once again, bare legal conclusions unaccompanied by factual support. Plaintiff points to no language or provision in his contract establishing the property interest of which he claims to have been deprived by the Court's July 16 Clarification. Plaintiff may not ask this Court to take it on faith that his contract vested him with "sufficient property interests," Complaint ¶ 25,

to state a claim for relief under the due process clause. *See Kramer*, 197 Mich. App. at 725 ("The mere statement of a pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action."); *Papasan*, 478 U.S. at 286 (courts "are not bound to accept as true a legal conclusion couched as a factual allegation" and "may disregard" that conclusion); *Mezibov*, 411 F.3d at 716 ("legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

As noted, Plaintiff conclusorily alleges that the January 22 Ruling established that "only the Ogema" could terminate Plaintiff's contract. Complaint ¶ 25. Even if that were true (which, as discussed above, it is not), the Court's January 22 ruling was not itself a source of any property right of Plaintiff's protected by the Due Process clause. *See, e.g.*, *Carolina-Virginia Racing Ass'n v. Cahoon*, 214 F.2d 830, 832 (4th Cir. 1954) ("No one has a property right in a court decision"); *Leppala v. Sawbill Canoe Outfitters, Inc.*, 361 F.Supp. 409, 412 (D.C. Minn. 1973) ("No where does the Constitution provide that common law judicial decisions are property rights or are guaranteed to continue unchanged, fixed and unaltered"). Rather, Plaintiff must adequately – *i.e.* factually, by pointing to language in the contract – allege that the right in question is established by his contract. As noted above, Plaintiff has not even attempted to allege that *his contract* requires that "only the Ogema" can terminate it. Once again, this failing is fatal to Plaintiff's due process claims.

Plaintiff not only fails to point to any language or provision in the contract establishing a property interest of which he has been deprived, he fails even to produce the contract. That failure alone provides yet another independent ground for dismissal of his due process claims. Under MCR 2.113(F)(1), "[i]f a claim . . . is based on a written instrument, a copy of the instrument or its pertinent parts *must* be attached to the pleading as an exhibit" (emphasis added).

Because Plaintiff did not comply with MCR 2.113 (F)(1), his due process claims should be dismissed. *See English Gardens Condo., LLC v. Howell Twp.*, 273 Mich. App. 69, 81 (2006) (failure to comply with MCR 2.113(F)(1) "warrants dismissal"); *Stephenson v. Union Guardian Trust Co.*, 289 Mich. 237, 241-42 (1939) (same); *Frame v. Royal Oak Twp. Fire Dep't*, 2003 WL 21921178, *2 (Mich. App. 2003) (where plaintiff failed to attach document on which claim was based "as required by MCR 2.113(F)(1) . . . . we find that plaintiff failed to state a claim . . . [and] Plaintiff's pleadings are insufficient as a matter of law").[7]

Even if Plaintiff had adequately alleged a property interest in his contract of which he was deprived by the July 16 Clarification and had attached the contract to his Complaint, he would *still* be unable to state a claim for which relief can be granted under the Due Process clause. To state a due process claim, a plaintiff must adequately allege the deprivation of a property interest of the sort protected by the Due Process clause and "not every injury to an alleged property interest rises to the level of a constitutional violation." *Farkas v. Ross-Lee*, 727 F.Supp. 1098, 1104 (W.D. Mich. 1989); *Ferencz v. Hairston*, 119 F.3d 1244, 1247 (6th Cir. 1997) (to state a due process claim "a plaintiff must first show a *protected* property interest" (emphasis added)). Where a plaintiff cannot allege a protected property interest, he cannot state a claim for relief under the Due Process clause and dismissal of the claim is appropriate. *See Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 297-98 (6th Cir.

[7] The requirement that the written instrument on which a claim is based must be provided to the Court with a complaint is not a mere formality. By filing his Complaint, Plaintiff has invoked this Court's jurisdiction and set in motion the very costly machinery of the Tribal Court system. The requirement reflects (as Plaintiff, who is a lawyer, undoubtedly knows) a litigant's basic obligation to demonstrate that it has a legitimate legal claim to pursue before that costly machinery proceeds further. Plaintiff knows he cannot identify a property interest in his contract of which he was deprived by the Court's July 16 Clarification, which is clearly why he chose to disregard the fundamentally obvious imperative of producing the contract with his Complaint.

2006); *Gasca-Rodriguez v. Holder*, 322 Fed. App. 447, 449 (6th Cir. 2009) (absent a protected property interest "it is *impossible* to show a Due Process violation" (emphasis added)).

The Sixth Circuit and other courts are clear: in order for government action affecting an employment contract to rise to the level of a deprivation of "property" under the Due Process clause (as opposed to a simple breach of contract), the action must involve "a substantial, tangible harm and a material change to an employee's *status*[.]" *Samad v. Jenkins*, 845 F.2d 660, 662 (6th Cir. 1988) (the government must have "significantly and materially impaired [a] plaintiff's *agreed employment status*" (emphasis added)). And certainly not every contractual term gives rise to a status that qualifies as "property" protected by the Due Process clause. Rather, certain statuses are protected because, by their nature or importance, persons unjustly stripped of such statuses cannot easily be made whole by ordinary legal remedies such as those available for a breach of contract. As the Second Circuit has explained:

> [T]he Due Process Clause is invoked to protect *something more than an ordinary contractual right*. Rather, procedural protection is sought in connection with a state's revocation of a *status*, *an estate within the public sphere characterized by a quality of extreme dependence in the case of welfare benefits, or permanence in the case of [job] tenure, or sometimes both,* as frequently occurs in the case of social security benefits.

S & D Maint. Co. v. Goldin, 844 F.2d 962, 966 (2d Cir. 1988) (emphasis added) (footnote omitted). *See also Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (Due Process clause implicated where government revokes status connected to extreme dependency (*e.g.*, welfare benefits) or permanence (*e.g.*, guaranteed job tenure)); *Elsag Bailey, Inc. v. Detroit*, 975 F.Supp. 993, 998 (E.D. Mich. 1997) (same).

The reason for these principled limitations on the protections of the Due Process clause is self-evident. Constitutions embody *core* values. Government-conferred statuses such as extreme dependence and guaranteed permanence are ones around which people shape their lives

and on which they fundamentally rely. The Due Process clause, like other constitutionally enshrined civil rights, is intended to provide a bedrock measure of security in such reliance; it is not intended as just another cause of action for every purported grievance against a government, regardless of how trivial. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1449 (11th Cir. 1986) ("The Due Process Clause . . . affords direct protection to certain 'core' values."). As the Third Circuit has explained:

> [I]f every breach of contract by [a public entity] constituted a deprivation of property for procedural due process purposes, . . . courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities . . . . We agree that such a wholesale [constitutionalization of] contract law seems *far afield from the great purposes of the due process clause.*

Reich v. Beharry, 883 F.2d 239, 242 (3d Cir. 1989) (emphasis added) (citations omitted); *see also Farkas*, 727 F.Supp. at 1103 ("Not every contractual right a public employee has as a term and condition of the employment relation is constitutionally actionable [under the Due Process clause]. . . . Unless every breach of every public contract is to be actionable as a violation of constitutional rights, it is necessary to distinguish between 'mere' contract rights and property rights created by contracts" (quotations omitted)).

Plaintiff alleges that the Court's July 16 Clarification altered a term of his contract requiring that "only the Ogema" could terminate the contract. Complaint ¶ 25. Even if this wholly unsupported legal conclusion were true, it would not remotely qualify as an allegation of "substantial, tangible harm and a material change," *Samad*, 845 F.2d at 662, to any constitutionally protected status guaranteed to Plaintiff under his contract. Plaintiff has nowhere alleged that he was tenured or otherwise entitled to any degree of permanence or to any other protected status under his contract. *See Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) (to have a property interest protected by the due process clause, "a person clearly must have more

than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of *entitlement* to it" (emphasis added)).

Nor has Plaintiff alleged that the Court's July 16 Clarification *revoked* any such status. He has not alleged that the July 16 Clarification terminated his job or suspended or demoted him, or changed his working conditions, salary, benefits, title, authority or job duties, or otherwise resulted in any tangible, material change in status whatsoever, *see Samad*, 845 F.2d at 662 (due process claims may not be "founded upon intangible harms"), much less a status rooted in extreme dependency, an entitlement to permanence or any other status sufficient to implicate "the great purposes of the due process clause." *Reich*, 883 F.2d at 242. Plaintiff has merely alleged, albeit in conclusory fashion, that the Tribe somehow altered his contract. If the law provides Plaintiff with viable avenues of legal recourse for such an action, the Due Process clause is certainly not among those avenues. Plaintiff's due process claims should be dismissed under TRCP 4.3 as lacking any basis in the law and/or under MCR 2.116(C)(8) for failure to state a claim for which relief may be granted.[8]

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[8] Plaintiff's citations to the Supreme Court's decisions in the *Matthews* and *Mullane* cases, Complaint ¶ 26, are without force and indeed undermine Plaintiff's claim to due process protection. The quoted language from *Matthews* refers to an individual who is "deprived of a property interest." As explained in detail above, Plaintiff is not such an individual for purposes of the Due Process clause. And Plaintiff's selective quotation from *Mullane* referring to "interested parties" would write the "property" requirement out of the Due Process clause altogether. In fact, the *Mullane* Court analyzed at length whether the rights at issue in that case were "property" under the Due Process clause, *see* 339 U.S. 306, 311-13, and concluded that "[c]ertainly the proceeding is one in which [claimaints] may be deprived of property rights and *hence* notice and hearing must measure up to the standards of due process." *Id.* at 313 (emphasis added). Thus, *Mullane*'s reference to "interested parties" cannot help Plaintiff here. Interested parties in the due process context are those with a constitutionally protected property interest at stake. Plaintiff has alleged no such interest.

E. Plaintiff Fails to State a Claim under the Tribal Court Ordinance

The Court's July 16, 2009 Clarification states that "[o]n July 16, 2009, a meeting was held with the Ogema and the Council Speaker and the Court, at the request of the Ogema and the Speaker to clarify the Judgment." *See* Plaintiff's Exhibit C. Plaintiff asserts that the July 16 meeting violated Section 7.03 of the Tribal Court Ordinance ("TCO"), which requires that a record be made of "all official proceedings in the Tribal Courts[.]" Complaint ¶¶ 13, 27-31.[9] This claim fails for at least two reasons.

1. Plaintiff has no cause of action under Tribal Court Ordinance No. 97-300-01

As a matter of law, Plaintiff cannot state a claim for which relief can be granted under the TCO. The reason is simple: the TCO provides no cause of action under which private individuals can bring a lawsuit to enforce its terms.

In order to assert a claim based on a promulgated or enacted law, such as Plaintiff's claim under the TCO, a plaintiff must first establish that the law in question confers a private right of action on Plaintiff. "Without [such a right], a cause of action does not exist." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).[10] Without a cause of action under the TCO, Plaintiff cannot state a claim and, moreover, this Court does not have subject matter jurisdiction to adjudicate the matter. *See, e.g.*, *In re Digimarc Corp. Deriv. Litig.*, 549 F.3d 1223, 1229 (9th Cir. 2008) ("If, however, [the statute] does not contain a private right of action, the district court properly dismissed the . . . claim for lack of subject matter jurisdiction").

The TCO contains no language expressly creating a private right of action. Absent an express right, courts may find an implicit right of action only where "'the plaintiff is one of the

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[9] Plaintiff also alleges violations of ICRA and the Tribal Constitution in paragraphs 27-31. But those allegations fail for the reasons set forth in sections B through D of this Brief.

[10] *See* Tribal Court Ordinance No. 97-300-01, § 8 (Courts of the Little River Band shall apply Tribal and applicable federal substantive law).

class for whose *especial benefit*" the law was enacted. *Care Choices HMO v. Engstrom*, 330 F.3d 786, 788 (6th Cir. 2003) (emphasis added) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (for a law to create a private right of action, "its text must be phrased in terms of the persons benefited" (quotations omitted)); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93 and n.13 (1979) (private right of action exists where legislative body "explicitly conferred a right directly on a class of persons that included the plaintiff").

The United States Supreme Court has explained that such "rights-creating language" is exemplified by phrases such as "no person shall be denied the right to vote" and "Employees shall have the right to organize[.]" *Cannon*, 441 U.S. at 690 n.13. The TCO is wholly devoid of such language or any other indication that it was enacted by the Tribal Council for the "especial benefit" of Tribal employees or any other class of individuals to which Plaintiff may belong.

Rather, the TCO is a general mandate establishing the Tribal Judiciary and setting forth the institutional policies, practices and structures designed to implement that mandate. *See Gonzaga*, 536 U.S. at 288 (statutes that "speak only in terms of institutional policy and practice . . . are not concerned with whether the needs of *any particular person* have been satisfied . . . and they cannot give rise to individual rights" (quotations omitted) (emphasis added)).

The Tribal Council's intentions in enacting the TCO are clear:

> [I]n furtherance of the Tribal Council's authority to provide for the health, safety, morals, and welfare of the Tribe, the Tribal Council of the Little River Band of Ottawa Indians hereby establishes the Tribal Judiciary, and enacts this ordinance which shall establish the purposes, powers, and duties of the Tribal Courts.

TCO § 1.01. This language reflects a strictly public purpose and does not remotely reflect an intent to protect or otherwise "especially benefit" individual employees aggrieved by employment actions of the Tribe, or any other class of individuals. To the extent the TCO

imposes duties on persons responsible for implementing the TCO, those duties are clearly imposed for the benefit of the Tribe and Tribal public. *See, e.g., Cannon*, 441 U.S. at 690 n.13 ("[T]he Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large").

Because the TCO is a general mandate and contains no language or other indication of a legislative intent to allow enforcement of the TCO by individual private rights of action, Plaintiff's "cause of action does not exist." *Sandoval*, 532 U.S. at 286. This Court should therefore dismiss Plaintiff's TCO claims under TRCP 4.3(2) as lacking any basis in law, and under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted.

2. Plaintiff has not factually alleged a violation of the TCO

Even if the TCO provided an enforceable private right of action, Plaintiff cannot state a claim under Section 7.03 because he cannot allege facts that would, if true, constitute a violation of that provision. Section 7.03 requires that a record be made "of all *official proceedings in the Tribal Courts*[.]" (emphasis added). Plaintiff has not factually alleged, and will not be able to factually allege, that the July 16 meeting between Judge Sherigan and the Ogema and Speaker was an "official proceeding[] in the Tribal Courts." Section 7.03's record requirement simply does not apply to that meeting.

Further, that Judge Sherigan met with the Speaker and Ogema on July 16, 2009, and discussed her holding in Case No. 08-093-GC does not remotely constitute impermissible ex parte (or otherwise unlawful or improper) communications, as suggested by Plaintiff. Tribal Court Rule ("TCR") 2.104(A)(3) provides that a judge may not engage in "ex parte or other communication with a litigant . . . concerning a pending or impending proceeding unless all representatives of *the parties* to the proceeding are present." (emphasis added). Plaintiff was not

a party to Case No. 08-093-GC (nor did he seek to intervene under MCR 2.209). The two parties to Case No. 08-093-GC were the Tribal Council and the Tribal Ogema. Thus, representatives of all parties to the proceeding *were* present at the July 16 meeting as required by TCR 2.104(A)(3). *See* Plaintiff's Exhibit B (Entry at 7/17/2009) *and* Exhibit C.

Plaintiff's claims under Section 7.03 of the TCO should be dismissed under TRCP 4.3 as lacking any basis in the law, and under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted.

IV. SUMMARY

This brief has established the following independent bases for dismissal and/or summary disposition of each of Plaintiff's claims:

- Plaintiff's ICRA claims should be dismissed because the Tribe possesses absolute sovereign immunity in its own courts to claims arising under that federal statute and this Court accordingly lacks jurisdiction over those claims. *See supra* at 4-6.
- Plaintiff's equal protection claims should be dismissed because Plaintiff has failed to factually allege the existence of other persons who were treated more favorably and who were similarly situated to him in every material respect. Plaintiff has accordingly failed to state a claim for which relief can be granted under the Equal Protection clause of the Tribal Constitution. *See supra* at 6-8.
- Plaintiff's due process claims should be dismissed because Plaintiff has failed to allege facts that would, if true, establish that the Court's July 16, 2009, Clarification operated to "deprive" him of any interest, much less a constitutionally protected "property" interest. Plaintiff has accordingly failed to state a claim for which relief can be granted under the Due Process clause of the Tribal Constitution. *See supra* at 8-15.

- Plaintiff's due process claims should further be dismissed because those claims are based on a purported property right contained in a written contract, and Plaintiff failed to attach that contract to his Complaint as required by MCR 2.113(F)(1). *See supra* at 11-12.
- Plaintiff's claims under Section 7.03 of the TCO should be dismissed because the TCO does not provide Plaintiff with an individual private cause of action. As a matter of law, Plaintiff thus cannot state a claim for which relief can be granted under the TCO. *See supra* at 16-18.
- Plaintiff's claims under Section 7.03 of the TCO should further be dismissed because Plaintiff has failed to allege facts that would, if true, constitute a violation of Section 7.03. Plaintiff has accordingly failed to state a claim for which relief can be granted under the TCO. *See supra* at 18-19.

V. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court dismiss all of Plaintiff's claims under TRCP 4.3 as lacking any basis in the law and/or grant summary disposition of all of Plaintiff's claims under MCR 2.116(C)(8) for failure to state a claim for which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Giampetroni, certify that on January 7, 2010, I caused to be served a true and correct copy of the Tribe's Motion to Dismiss and/or For Summary Disposition and Memorandum of Law in Support via Electronic Mail with a hard copy sent via Federal Express Overnight Delivery:

Joseph H. Martin
362 1st Street
Manistee, MI 49660

David A. Giampetroni