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

Plaintiff,

Case No. 10210GC

v.

Hon. Wilson D. Brott

LITTLE RIVER BAND OF OTTAWA INDIANS, LRBOI TRIBAL COUNCIL, and LRBOI OGEMA LARRY ROMANELLI,

Defendants.

Joseph H. Martin
Plaintiff – *Pro se*
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## ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION, COSTS AND INJUNCTIVE RELIEF

### FACTS

Plaintiff filed a complaint in the instant matter on September 28, 2010, alleging that the Little River Band of Ottawa Indians, the Little River Band of Ottawa Indians Tribal Council, and Little River Band of Ottawa Indians Ogema Larry Romanelli (hereinafter collectively referred to as "the Tribe"), in essence breached his contract of employment which was entered into between Plaintiff and the Little River Band of Ottawa Indians on or about September 10, 2007. Plaintiff was terminated from his employment, effective on or about October 16, 2009. Since

then, Plaintiff has filed several lawsuits under various legal grounds against the Tribe and other parties (including two Tribal Court judges), seeking damages, declaratory and injunctive relief.

Defendants Little River Band of Ottawa Indians, its Tribal Council and Ogema (hereinafter collectively "the Tribe") filed Defendants' Motion for Summary Disposition, and for Costs and Injunctive Relief, and Memorandum of Law in Support as to the claims filed by Plaintiff Joseph Martin in his Complaint in the above matter. Plaintiff has filed a reply brief in response to the Defendants' motions. Defendants then filed a reply brief in response.

The Court is determining this matter without hearing oral argument based upon the pleadings and briefs submitted by the parties.

## SUMMARY DISPOSITION STANDARD

Dismissal of court cases is governed under the Little River Band Tribal Court Rules, Appendix A, Rule 4.3, which states in part:

> 4.3 Dismissal of Actions. Actions before the Court may be dismissed in the following manners:
>
> 1. Dismissal by plaintiff. An action may be dismissed by the plaintiff upon filing of motion and payment of fees. Such motion may be made prior to service to the adverse party or by stipulation signed by parties involved.
>
> 2. Involuntary dismissal. If the plaintiff fails to comply with these rules or a court order or if there is no basis for action in laws or claim, a defendant may move for dismissal of an action against that defendant.
>
> (a) In an action tried without jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if motion is denied, may move for dismissal on the ground the facts and the law the plaintiff has no right to relief. The court may then determine the facts and render a decision, or may hold until all evidence is presented.
>
> (b) Unless specified in the order of dismissal, any dismissal of an action under these rules operates as an adjudication on the merits. Exception to this rule is dismissal for lack of jurisdiction.

In the instant case, Plaintiff has filed what is in essence a breach of contract action, and seeks damages including the monetary value of all remaining salary and benefits payments for the duration of the contract, which extended until September 10, 2011; the monetary value of all expenses incurred by Plaintiff in maintaining Continuing Legal Education requirements during

the calendar year 2009, up to and including November 16, 2009; and costs and attorney fees incurred in connection with this action. The instant Complaint is factually identical to the actions filed and decided in *Martin v. Little River Band of Ottawa Indians, et al*, Case Nos. 09169GC/09244GC, and *Martin v. Little River Band of Ottawa Indians, et al*, Case No. 09248GC. The Complaint in Case Nos. 09169GC/09244GC focused on contract claims, while the complaint in Case No. 09248GC focused civil rights and whistleblower claims. Both cases were dismissed with prejudice by this Court.

Plaintiff's allegations in the instant case include claims for breach of contract arising from (1) the Tribe terminating his employment before the expiration of the 60-day notice period referenced in paragraph 6 of the contract, (2) the elimination of Plaintiff's training and travel budget, and (3) the failure to comply with the last sentence of paragraph 6 which states: "If the parties are unable to reach agreement within 15 days after the date of termination, the Attorney shall receive such compensation as the Tribal Court may determine equitably through the date of termination."

Defendants seeks summary disposition on the basis that the Plaintiff's the first two contract claims have already been squarely dismissed by the Court with prejudice in its prior order in Case No. 09169GC/09244GC, based upon a finding that the Plaintiff's contract claims for damages and injunctive relief were barred under the doctrine of sovereign immunity and Article XI, Section 2(b) of the Tribal Constitution. Defendants argue that the third contract claim should also be dismissed on the basis of sovereign immunity, as well as the fact that Plaintiff was given the opportunity to amend his complaint (which he did do) to add a claim based upon the last sentence of paragraph 6 (which he did not include). In the Order Following Status Conference in Case Nos. 09169GC/09244GC, dated February 8, 2010, and specifically paragraph 4 of that order, Plaintiff was provided an opportunity to file an amended complaint that incorporated previous counts alleged in both Case No. 09169GC and No. 09244GC. Further, the Court recalls that there was discussion at the status conference held on February 3,

2010, that instead of filing a separate claim, Plaintiff should either amend his complaint, or file a motion requesting that he be allowed to amend his complaint. While Plaintiff did file an amended complaint, Plaintiff did not specifically include the legal arguments he is making in the current case concerning the interpretation of paragraph 6 of the contract.

## SOVEREIGN IMMUNITY

Article XI of the Tribal Constitution sets out provisions concerning the Tribe's sovereign immunity, which states:

> Section 1 – The Tribal Council shall not waive or limit the right of the Little River Band to be immune from suit, except as authorized by tribal ordinance or resolution or in furtherance of tribal business enterprises. Except as authorized by tribal ordinance or resolution, the provisions of Article III of this Constitution shall not be construed to waive or limit the right of the Little River Band to be immune from suit or damages.
>
> Section 2 - Suits against the Little River Band in Tribal Courts Authorized.
> (a) The Little River Band, its Tribal Council members, Tribal Ogema, and other Tribal officials, acting in their official capacities, 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.
> (b) Notwithstanding the authorization provided in subsection (a) of this Section, persons shall not be entitled to an award of damages, as a form of relief, against the Tribe, its Tribal Council members, the Tribal Ogema, or other Tribal officials acting in their official capacities; provided that the Tribal Council may by ordinance waive the right of the Tribe or Tribal officials to be immune from damages in such suits only in specified instances when such waiver would promote the best interests of the Band or the interests of justice.
> (c) The Tribe, however, by this Article does not waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state.

Plaintiff argues that pursuant to *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), sovereign immunity is not available as a defense and that the Tribe has waived its sovereign immunity via the terms of its contract with Plaintiff. In that case, the Tribe in question contracted with C&L Enterprises for the building of a new roof on a building it owned which was off-reservation, non-trust

property. *Id.*, at 414-415. The contract contained an arbitration clause which indicated that all claims or disputes arising out of the contract would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA), unless the parties mutually agreed otherwise. *Id.*, at 415. The contract further stated that the award rendered by the arbitrator would be final, and that judgment may be entered on the award in accordance with applicable law in any court having jurisdiction thereof. *Id.* The AAA rules stated that parties to the rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof. *Id.* The contract also included a choice of law provision that the contract would be governed by the law of the place where the project is located, i.e. Oklahoma, which had a statute conferring upon its courts jurisdiction to enforce arbitration agreements and awards. *Id.*, at 415-416. When a dispute arose over the contract, C&L Enterprises submitted an arbitration claim pursuant to the contract. *Id.*, at 416. The Tribe asserted sovereign immunity and did not participate in the arbitration proceeding. *Id.* An arbitration award was entered in favor of C&L Enterprises, who then sought to enforce the judgment in the Oklahoma courts. *Id.*

The U.S. Supreme Court in *C&L Enterprises* noted that it had held in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981, that an Indian tribe is not subject to suit in a state court, even for breach of contract involving off-reservation commercial conduct, unless Congress has authorized the suit or the tribe has waived its immunity. *Id.*, at 418. The Supreme Court held that the Tribe in the Citizen Band Potawatomi had waived with clarity its immunity from suit with respect to the arbitration award, based upon the contract's provision for arbitration and related provisions. *Id.* The Court stated:

> "In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures. The regime to which the Tribe subscribed includes entry of judgment upon an arbitration award in accordance with the Oklahoma Uniform Arbitration Act. That Act concerns the arbitration in Oklahoma and correspondingly designates as enforcement forums "court[s] of competent

> jurisdiction of [Oklahoma]." C&L selected for its enforcement suit just such a forum.

*Id.*, at 420. In short, the Court stated that there was nothing ambiguous about the language of the arbitration clause, and that sovereign immunity was waived as the Tribe agreed to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. *Id.*, at 420.

In the instant case, paragraph 6 of the contract between Plaintiff and the Tribe states:

> This agreement may be terminated by either party by giving 60 days written notice to the other party. If the Agreement is terminated by either parties, the parties shall make a good faith effort to agree on the amount of compensation that may be equitably due through the date of termination. If the parties are unable to reach agreement within 15 days after the date of termination, the Attorney shall receive such compensation as the Tribal Court may determine equitably through the date of termination.

In essence, Plaintiff argument is that this paragraph 6 is akin to the arbitration "dispute resolution regime" that was present in the *C&L Enterprises* case, and that by entering into the contract with Plaintiff, which is alleged to have been approved by Tribal Council, the Tribe has waived sovereign immunity as to the contract.

However, this Court disagrees. While there are similarities to the facts in *C&L Enterprises*, there are also significant differences. This Court cannot equate the portion of the last sentence of paragraph 6 that "Attorney shall receive such compensation as the Tribal Court may determine equitably through the date of termination" to the very detailed and specific arbitration provisions referenced in *C&L Enterprises*. While there is reference to the Tribal Court determining the compensation that Plaintiff would be entitled to, there are no specifics stated in the contract which rise to the level of detail the justified the finding of a waiver by the Supreme Court in *C&L Enterprises*. There is clearly no explicit waiver of sovereign immunity in that simple phrase. The Court does not believe that a reference to the Tribal Court resolving a dispute, without the level of detail as to the mechanism for resolving the dispute (arbitration), where the dispute would be heard and enforced (jurisdiction), etc., which were present in *C&L*

*Enterprises*, but which are absent in this case. In essence, Plaintiff is taking the position that every contract signed and ratified by the Tribal Council results in a waiver of sovereign immunity as to the other party to the contract, which is not supported by the facts or the law. This Court does not believe that the holding in *C&L Enterprises* extends that far. Rather, this Court believes that the finding of a waiver of sovereign immunity reached by the Supreme Court in *C&L Enterprises* was driven by the facts of that case in which the method of resolving disputes through arbitration, and specifically providing for the method and jurisdiction for enforcement of the arbitration award were very detailed and explicit. Without that level of detail, it is very unlikely that the Supreme Court would have reached the same result. And without that level of detail being present in the instant case, this court is not willing to find an explicit or implicit waiver of sovereign immunity on the part of the Tribe. Thus, as with the other contract claims raised by Plaintiff in the previous actions, the claims made in the instant case are also barred by the Tribe's sovereign immunity granted by Article XI of the Tribal Constitution. To be clear, Plaintiff's breach of contract claims arising out of his employment contract with the Tribe, whether filed in this case, the previous cases, or any future cases, are wholly barred by sovereign immunity.

## RES JUDICATA

Defendants also argue that the Plaintiff's claims are barred by the doctrine of *res judicata*. Although the court has held above that the Plaintiff's claims are barred by sovereign immunity, the court will address the *res judicata* arguments to potentially avoid further confusion or further litigation concerning the Plaintiff's employment contract with the Tribe. Unlike dismissal without prejudice, a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits and res judicata precludes further litigation. *U.S. v. One Tract of Real Property*, 95 F.3d 422, 426 (6th Cir. 1996). In general, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action is identical to that

essential to a prior action. *Richards v. Tibaldi*, 272 Mich. App. 522, 530-531, 726 N.W.2d 770 (2007); *Sewell v. Clean Cut Mgt., Inc.*, 463 Mich. 569, 575, 621 N.W.2d 222 (2001). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 460 Mich. 372, 380, 596 N.W.2d 153 (1999). Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Baraga Co. v. State Tax Comm.*, 466 Mich. 264, 269, 645 N.W.2d 13 (2002); *Kosiel v. Arrow Liquors Corp.*, 446 Mich. 374, 379-380, 521 N.W.2d 531 (1994); *Peterson Novelties, Inc. v. City of Berkley*, 259 Mich.App. 1, 10-11, 672 N.W.2d 351 (2003); *Ditmore v. Michalik*, 244 Mich.App. 569, 576, 625 N.W.2d 462 (2001). The burden of establishing the applicability of res judicata is on the party asserting the doctrine. *Baraga Co.*, supra at 269, 645 N.W.2d 13.

As noted above, the Plaintiff's contract claims as stated in Case Nos. 09169GC and 09244GC were dismissed by the court in its July 7, 2010 Order Regarding Defendants' Motion to Dismiss and/or For Summary Disposition. The dismissal was made pursuant to Little River Band Civil Procedure Rule 4.3.2. This court specifically noted that "Said dismissal shall be with prejudice and shall be a final adjudication pursuant to Rule 4.3.2(b)." That order decided the case on the merits as the Plaintiff's claims were barred by sovereign immunity and was a final adjudication by the court. The facts raised in the instant case arguably were, and most definitely could have been resolved or brought in the first action. The parties discussed with the Court at the status conference on February 3, 2010, whether additional claims needed to be filed concerning these facts, and provided Plaintiff with an opportunity to amend his complaint to incorporate the current claims. Finally, both actions involve all of the same parties. Thus, all of the elements of res judicata have been met, and Plaintiff's claims against Defendants are barred under this ground as well.

## MERIT OF PLAINTIFF'S CLAIMS

Defendants request that the court find that the Complaint filed by Plaintiff in the instant case was frivolous, and award Defendants costs for having to defend this action. Under Tribal Court Rules of Civil Procedure 5.3(e), "If the Court finds a claim or defense to be frivolous, it may award costs under this section." The word "frivolous" is not defined in the Tribal Court Rules. Frivolous has been defined as "Lacking a legal basis or legal merit; not serious; not reasonably purposeful." Black's Law Dictionary, 7th Ed., p. 677.

"Frivolous" is well-defined under Michigan law. "Pursuant to M.C.L. § 600.2591, a claim is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit." *Jerico Construction, Inc. v. Quadrants, Inc.*, 257 Mich. App. 22, 35-36, 666 N.W.2d 310; *app. den.* 469 Mich. 1010, 675 N.W.2d 37 (2003). The filing of a signed pleading that is not well-grounded in fact and law subjects the filer to similar sanctions pursuant to MCR 2.114(E). *Id.*, at 36. However, not every error in legal analysis constitutes a frivolous position. *Kitchen v. Kitchen,* 465 Mich. 654, 663, 641N.W.2d 245 (2002).

The federal courts also have a system under Federal Rule of Civil Procedure, Rule 11, which addresses the validity of a claim and whether sanctions are warranted. Federal Rule of Civil Procedure, Rule 11 provides that by presenting a pleading to the court, an attorney certifies that to the best of his knowledge, information, and belief, that the pleading is not presented for an improper purpose, and that the claims, defenses, or other legal contentions contained in it are warranted by existing law or a nonfrivolous argument for reversing, extending, or modifying existing law. *Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n,* 524 F.3d 726, 739 (6th Cir.2008). The test is whether an attorney's conduct was reasonable under the circumstances. *Id.*

There is also a federal statute, 28 U.S.C. § 1927 which deals with misconduct by attorneys in filing baseless claims, separate from Rule 11 sanctions. The Court has discretion to award attorney's fees, costs, and expenses against "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. "Under § 1927, a court must review whether the attorneys engaged in conduct which multiplied the litigation unreasonably or vexatiously." *Riddle v. Egensperger,* 266 F.3d 542, 553 (6th Cir.2001). Under this provision, a court may impose sanctions "when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Jones v. Cont'l Corp.,* 789 F.2d 1225, 1230 (6th Cir.1986). A finding of bad faith is not necessary under section 1927. *Dixon v. Clem,* 492 F.3d 665, 679 (6th Cir.2007). "Simple inadvertence or negligence that frustrates the trial judge will not support a sanction under § 1927." *Riddle,* 266 F.3d at 553. Rather, " '[t]here must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.' " *Ibid.* (quoting *In re Ruben,* 825 F.2d 977, 984 (6th Cir.1987)). The primary goal of 28 U.S.C. § 1927 is deterrence and punishment. *See Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater,* 465 F.3d 642, 647 (6th Cir.2006). "As with a Rule 11 sanction, district courts have broad discretion in deciding upon a sanction award under § 1927." *In re Meier,* 223 F.R.D. 514, 520 (W.D.Wis.2004).

In the present case, Plaintiff's claims in this action are nearly identical to claims brought in prior actions involving the identical Defendants. The Court ruled in Case Nos. 09169GC and 09244GC that Plaintiff's claims were barred by the doctrine of sovereign immunity. Plaintiff was given the opportunity to amend his complaint in the prior cases to include the claims made in the current Complaint that are based upon paragraph 6 of his contract, but failed to do so after

the court requested that he include all claims in his amended complaint, or alternatively file a motion in those consolidated cases so that all matters could be decided. Even if the court were to find that the contract claims stated in the current complaint were entirely separate and distinct from those raised in the prior action, the Plaintiff, as a licensed attorney, should be aware that the doctrine of sovereign immunity has broad application and would bar any other contract claims he might raise.

Therefore, the court finds that Plaintiff's complaint filed in this case was frivolous on two separate grounds. First, because Plaintiff's complaint was without legal merit and Plaintiff was or should have been aware of the lack of legal merit. The claims made were not warranted by existing law, nor was a non-frivolous argument for reversing, extending, or modifying existing law present. Second, because the Plaintiff has filed a steady stream of lawsuits related to his termination of employment, each of which has been unsuccessful, the court must conclude that this suit's primary purpose was to harass, embarrass or injure the Tribe, and to cause the Tribe to incur additional expense in defending the actions. The court finds that Plaintiff should be sanctioned, and that the Defendants should be compensated for reasonable attorney fees, costs and expenses incurred in defending this action.

## PERMANENT INJUNCTION

Defendants further request that the Court enter permanent injunction requiring Plaintiff to obtain leave of the court prior to filing any further pleadings in this Court and the Tribal Court of Appeals. Plaintiff, in his response to the brief filed by Defendants, failed to address the request for an injunction. Defendants cites the United States Sixth Circuit Court of Appeals, which stated in *Feathers v. Chevron, U.S.A., Inc.*, 141 F.3rd 264, 269 (6th Cir. 1998):

> There is nothing unusual about imposing prefiling restrictions in matters with a history of repetitive or vexatious litigation. *See, e.g., Filipas v. Lemons,* 835 F.2d 1145, 1146 (6th Cir.1987). Moreover, we see nothing wrong, in circumstances such as these, with an order that restrains not only an individual litigant from repeatedly filing an identical complaint, but that places limits on a reasonably

> defined category of litigation because of a recognized pattern of repetitive, frivolous, or vexatious cases within that category. As the Ninth Circuit has recognized, "[t]he general pattern of litigation in a particular case may be vexatious enough to warrant an injunction in anticipation of future attempts to relitigate old claims." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir.1983) (citing *Pavilonis v. King*, 626 F.2d 1075 (1st Cir.1980), and *Ruderer v. United States*, 462 F.2d 897 (8th Cir.1972)), *cert. denied*, 465 U.S. 1081, 104 S.Ct. 1446, 79 L.Ed.2d 765 (1984).

Similarly, the Six Circuit Court of Appeals has held that a person cannot be absolutely foreclosed from initiating a court action, but it is permissible to require one who has abused the legal process to make a showing that a tendered lawsuit is not frivolous or vexatious before permitting it to be filed. *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996). In *Ortman*, the court ordered that the Plaintiff be "permanently enjoined from filing any civil lawsuit alleging or asserting factual or legal claims based upon or arising out of the legal or factual claims alleged in this action or any of the actions underlying it without first obtaining certification from a United States Magistrate Judge that the claim or claims asserted are not frivolous and that the suit is not brought for any improper purpose." *Id.* For the reasons stated above, and based upon the numerous complaints which have been filed by Plaintiff, this court finds that issuing such an injunction is warranted. This court will therefore grant Defendants' request for a permanent injunction as requested. This court does not have jurisdiction to enter such an order as to the Tribal Court of Appeals, and any requests for such an injunction as to appeals before that court will need to be raised and heard before that court.

## CONCLUSION

For the reasons stated above, the Court orders the following:

1. Pursuant to Little River Band Civil Procedure Rule 4.3.2, Plaintiff's claims against the Defendants herein are hereby dismissed with prejudice and the Defendants' motion for summary disposition is granted. Said dismissal shall be a final adjudication pursuant to Rule 4.3.2(b).

2. Plaintiff shall be required to pay Defendants' costs, including reasonable attorney fees, incurred in defending this action, pursuant to Little River Band Civil Procedure Rule 5.3. Defendants shall submit a Bill of Costs pursuant to Rule 5.3 within 21 days of the date of this Order.

3. The court further orders that Plaintiff is permanently enjoined from filing any civil lawsuit alleging or asserting factual or legal claims based upon or arising out of the legal or factual claims alleged in this action or any of the actions preceding it without first obtaining certification from a Tribal Court judge that the claim or claims asserted are not frivolous and that the suit is not brought for any improper purpose. Said determination may be made by any Tribal Court trial judge, and is not required to be determined by the undersigned judge pro tem.

IT IS SO ORDERED.

Dated: February 7, 2011

Wilson D. Brott

Hon. Wilson D. Brott
Judge Pro Tem