UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RAYMOND DE PERRY,

Plaintiff,

v. Civil Action No. 12-CV-123-WMC

LAWRENCE DERAGON, MICHAEL BABINEAU, JEAN DEFOE, MARK DUFF, DESIREE LIVINGSTON, JEFFREY BENTON, and VERONICA WILCOX,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants, Lawrence Deragon, Michael Babineau, Jean Defoe, Mark Duff, Desiree Livingston, Jeffrey Benton, and Veronica Wilcox, through counsel, Ripley B. Harwood (Ripley B. Harwood P.C.), Reply as follows in support of their Motion to Dismiss:

I. PLAINTIFF FAILS TO ESTABLISH STANDING

Article III of the U.S. Constitution gives the federal courts subject matter jurisdiction over actual cases or controversies, neither of which exists unless a plaintiff establishes standing to sue. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 613, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)*; Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)*; see* U.S. Const. art. III, §2. The first section of Plaintiff's Response Brief (pp. 4-8) circles the question of whether the so-called 'main conspiracy' violated 42 U.S.C. §1985(3). Plaintiff says it does, but provides no cogent explanation of why. More particularly, plaintiff's Response (styled as a tedious series or rhetorical, off-point questions), fails to rebut defendants' core contention that he has no rights or remedies whatsoever (in this Court or any other), under the NAHASDA.

Plaintiff says the actions of two of the defendants were illegal. Ptf's Resp. at p. 4. Plaintiff says Tribes cannot restrain the operation of federal law. *Id.* Plaintiff says the

acts of two of the defendants caused actual injury to NAHASDA tenants. *Id.* at p. 5. He says that two of the defendants conspired to deprive this tenant class of equal protection of the laws. *Id.* What he never explains is how (assuming *arguendo* all these statements are true),[1] these facts give him standing, or this Court subject matter jurisdiction.

First of all, private citizens such as DePerry have no judicially cognizable right in the federal prosecution or non-prosecution of others for alleged criminal transgressions. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Nieves-Ramos v. Gonzalez*, 737 F.Supp. 727, 728 (D. P.R. 1990). Plaintiff's suit is thus fairly characterized as frivolous insofar as it suggests (repeatedly), that a supposed violation of federal criminal law gives this Court jurisdiction to hear a cobbled together civil conspiracy case. *See e.g., Akande v. John Doe 1*, 2012 WL 1658981 (slip op. D. Mass. 2012).

The federal courts "may choose among threshold grounds for denying audience to a case on the merits." *Wilbur v. Locke*, 423 F.3d 1101, 1106 (9th Cir. 2005) (citations to referenced authority omitted). Likewise, the district courts have inherent authority to dismiss frivolous complaints *sua sponte*. *Mallard v. United States District Court*, 490 U.S. 296, 307-08, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989); *see Fitzgerald v. First East Seventh*

[1] There is a well-established distinction between a motion to dismiss for want of jurisdiction under Fed. R. Civ. P. 12(b)(1)) and a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). *See, e.g.,* 5B Charles Alan Wright, *Federal Practice and Procedure* §1350 (3d ed.). To the extent that the Court must determine the facts in order to resolve the defendant's motion, the Court is NOT bound by Plaintiff's factual allegations. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989), cert. denied, 493 U.S. 993 (1989). The Court is instead permitted to adopt any suitable mode or proceeding to determine whether on the actual facts, it has jurisdiction. *Land v. Dollar*, 330 U.S. 731, 735 fn. 4 (1947); accord *Tigges v. City of Ames*, 356 N.W.2d 503, 511 (Iowa 1984).

Street Tenants Corp., 221 F.3d 362, 363-64 (2d Cir. 2000)(district courts, as a target forum for frivolous cases, have heightened need to dismiss such cases quickly to conserve scarce resources).

Second, plaintiff fails to explain how he has standing (or this court jurisdiction), to remedy even perceived non-criminal violations of NAHASDA. Plaintiff claims that certain of the defendants conspired to deprive members of a class in which he is concededly not a member, of the benefits and rights of federal legislation. He alleges that this deprived others (NAHASDA beneficiaries), of their equal protection rights. He does not and cannot allege that these actions deprived him of rights under NAHASDA. Generalized claims that laws are being violated or statutes mismanaged have long been rejected as non-justiciable under federal law. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-75, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (collecting cases). Plaintiff adduces no authority whatsoever in support of the implication that he has standing to enforce NAHASDA or this Court jurisdiction to remedy alleged violations of that statute at his request. This Court may accordingly assume none supports his position.

In the absence of an express right of action conferred in a federal statute, the courts look to the statute to determine if any such right is implied. Respecting NAHASDA, Plaintiff makes no such argument and adduces no such authority. It is clear from a review of NAHASDA history (see authorities cited in defendants' brief-in-chief at p. 4), that NAHASDA cannot even remotely be considered to be 'rights-creating' legislation in the sense of individual rights. If it creates any rights, it is only insofar as it shifts and concentrates authority over low-income housing to and in Indian governmental entities, to be exercised in Indian country. As in *Day v. Bond*, 500 F.3d

1127, 1139 (10th Cir. 2007),[2] NAHASDA is devoid of the sort of right-creating language required to infer that congress intended to create any new, implied, private rights. Likewise as in *Day v. Bond*, NAHASDA is directed towards institutions and their authority to provide benefits to a class, and not to the class itself. *Id.* Finally, as in *Day v. Bond*, NAHASDA enforcement is vested in the United States Attorney General, a fact which augers decidedly against implication of any private right of action, much less a right of action in Raymond DePerry, a person not even a member of the NAHASDA beneficiary class he claims is adversely affected by the allegations of his Complaint.

Even if Mr. DePerry had pleaded or could establish that he is a member of the class adversely affected by defendants' alleged NAHASDA-trampling actions (which he has not and cannot), his only remedy is to bring his grievance to the attention of the United States Attorney General. He has no rights under NAHASDA. Having no rights under NAHASDA, plaintiff cannot establish a predicate violation of law necessary to bring 42 U.S.C. §1985(3) into play. For this principal reason, as set forth with more particularity in defendants' brief-in-chief, this Court should dismiss Plaintiff's First Amended Complaint.

II. PLAINTIFF'S NEW THEORIES OF JURISDICTION VIOLATE THE WELL-PLEADED COMPLAINT RULE

Plaintiff's Response jumbles the legal theories underlying defendants' dismissal motion in a way that makes reply difficult. *See* Pltf's Response, Introduction section at p. 1-2 & p. 10-17. The Court may recall that no one could determine from Plaintiff's original Complaint what claims were or were not being asserted. See Doc. 16 at p. 4-5 (5/21/12 Op. & Ord.). In reviewing Plaintiff's Complaint, the Court thought that perhaps the Plaintiff was asserting that the defendants violated his First Amendment right to free

[2] Providing a useful analogous framework for analysis of the private remedy question.

speech by firing him in retaliation for speaking out against the so-called moratorium against NAHASDA enforcement. Doc. 16 at p. 4-5. The Court ordered Plaintiff to file a First Amended Complaint to clarify his claims, and the Plaintiff did so.

Like the original Complaint, Plaintiff's First Amended Complaint contains nothing more than allusions to free speech rights. *See* Complaint at ¶'s 36-37; *compare* First Amended Complaint at ¶'s 55-56. Plaintiff's First Amended Complaint no more claims firing for exercising first amendment rights than did the original Complaint. The thrust instead remains the allegation that Plaintiff was fired for seeking to enforce NAHASDA. FAC ¶'s 63-65. Plaintiff's only reference to free speech appears in his plea that this Court act as a second appellate tribunal to review whether the defendants acted arbitrarily and capriciously in firing him and in upholding his termination in a previous appeal. FAC ¶'s 76.e & 76.g.

The presence or absence of a federal question is governed by the well pleaded complaint rule, which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded Complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Whether or not the defendants had good cause to terminate the Plaintiff is, if anything, a question of tribal, not federal law. Plaintiff's First Amended Complaint does not plead a First Amendment violation and his Response to the motion to dismiss fails to explain how this Court has appellate jurisdiction over the Tribe's intramural employment decisions.

It is thus troubling that Plaintiff's Response suggests he did plead a theory of First Amendment retaliation, and/or a related claim for defamation. Pltf's Response at p. 10-17. Plaintiff advances these suggestions in an exceedingly inarticulate effort to shift

the focus of defendants' qualified immunity argument. *Id.* Plaintiff concedes that defendants are "not chargeable with forecasting the issues at bar…". *Id.* at p. 10. Thus, the Court should conclude in the defendants' favor on the qualified immunity argument that is actually briefed in defendants' brief-in-chief. Likewise, under the well pleaded complaint rule, the Court should disregard the claim that defendants do not enjoy qualified immunity as to alleged free speech and defamation claims, because no such claims are pleaded.

The remainder of Plaintiff's Response should simply be disregarded. It is after-the-fact mumbo jumbo which is unresponsive to the defendants' motion and which, insofar as it can even be understood, fails to shed light on any jurisdictional issue that is before the Court on any claim that has actually been asserted in the First Amended Complaint. However, if the Court determines not to apply the well pleaded complaint rule and further determines that new issues raised in the Plaintiff's Response give rise to new or separate questions of jurisdiction, the defendants respectfully request the opportunity to submit further briefing on any such matters.

For all of the foregoing reasons and as set forth in defendants' brief-in-chief, defendants respectfully request that the Court dismiss Plaintiff's First Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim, and that it grant them such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

RIPLEY B. HARWOOD, P.C.

s/

By: _____

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I HEREBY CERTIFY that on the 2nd day of July, 2012, I filed the foregoing *Reply in Support of Defendants' Motion to Dismiss* electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Robert A. Kennedy, Jr., Esq.
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s/

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RIPLEY B. HARWOOD