UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT P. MAGYAR, Plaintiff, vs. JERRY KENNEDY, CLIFFORD PEACOCK, and CLEANAN J. WATKINS Defendants.	CIVIL ACTION NO. 12-5906 JP

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE *AD DAMNUM* CLAUSES

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I. PRELIMINARY STATEMENT

Defendants submit this reply brief to address two issues raised in Mr. Magyar's January 10, 2013 Opposition (the "Opposition"). First, plaintiff is wrong that this is a "factual" challenge to the Court's subject matter jurisdiction. Opp. at 3 of 16.[1] Defendants' Rule 12(b)(1) challenge is facial. This Court does not have jurisdiction over plaintiff's claims regarding acts defendants took in their official capacity as members of the Tribe's Executive Committee (defendants Watkins and Peacock) and as the Chief Executive Officer of the Tribe's Economic Development Authority (defendant Kennedy). Similarly, this Court does not have jurisdiction over the intra-tribal governmental dispute between Mr. Holton (the Tribe's former President) and Mr. Holton's proxies on the one hand and the defendants here. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Mr. Magyar wants the Court to weigh in on what he believes was a *coup d'etat*. Am. Compl. ¶ 12. This Court does not have jurisdiction to do so. *Santa Clara Pueblo*, 436 U.S. at 59.

Second, Mr. Magyar's opposition to defendants' motion, in the alternative, to strike the *ad damnum* clauses of Counts Two and Three misses the mark. Plaintiff argues that Local Rule 53.2 (mandating compulsory arbitration when the amount in controversy does not exceed $150,000) trumps Local Rule 5.1.1. As set forth more fully below, the case law says otherwise.

II. ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction Because The Tribe And Its Officials Have Sovereign Immunity

Mr. Magyar agrees that Indian tribes are immune from suit in federal court. Opp. at 4 of 16. Mr. Magyar agrees that individual tribal members acting in an official tribal capacity are immune from suit. Opp. at 4-5 of 16. Nor is there a dispute that defendants Watkins and

[1] Mr. Magyar's Opposition is not page-numbered. In referencing the Opposition, this Reply uses the ECF-created page numbers in the document's header (e.g. "__ of 16").

Peacock were acting as members of the Tribe's Executive Committee and Mr. Kennedy was acting as the CEO of the Tribe's Economic Development Authority.

The parties' dispute comes down to a distinction between Tribal "authority" and defendants' "capacity." Mr. Magyar confuses the distinction. Mr. Magyar argues the defendants "acted beyond the scope of their authority and are therefore not entitled to sovereign immunity." Opp. at 7 of 16. *See also* Opp. at 8 of 16 ("[Defendants] never had any authority, timely or not."). Plaintiff claims the defendants did not have authority to act because they were part of a "junta [that] illegally removed the President of the Tribe." Opp. at 6-7 of 16; fn. 4.

Plaintiff's confusion is highlighted by his reliance on *Tenneco Oil Co. v. The Sac And Fox Tribe of Indians of Okla.*, 725 F.2d 572 (10th Cir. 1984). Tenneco had an interest in an oil and gas lease issued by the Sac and Fox Tribe. After issuing the lease, "the Tribe enacted several ordinances purporting to impose certain licensing, organizational and taxation requirements on Tenneco as a lessor." *Id.* at 574. Tenneco sued the tribe and members of the tribe's business committee in federal court arguing the tribal ordinances were preempted by federal regulation of oil and gas leases on Indian land. *Id.* The District Court granted the tribe's motion to dismiss on the basis of sovereign immunity. The court noted "the test for the validity of an exercise of tribal power is whether it goes beyond what is necessary to protect tribal self-government or to control internal relations, or trespasses upon overriding interests of the National Government." *Id.* at 575 (internal quotations omitted). The Tenth Circuit reversed and remanded to the district court to determine the extent of tribal authority and whether the tribal ordinances were preempted by federal law. Thus, the issue in *Tenneco Oil* was whether the Sac and Fox Tribe exceeded its authority because of federal preemption.

In his concurrence, Judge McKay crystallized the court's holding:

> The narrow exception to that rule [sovereign immunity of tribal officers acting in their representative capacity] is invoked, as noted by the court, when the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing.

Id. at 576 (emphasis added). Judge McKay continued by explaining:

> The exception enumerated above, however, has no application to those cases where plaintiffs claiming a breach of common law duty attempt to avoid sovereign immunity by suing the officers of the sovereign. Merely being wrong or otherwise actionable does not take an action outside the scope of immunity.
>
> . . .
>
> Similarly, a plaintiff claiming breach of contract cannot avoid a tribe's sovereign immunity by suing tribal officers.

Id. (emphasis added). In other words, sovereign immunity shields tribal officials from claims for breach of a common law duty and breach of contract because those claims are not preempted by federal law. Those claims involve actions that fall well within "the amount of authority that the sovereign is capable of bestowing." *Id.* at 576.

Mr. Magyar's reliance on *Northern States Power Co. v. The Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) is equally unavailing. In that case, the Tribal Council enacted an ordinance which regulated the transportation of nuclear materials on reservation land. *Id.* at 459. The ordinance required that transporters obtain a separate tribal license for each shipment of nuclear material. "[L]icense applications [had to] be filed 180 days in advance of each shipment, and be accompanied by an application fee of $1,000." *Id.* Northern States Power Company ("NSP") operated a nuclear power plant near the tribe's reservation and the only access to the plant was over the tribe's land. NSP moved approximately seventy shipments of nuclear material into and out of the plant (and over tribal land) per year.

NSP filed a complaint seeking a declaratory judgment that the tribe's ordinance was preempted by the federal Hazardous Materials Transportation Act. The tribe argued sovereign immunity barred suit in federal court. The district court disagreed and entered a preliminary injunction against enforcement of the tribe's ordinance. The Eighth Circuit affirmed. The Court explained:

> We conclude that the Hazardous Materials Transportation Act preempts the tribal ordinance. In resolving to enforce the ordinance, the members of the Tribal Council were acting to enforce an ordinance that the tribe had no authority to enact. The Council members acted beyond the scope of their authority and placed themselves outside of the tribe's sovereign immunity. The district court therefore did not err in concluding that it had jurisdiction over the Council members, and in denying the tribe's motion to dismiss.

Id. at 462 (emphasis added). The members of the Tribal Council acted in their capacity as Tribal leaders in enacting the ordinance. However, as in *Tenneco Oil*, the Tribal Council exceeded its authority because its actions were preempted by federal law.

In this case, the Tribe had the **authority** to hire Mr. Magyar. The Tribe had the **authority** to fire Mr. Magyar. The Tribe had the **authority** to pay Mr. Magyar or not to pay Mr. Magyar if it fired him. At all times, members of the Tribe's Executive Committee had the **capacity** to act on behalf of the Tribe. And the CEO of the Tribe's Economic Development Authority had the **capacity** to act on behalf of the Tribe.

Imperial Granite Co. v. Pala Tribe of Mission Indians, 940 F.2d 1269 (9th Cir. 1991) which defendants cited in their opening brief, correctly combined the concepts authority and capacity. In that case, the court explained "when tribal officials act in their official capacity and within the scope of their authority, they are immune." *Id.* at 1271 (citations omitted).

Ultimately, Mr. Magyar wants this Court to opine on whether the defendants correctly removed Mr. Holton, the Tribe's former President, from office. This Court does not have

jurisdiction to determine such an intra-tribal dispute. *Santa Clara Pueblo*, 436 U.S. at 59 (because of tribal sovereign immunity, federal courts do not have jurisdiction over intra-tribal governmental disputes).

The Court should dismiss plaintiff's Amended Complaint pursuant to Rule 12(b)(1). The defendants have sovereign immunity and are not subject to suit in this Court.

B. The Court Should Strike The *Ad Damnum* Clauses Of Counts Two And Three of The Amended Complaint

Again, Local Rule of Civil Procedure 5.1.1 provides that:

> No pleading asserting a claim for unliquidated damages shall contain any allegation as to the specific dollar amount claimed, but such pleadings shall contain allegations sufficient to establish the jurisdiction of the court, to reveal whether the case is or is not subject to arbitration under Local Rule 53.2, and to specify the nature of the damages claimed e.g., 'compensatory,' 'punitive,' or both.

Local R. Civ. P. 5.1.1.1.

The *ad damnum* clauses of Counts Two and Three of the Amended Complaint both fancifully assert Mr. Magyar is claiming "an amount in excess of One Million Dollars." In his Opposition, Mr. Magyar argues that his preposterous *ad damnum* clauses are justified by Local Rule 53.2. Mr. Magyar claims his *ad damnum* clauses are designed to show that this matter is not subject to compulsory arbitration.

But this is precisely the same argument Judge Brody rejected in *Jodek Charitable Trust, R.A. v. Vertical Net Inc.*, 412 F. Supp.2d 469 (E.D. Pa. 2006). There, Judge Brody explained:

> Plaintiff contends that it alleged $60 million in damages merely to indicate that this matter was not subject to compulsory arbitration under Local Rule 53.2. However, under this rationale, every allegation of a specific dollar amount in damages greater than $150,000 would have to be allowed, despite the fact that Rule 5.1.1 explicitly forbids such pleading. To avoid compulsory arbitration, Plaintiff could simply have pleaded that the amount in controversy exceeded $150,000. Accordingly, I will grant Defendants' motion

> to strike the reference in the Ad Damnum clause to a specific dollar amount in damages.

Id. 412 F. Supp.2d at 484. As discussed more fully in defendants' opening brief, Counts Two and Three of the Amended Complaint should be dismissed with prejudice. But if they are not, the *ad damnum* clauses of those counts should be stricken in accordance with Local Rule 5.1.1.

III. CONCLUSION

For the reasons set forth here and in defendants opening memorandum of law, Plaintiff's Amended Complaint should be dismissed. The Tribe and its officials – Mr. Watkins, Mr. Peacock and Mr. Kennedy – are cloaked in sovereign immunity and not subject to suit in this Court. Further, the Amended Complaint by its own terms does not satisfy the amount in controversy requirement. Diversity jurisdiction does not exist. However, if Counts Two and Three of the Amended Complaint are not dismissed, the *ad damnum* clauses of those counts should be stricken.

Dated: January 24, 2013

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By: /s/

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CERTIFICATE OF SERVICE

I, Matthew J. Borger, certify that I served a true and correct copy of Defendants' Motion For Leave To File A Reply Brief In Further Support Of Defendants' Motion To Dismiss Plaintiff's Amended Complaint Or, In The Alternative, To Strike *Ad Damnum* Clauses upon counsel of record on the date indicated below via U.S. First Class Mail:

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