**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF PENNSYLVANIA**

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

**ORDER**

AND NOW, this _____ day of _____ 2013, upon consideration of the Motion to Dismiss Count One of Plaintiff's Second Amended Complaint, the Memorandum of Law in Support Thereof, and the opposition thereto, if any, it is hereby ORDERED as follows:

1. Defendants' Motion is granted.

2. Count One of Plaintiff's Second Amended Complaint is hereby dismissed with prejudice.

HON. JOHN R. PADOVA
United States District Judge

**UNITED STATES DISTRICT COURT**
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| ROBERT P. MAGYAR,<br>Plaintiff,<br><br>vs.<br><br>JERRY KENNEDY, CLIFFORD PEACOCK, and CLEANAN J. WATKINS<br>Defendants. | CIVIL ACTION NO. 12-5906 JP |

**DEFENDANTS' MOTION TO DISMISS COUNT ONE OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins, hereby move to dismiss Count One of the Second Amended Complaint in the above-captioned action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In support of the Motion, Defendants rely upon the Memorandum of Law being filed contemporaneously herewith. Oral argument is requested.

Dated: May 3, 2013

KLEHR HARRISON HARVEY
BRANZBURG LLP

By: /s/
Matthew J. Borger
1835 Market Street, 14th Floor
Philadelphia, PA 19103
Tel: 215-569-2700
Fax: 215-568-6603
mborger@klehr.com

*Attorneys for Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins*

**UNITED STATES DISTRICT COURT**
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| ROBERT P. MAGYAR,<br>Plaintiff,<br><br>vs.<br><br>JERRY KENNEDY, CLIFFORD PEACOCK, and CLEANAN J. WATKINS<br>Defendants. | CIVIL ACTION NO. 12-5906 JP |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COUNT ONE OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

Matthew J. Borger
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, 14th Floor
Philadelphia, PA 19103
Tel: 215-569-2700
Fax: 215-568-6603
mborger@klehr.com

*Attorneys for Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins*

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## I. PRELIMINARY STATEMENT

Once again, Mr. Magyar has failed to state a claim that can survive a motion to dismiss. On March 6, 2013, the Court granted Defendants' previous motion to dismiss but also granted Mr. Magyar leave to file a Second Amended complaint to try to state "a cognizable claim against Defendants for intentional interference with contractual relations." 3/6/13 Order (Docket No. 17) at ¶ 2. The issue Plaintiff needed to bolster was whether Defendants acted in their official capacity and whether they had the authority to do what they allegedly did. But Mr. Magyar added nothing to in his Second Amended Complaint (the "SAC") regarding Defendants' capacity or authority other than formulaic recitations. Ultimately, Plaintiff still has not stated a cognizable claim for tortious interference with contract and, thus, the Court should dismiss Count One of the Second Amended Complaint.

This case is about the Delaware Nation of Western Oklahoma (the "Tribe") which is a sovereign federally-recognized Indian tribe. The Defendants in this case are the Tribe's Acting President (Mr. Watkins), the Tribe's Treasurer (Mr. Peacock) and the Chief Executive Officer of the Tribe's Economic Development Authority (Mr. Kennedy). It is well-settled that, because of the Tribe's sovereign immunity, neither the Tribe nor its officials are subject to this Court's jurisdiction. In the Second Amended Complaint, Mr. Magyar alleges he entered into two contracts with the Tribe. He alleges that the Defendants interfered with those contracts by not paying him. However, the actions Defendants took in not paying Mr. Magyar were all taken in their official capacity on behalf of the Tribe. More importantly, the Defendants had the authority to make the accounts payable decision they made. This Court does not have jurisdiction to hear Plaintiff's tortious interference claim.

## II. BACKGROUND

### A. The Delaware Nation Of Western Oklahoma

The Tribe is a federally-recognized Indian tribe headquartered in Anadarko, Oklahoma. SAC, ¶ 5. *See also, The Delaware Nation v. Pennsylvania*, 446 F.3d 410, 415 (3d Cir. 2006), *cert. den.* 549 U.S. 1071 (2006). The Tribe has approximately 1,400 members. SAC, ¶ 5.

Prior to June 21, 2012, non-party Kerry Holton was the Tribe's President. SAC, ¶ 18; SAC, Exh. 7. On June 21, 2012, the Tribe's Executive Committee voted to remove Mr. Holton from office. SAC, Exh. 7 at 1 ("Plaintiff [Holton] was removed from Office of the President of the Delaware Nation on June 21, 2012, at a duly called meeting of the Executive Council of the Delaware Nation."). At the time Mr. Holton was removed from office, Defendant Watkins was Vice President of the Tribe. SAC, ¶ 18. From June 21, 2012 to the present, Mr. Watkins has been the Acting President of the Tribe. December 21, 2012 Declaration of Cleanan Watkins (the "Watkins Decl."), ¶ 1. At all relevant times, Defendant Peacock has been the Tribe's Treasurer and Defendant Kennedy has been the Chief Executive Officer of the Tribe's Economic Development Authority. SAC, ¶ 18. December 21, 2012 Declaration of Clifford Peacock, ¶ 1.

### B. Mr. Kennedy And The DNEDA

The Delaware Nation Economic Development Authority (the "DNEDA") is wholly-owned by the Tribe. SAC, ¶ 14. *See also*, May 3, 2013 Declaration of Jerry Kennedy In Support Of Defendants' Motion to Dismiss Count One of Plaintiff's Second Amended Complaint (the "Kennedy Decl."), ¶ 2. Defendant Jerry Kennedy is the Chief Executive Officer of the DNEDA. SAC, ¶ 18; Kennedy Decl., ¶ 2.

As CEO, Mr. Kennedy has the authority to manage the day-to-day operations of the DNEDA. Kennedy Decl., ¶ 3. More specifically, Section 7.11 of the DNEDA Operating Agreement provides that the DNEDA Board of Directors "shall delegate the day-to-day

management responsibilities [of the DNEDA] to a Chief Executive Officer . . . who shall also serve in the capacity of President, and such other officers, as determined by the Board from time to time, and such officers shall have the authority to contract for, negotiate on behalf of and otherwise represent the interests of the Company as so authorized by the Board." *Id.* The DNEDA Operating Agreement is attached to the SAC as Exhibit 4.

**C. Mr. Magyar's Alleged Contracts**

Mr. Magyar alleges that in 2009 he entered into a contract with the Tribe pursuant to which he agreed to perform work for an entity called Unami Solar, LLC ("Unami"). SAC, ¶ 11. He also alleges that in 2012 he entered into a contract with a Tribal entity called Lenape Light and Manufacturing LLC ("Lenape"). SAC, ¶ 17.

On February 9, 2012, Mr. Magyar attended a meeting of the DNEDA Board of Directors. Kennedy Decl., ¶ 7. At that meeting, Mr. Magyar discussed a Bureau of Indian Affairs grant that was available and that could be used by Unami. Kennedy Decl., ¶¶ 8-9. Mr. Magyar told the DNEDA Board of Directors that his Unami consulting salary would be paid by the BIA grant from March 2012 through June 2012. *Id.* At the February 9, 2012, DNEDA Board of Directors meeting, Mr. Magyar stated that he was suspending his Unami contract with the Tribe from March 2012 through June 2012. *Id.* Mr. Magyar told the DNEDA Board of Directors that he would need to execute a new contract with the Tribe in July 2012. *Id.* A copy of the DNEDA Board of Directors meeting minutes from the February 9, 2012 board meeting is attached to the Kennedy Declaration as Exhibit A.

**D. Mr. Magyar Invoices The DNEDA**

In June 2012, contrary to what he promised in February, Mr. Magyar submitted an invoice to the DNEDA seeking payment for June consulting services for Unami. Kennedy Decl., ¶ 11.

Mr. Kennedy, acting in his capacity as CEO of the DNEDA and acting within the scope of his authority as CEO of the DNEDA directed that Mr. Magyar's June invoice not be paid. Kennedy Decl., ¶ 12.

Mr. Kennedy directed the DNEDA to not pay Mr. Magyar's June 2012 invoice for two reasons. First, Mr. Magyar told the DNEDA Board of Directors that his salary was going to be paid through June 2012 by the Bureau of Indian Affairs grant – not by the DNEDA. Kennedy Decl., ¶ 12; Kennedy Decl., Exh. A ("Bob states that he will be getting paid by the BIA Grant. . . . Bob discussed that he will suspend his agreement with the DNEDA during March thru [sic] June."). Second, Mr. Magyar directed that the DNEDA not pay Mr. Magyar's June 2012 invoice because Mr. Magyar had not yet signed a new contract with the DNEDA as Mr. Magyar had acknowledged would be required at the February 9, 2012 meeting. Kennedy Decl., ¶ 13; Kennedy Decl., Exh. A ("Darek asks if we will need to start a new agreement with Bob in July. Jerry states that we will and Bob agrees.").

### E. The DNEDA And The Tribe Vote To End Their Business Relationship With Mr. Magyar

On July 25, 2012, the DNEDA Board of Directors voted to terminate Mr. Magyar's services with the Tribe. The July 25 meeting minutes (attached to the Kennedy Declaration as Exhibit C) state:

> Jerry [Kennedy] states that Bob Magyar's position needs to be reviewed. Bob was paid through the BIA grant feasibility study. The grant expired at the end of June. Bob is currently not under contract but has sent an invoice for a June retainer. Jerry states if Bob continues then he would need to be set up on a consulting agreement since his old agreement was replaced with the BIA grant payments. [Board member] Darek [Marino] suggests to the board that Bob has been getting paid too much and no profit has come out of the business in 3 years. . . . [Board member] Billie [Kionute] makes a motion that the DNEDA does not retain Bob Magyar's services any further for any Delaware Nation company. Darek seconds. Votes 3-0-0. Motion passes.

Kennedy Decl., Exh. C at 2.

On August 15, 2012, at a duly called meeting of the Tribe's Executive Committee, the Executive Committee voted 4-0 to terminate any consulting agreements it had with Mr. Magyar. A true and correct copy of the Resolution Terminating Consulting Agreement with Robert Magyar is attached to the Watkins Declaration as Exhibit A.

## III. ARGUMENT

### A. The Court Does Not Have Subject Matter Jurisdiction Because The Tribe And The Defendants Have Sovereign Immunity

Count One of Plaintiff's Second Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants are entitled to sovereign immunity. This Court does not have jurisdiction over Plaintiff's tortious interference claim. It is well-settled that an Indian tribe is not subject to suit unless it has waived its sovereign immunity or Congress has expressly authorized the action. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). *See also, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1988); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Brown, et al. v. American Home Prod. Corp. (In re: Diet Drugs)*, 2000 U.S. Dist. LEXIS 15683, *10 (E.D. Pa. October 26, 2000) ("As quasi-sovereign nations, Indian tribes are immune from suit in state or federal court in the absence of congressional abrogation or tribal consent.").

Similarly, a tribe's officials share the tribe's sovereign immunity when acting in their official capacity. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (tribal sovereign immunity

extends to tribal officials against claims for activities undertaken in their official capacity); *Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) ("when tribal officials act in their official capacity and within the scope of their authority, they are immune.") (citations omitted). *See also*, *Brown*, 2000 U.S. Dist. LEXIS 15683, *10 ("an individual tribe member does not have sovereign immunity from suit in federal court unless he or she is a tribal official acting in an official capacity.") (emphasis added); *Stringer v. Chrysler (In re Stringer)*, 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (tribe's officer entitled to sovereign immunity if the action is related to the officer's performance of official duties; tribe member not entitled to sovereign immunity if the subject of the action is not related to performance of official duties).

To be entitled to tribal sovereign immunity, a tribal officer must also act within the scope of the tribal authority. *Tenneco Oil Co. v. The Sac And Fox Tribe of Indians of Okla.*, 725 F.2d 572 (10th Cir. 1984). In *Tenneco Oil*, 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).

In his *Tenneco Oil* 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 *Tenneco Oil*, the court held 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.

### B. Defendants Acted In Their Official Capacities And They Had The Authority To Do What They Allegedly Did

In this case, Defendants acted in their capacity as Tribal officials and they acted within the scope of the authority granted to them by the Tribe. The real issue Plaintiff should have bolstered in the Second Amended Complaint is the one framed by the Court at oral argument on Defendants' previous motion to dismiss: were Defendants acting in their official capacity and did they have the authority to do what they did? Despite having been given the opportunity to supplement his "capacity" and "authority" arguments in yet a third complaint, Plaintiff has added nothing to explain how the Defendants did not act in their capacity as Tribal officials or how Defendants did not have the authority to do what they allegedly did when they purportedly tortiously interfered with Plaintiff's contracts.

More specifically, in the Second Amended Complaint, Mr. Magyar does not allege or explain any of the following:

- Mr. Magyar does not allege that he is suing the Defendants in their individual – as opposed to their official capacity;
- There is no allegation regarding anything Mr. Kennedy did to prevent Mr. Magyar from being paid;
- There is no allegation regarding anything Mr. Watkins did to prevent Mr. Magyar

from being paid;

- There is no allegation regarding anything Mr. Peacock did to prevent Mr. Magyar from being paid;
- There is no allegation regarding any specific act any of the Defendants – acting together or on their own – did to prevent Mr. Magyar from being paid;
- Assuming there was an allegation regarding a single specific act that prevented Mr. Magyar from being paid, there is no explanation regarding why the Defendants were not acting in their official capacity when they committed that act;
- Assuming there was an allegation regarding a specific act that prevent Mr. Magyar from being paid, there is no explanation as to why Defendants were not authorized to do what they did.

Instead, all Mr. Magyar added to the Second Amended Complaint were a number of formulaic recitations that do not pass muster under *Iqbal* and *Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) ("A complaint 'must contain sufficient factual matter . . .' to 'state a claim to relief that is plausible on its face.'") (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Naked assertions devoid of further factual enhancement" do not suffice. *Twombly*, 550 U.S. at 545. Under the rule articulated in *Iqbal*:

> [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not do.

*Id*. (citations omitted) (emphasis added).

The Second Amended Complaint simply does not pass muster. In paragraph 21 of the Second Amended Complaint, Mr. Magyar alleges "[a]t this time – June 2012 – when Defendants

disrupted, interfered with and constructively destroyed Plaintiff's two agreements and relationships, they were not authorized to do so." SAC, ¶ 21. But there is no explanation why Defendants were not authorized to act. Nor does Plaintiff cite any case law to support his claim that Defendants were not authorized to act.

In paragraph 58 of the Second Amended Complaint, Plaintiff states "[a]t the time when Defendants disrupted, interfered with and constructively destroyed Plaintiff's two agreements and relationships – June of 2012 – Defendants acted without authority and beyond their official capacities. They had no authority to do what they did when they did it." SAC, ¶ 58. Again, there is no explanation as to why Defendants did not have authority to do what they allegedly did or how they acted beyond their official capacity.

In paragraph 61 of the Second Amended Complaint, Plaintiff sates "[t]he actions by Defendants were rogue, without legal authority and outside their various official capacities. Their official capacities as defined by the Constitution did not enable them to take these actions unilaterally and without authorization." SAC, ¶ 61.

The closest Plaintiff comes in the Second Amended Complaint to alleging any vague action Defendants took that constituted tortious interference with contract and that was without authority and beyond the Defendants' capacity was Defendants' failure to pay Mr. Magyar for services purportedly rendered in June before the Tribe fired Mr. Magyar.

In paragraph 59, Plaintiff alleges that "the Tribe – by and through its Executive Committee – had not taken any official action on Plaintiff's Unami contract as required by the Tribe's Constitution and the Unami Operating Agreement." SAC, ¶ 59. Similarly, in paragraph 60, Plaintiff alleges that the Tribe's Economic Development Authority "had not even taken any official action (as required by the DNEDA Operating Agreement) to authorize its Lenape Board

representatives to exhort the full Lenape Board to cancel Plaintiff's contracts." SAC, ¶ 60.

However, as set forth in more detail in Mr. Kennedy's Declaration, in June 2012 Mr. Magyar only submitted one invoice to the DNEDA for Unami work.[1] Kennedy Decl., ¶11. Mr. Kennedy directed that Mr. Magyar's June 2012 invoice not be paid for two reasons. First, Mr. Kennedy directed that Mr. Magyar's June 2012 invoice not be paid because Mr. Magyar had told the DNEDA Board of Directors that he would be paid by a Bureau of Indian Affairs grant through the end of June 2012. Kennedy Decl., ¶ 12. Second, Mr. Kennedy directed that Mr. Magyar's June 2012 invoice not be paid because Mr. Magyar had told the DNEDA Board of Directors that he was going to sign a new contract between himself and the DNEDA in July 2012. Kennedy Decl., ¶ 13.

Importantly, when Mr. Kennedy directed that the DNEDA not pay Mr. Magyar's June 2012 invoice, he was acting in his capacity as the CEO of the DNEDA and he was acting within the scope of his authority as CEO of the DNEDA. The scope of Mr. Magyar's authority to act on behalf of the DNEDA include accounts payable, hiring and payment of employees and consultants as well as the day-to-day management of the DNEDA. Kennedy Decl., ¶ 14. Because Mr. Kennedy was acting within his capacity as the CEO of the DNEDA and within the scope of his authority, Mr. Kennedy's decision to not pay Mr. Magyar's June 2012 invoice is protected by the Tribe's sovereign immunity.

*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), is worth discussing in detail because it is closely on point. In that case, the Supreme Court examined whether an individual acted in his official capacity and with the requisite authority such that he

[1] Importantly, to the best of the Defendants' knowledge, Mr. Magyar never submitted a single invoice to the DNEDA or the Tribe for work he purportedly performed for Lenape. Kennedy Decl., ¶ 15. Mr. Kennedy specifically denies that he ever did anything to prevent the payment of any invoice from Mr. Magyar regarding work he purportedly did for Lenape. Kennedy Decl., ¶ 16. Plaintiff certainly never alleges that he did submit any invoices to the DNEDA or the Tribe for Lenape work. Nor does Mr. Magyar ever explain how the Defendants prevented such a non-existent invoice from being paid.

was protected by sovereign immunity. In *Larson*, the plaintiff brought suit against the Administrator of the War Assets Administration. The complaint alleged that the War Assets Administration agreed to sell coal to the plaintiff but the War Assets Administrator refused to deliver the coal to the plaintiff and entered into a new contract to sell the coal to a third party. *Id.* at 684. As in this case, the plaintiff sued the Administrator not the governmental entity. The issue before the Supreme Court was whether the lower court had jurisdiction to hear the action against the War Assets Administrator because of sovereign immunity.

The Court began by noting two situations when a suit against a governmental officer is not a suit against the sovereign. First, the Court explained that actions taken in an officer's individual capacity are not suits against the sovereign. *Id.* at 691 ("If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it [his home] to a third person."). Second, the Court explained that an officer can be sued if he is acting pursuant to a "statute or order conferring power upon the officer to take action in the sovereign's name [that] is claimed to be unconstitutional." *Id.*

The *Larson* Court then addressed plaintiff/respondent's argument advocating a third situation when a suit against an officer should not be barred by sovereign immunity:

> The respondent's contention, which the Court of Appeals sustained, was that there exists a third category of cases in which the action of a Government official may be restrained or directed. If, says the respondent, an officer of the Government wrongly takes or holds specific property to which the plaintiff has title, then his taking or holding is a tort, and "illegal" as a matter of general law, whether or not it be within his delegated powers. He may therefore be sued individually to prevent the "illegal" taking or to recover the property "illegally" held.
>
> . . .
>
> Since these actions were tortious they were "illegal" in the respondent's sense and hence were contended to be individual actions, not properly taken on behalf of the United Sates, which

could be enjoined without making the United States a party.

*Id.*, at 692 (emphasis added).

The Court crystallized respondent's argument as follows: "Therefore, the argument goes, the allegation that a Government officer has acted or is threatening to act tortiously toward the plaintiff is sufficient to support the claim that he has acted beyond his delegated powers." *Id.*, at 693.

The Court rejected respondent's argument. "There is . . . nothing in the law of agency which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers." *Id.* at 695. The Court concluded that "if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." *Id. See also, Tenneco Oil*, 725 F.2d at 576 ("Merely being wrong or otherwise actionable does not take an action outside the scope of immunity.").

In this case, if the Second Amended Complaint alleged Defendants broke into Mr. Magyar's mailbox and stole paychecks from the Tribe, this Court would have jurisdiction. A plausible allegation of theft would strip the Defendants of sovereign immunity. Theft is not within the scope of Defendants' Tribal authority.

Instead, Plaintiff's claim is basically just a collection action brought against the Tribe. If the Tribe's leadership decides to pay a vendor in thirty days, or sixty days or to not pay a vendor at all, the Tribe's leadership is acting on behalf of the Tribe. In making accounts payable decisions, a Tribal official acts in his capacity as a Tribal leader and within the scope of his Tribal authority.

Again, the *Larson* Court is instructive:

The very basis of the respondent's action is that the Administrator

> was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority, even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract.

*Larson*, 337 U.S. at 703 (emphasis added). In this case, even if the accounts payable decision to not pay Mr. Magyar was wrong, tortious, or a breach of contract, the Tribe, the DNEDA, and the Defendants still had the authority to make that decision.

### C. The Court Does Not Have Jurisdiction To Review The Tribe's Removal Of Former President Holton

Mr. Magyar's tortious interference claim now seems to be based solely on his allegation that Defendants caused the Tribe to not pay him for work done pursuant to his contract with the Tribe and his contract with Lenape: "Beginning in June 2012, all Defendants prevented the Tribe and Lenape from paying Plaintiff his monthly consulting fees, salary, expenses and other remuneration." SAC, ¶ 20.

However, it bears repeating that to the extent Mr. Magyar's tortious interference claim is in any way based on his unfounded allegation that Defendants "illegally [took] power" (SAC, ¶19) this Court is without jurisdiction. Similarly, to the extent Mr. Magyar's "capacity" and "authority" arguments are based on what he wrongly calls an "illegal *coup d'état*" (SAC, ¶18) this Court is without jurisdiction.

It is well-settled that this Court does not have jurisdiction to rule on an intra-Tribal dispute between former Tribal President Holton (or his surrogate, Mr. Magyar) and the Defendants. *Santa Clara Pueblo*, 436 U.S. at 59 (because of tribal sovereign immunity, federal courts do not have

jurisdiction over intra-tribal governmental disputes). *See also Kaw v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004) (affirming district court dismissal of intra-tribal dispute for lack of subject matter jurisdiction); *In re Sac & Fox Tribe*, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts.").

## IV. CONCLUSION

Count One of Plaintiff's Second Amended Complaint should be dismissed. The Tribe and its officials – Mr. Watkins, Mr. Peacock and Mr. Kennedy – are protected by the Tribe's sovereign immunity and are not subject to jurisdiction in this Court. Count One of the Second Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Dated: May 3, 2013

KLEHR HARRISON HARVEY
BRANZBURG LLP

By: /s/

Matthew J. Borger
1835 Market Street, 14th Floor
Philadelphia, PA 19103
Tel: 215-569-2700
Fax: 215-568-6603
mborger@klehr.com

*Attorneys for Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins*

**CERTIFICATE OF SERVICE**

I, Matthew J. Borger, certify that I served a true and correct copy of Defendants' Motion to Dismiss, Defendants' Memorandum of Law in Support Thereof, the Declaration of Jerry Kennedy in Support Thereof, the Declaration of Clifford Peacock in Support Thereof, and the Declaration of Cleanan J. Watkins in Support Thereof upon counsel of record on the date indicated below via U.S. First Class Mail:

Marc E. Weinstein, Esquire
WEINSTEIN LAW FIRM, LLC
One Northbrook Corporate Center
1210 Northbrook Drive, Suite 280
Trevose, PA 19053
215-953-5200
meweinstein@comcast.net
Counsel to Plaintiff, Robert P. Magyar

Dated: May 3, 2013

/s/
Matthew J. Borger