IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT P. MAGYAR	:	CIVIL ACTION
	:	
Plaintiff,	:	No. 12-CV-5906
	:	
v.	:	
	:	
JERRY KENNEDY	:	Before the Hon. John R. Padova
and	:	United States District Judge
CLIFFORD PEACOCK	:	
and	:	
CLEANAN J. WATKINS	:	
	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNT ONE OF PLAINTIFF'S SECOND AMENDED COMPLAINT

I. Background

In several earlier pleadings and motion papers Plaintiff has explained the genesis of this dispute. For the sake of brevity, he will succinctly revisit how the parties reached this point in the litigation. Plaintiff is a Pennsylvania resident and businessman in the field of clean energy. Beginning in 2009 and through the middle of 2012, he served as an employed executive and consultant to two companies affiliated with the Delaware Nation ("Tribe"), a federally recognized Indian tribe. Defendants are three citizens of Oklahoma. All three have held official positions with the Tribe. Plaintiff contends that in the summer of 2012 the three Defendants acted beyond the scope of their official Tribal capacity and lawful authority, and tortiously interfered with his two agreements.

On March 6, 2013 the Court held oral argument on Defendants' motion to dismiss Plaintiff's amended complaint. Defendants withdrew their motion as it pertained to Counts Two (Defamation) and Three (Trade Libel).[1] The Court granted Defendants' motion as it pertained to Count One (Intentional Interference with Contractual Relations) and directed Plaintiff to file a second amended complaint with a redrafted Count One that would state "a cognizable claim against Defendants for intentional interference with contractual relations." See 3/7/13 Order (ECF No. 17).

In articulating this ruling at the end of oral argument, the Court made it clear that in the second amended complaint Plaintiff was to include the governing documents - applicable to the Tribe and to the commercial entities involved - that would support Plaintiff's claims

[1] Plaintiff's amended complaint included counts for defamation and trade libel as a result of online postings made by Defendant Peacock characterizing Plaintiff as being corrupt, and professionally incompetent.

that these Defendants acted beyond the scope of their official Tribal capacity. In short, and has long been acknowledged by Plaintiff, ***if*** Defendants acted within the scope of their official capacity as Tribal officials then Plaintiff's claim must fail. However, what has long been alleged by Plaintiff, and now fortified by the documents included in his second amended complaint, ***is that Defendants' interference with Plaintiff contracts was not authorized at the time they acted.*** The governing documents the Court required now show this and Defendants are not entitled to the sovereign immunity behind which they seek refuge. Accordingly, Defendants' efforts to escape this lawsuit - unseemly at times[2] - must be rejected and their motion to dismiss Count One should be denied.

II. Legal Standard for Motion to Dismiss Based on Sovereign Immunity

Defendants challenge the viability of Count One under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defs.' Br. at ECF p. 9/19. They contend the Court does not have

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[2] Plaintiff does not issue this criticism lightly. Time and again during this case Defendants have alleged something, only to backtrack from it when their disingenuousness is exposed. For example, when Defendants first tried to wriggle free from this case on the grounds of lack of personal jurisdiction (ECF No. 6 at 12-15/16), they all but claimed they had never heard of Pennsylvania. When responding to Plaintiff's initial complaint, Defendant Kennedy declared under oath that he had never had been in Pennsylvania. See ECF No. 6 at 14/16. Defendants abandoned that fallacious claim when Plaintiff filed an amended complaint, supported with a sworn declaration, that illuminated the full extent of each Defendant's contacts with Pennsylvania, including the details of his picking up Defendant Kennedy at the Philadelphia International Airport.

As well, in sessions with the Court, Defendants - via in-house counsel from Oklahoma - alleged that Plaintiff never secured federal grant monies to assist the Tribe's clean energy endeavors. In about two minutes flat Plaintiff presented emails from federal officials showing that accusation to be false too. Moreover, Defendants claimed - initially - that Defendant Peacock's Facebook postings were only viewable by members of the Tribe. When Plaintiff presented printouts showing the postings had been viewed by non-Tribal members, Defendants scurried away from that proclamation too.

subject matter jurisdiction to preside over this dispute because Indian tribes have sovereign immunity. Indeed, at issue in a Rule 12(b)(1) motion is the court's "very power to hear the case." Mortensen v. First Fed. Sav. & Loan, 549 F.2d 884, 891 (3d Cir. 1977); see also Garcia v. Akwesasne Housing Auth., 268 F.3d 76, 84 (2d Cir. 2001) (motion to dismiss based on tribal immunity is appropriately examined under Rule 12(b)(1)). As Plaintiff has asserted jurisdiction here, he has the burden of establishing a federal court's subject matter jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

A. Legal Standard for Defendants' Facial Challenge Under Rule 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may be treated as either a facial or factual challenge. Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). A "facial attack" assumes the allegations of the complaint are true, but contends the pleadings fail to present an action within the court's jurisdiction. Mortensen, 549 F.2d at 891. **In evaluating a "facial" challenge, the court applies the same standard as is used in Rule 12(b)(6) challenge**. Petruska v. Gannon Univ., 462 F.3d 294, 299 n.1 (3d Cir. 2006). The other kind of Rule 12(b)(1) motion is a "factual attack," which argues that while the pleadings themselves facially establish jurisdiction, one or more of the factual allegations is untrue, thereby causing the matter to fall outside the court's jurisdiction. Mortensen, 549 F.2d at 891.

Again, as in their motion to dismiss the amended complaint (ECF No. 11), Defendants' pending motion fails to make clear whether they are raising a facial or factual challenge. However, in Defendants' reply brief supporting the earlier motion to dismiss

(ECF No. 13) - after Plaintiff raised the point and inferred it was a factual attack because of the declarations and documents Defendants submitted - Defendants then asserted they were raising a facial attack. See ECF No. 13 at 5/11 **("First, plaintiff is wrong that this is a 'factual' challenge to the Court's subject matter jurisdiction. . . . Defendants' Rule 12(b)(1) challenge is facial."**). Then at oral argument, when pressed as to what kind of challenge they were lodging, Defendants confirmed they were raising a facial attack. Thus, Plaintiff, then will proceed to respond to the pending motion under the presumption it is a facial attack.[3]

By presenting their challenge as a facial attack, Defendants thereby concede that Plaintiff's allegations in his second amended complaint must be accepted as true and that the Rule 12(b)(6) standard applies. Mortensen, 549 F.2d at 891. Under the familiar Rule

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[3] Should the Court, notwithstanding Defendants' representations, decide to consider this as a factual challenge, Plaintiff respectfully asks for the opportunity to submit a brief addressing that kind of challenge and submit declarations and documents countering Kennedy's affidavit. They are different kinds of challenges with different standards of review. It is not fair to force Plaintiff, or the Court for that matter, to guess Defendants' line of attack. It allows Defendants to play the legal equivalent of a cat-and-mouse game; i.e., don't specify the challenge, force Plaintiff to guess, and then assert the other kind of challenge prior to having the earlier one rejected.

For whatever reason, Defendants have launched a facial attack thereby rendering meaningless all of the documents they attached to their motion to dismiss. See Pension Benefit infra. Had Defendants opted for a factual challenge, the Court would have been "free to weigh the evidence and satisfy itself as to the power to hear the case." Mortensen, 549 F.2d at 891. There would have been no presumption of truthfulness afforded to Plaintiff's second amended complaint, and the Court would have been authorized to make factual findings, review documents outside of the pleadings, and even conduct a plenary trial prior to making a jurisdictional determination. Gould Electr., supra, 220 F.3d at 176-77. Although Defendants have forfeited this challenge for now, subject matter jurisdiction and, concomitantly, sovereign immunity can be raised both at the summary judgment phase and at trial. See Fed. R. Civ. P. 12(h)(3) ("[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

12(b)(6) standard, all factual allegations, and all reasonable inferences therefrom, must be accepted as true and viewed in a light most favorable to the plaintiff. Colburn v. Upper Darby Twp., 838 F. 2d 663, 666 (3d Cir. 1988). And, **of critical importance here**, when deciding a motion to dismiss under the Rule 12(b)(6) standard, a court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). A court may not examine matters outside of the complaint, including documents submitted by defendant, unless the document is undisputedly authentic and the plaintiff's claims are based on the document. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Instantly, Plaintiff challenges the authenticity of the purported minutes and resolutions Defendants have submitted to their pending motion to dismiss. He should be allowed the chance to conduct discovery to scrutinize their purported accuracy and legitimacy. The documents certainly are not undisputedly authentic and, further, Plaintiff's claims are not based on them. Id. The factual averments included in the Declarations themselves cannot be considered either, as it is only the facts alleged in the complaint and its attachments that may be considered at this stage. Jordan, 20 F.3d at 1261.

III. These Individual Defendants Are Not Entitled to Sovereign Immunity

A. Indian Tribes Have Immunity From Suit in Federal Court

It is well established that Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers. See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); United States v. United States

Fidelity & Guar. Co., 309 U.S. 506, 512 (1940). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., 523 U.S. 751 (1998); Romanella v. Hayward, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997) ("Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits … against a tribe.").

B. In Limited Circumstances, Individual Tribe Members Are Immune

An individual tribe member, however, does not have sovereign immunity from suit in federal court unless he or she is a tribal official acting in an official capacity. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 173 (1977); Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462 (8th Cir. 1993); Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984); United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992); In re Stringer, 252 B.R. 900, 2000 WL 912115, at *1 (Bankr. W.D. Pa. 2000).

C. The Contracts at Issue

The second amended complaint ("SAC") explains that Plaintiff's consulting engagement and employment arose from two agreements. SAC ¶¶ 11, 17. The first agreement involved Plaintiff's consulting on behalf of one of the Tribe's businesses, Unami Solar, LLC ("Unami"). SAC ¶ 11. This consultancy began in September 2009, and was paying $7,750 monthly as of June 2012 when Defendants stopped the payments to him. See SAC ¶¶ 11, 23; Unami Agmt. (SAC at Exs. 2-3).

In addition to the Unami consultancy, beginning in April 2012 Plaintiff was hired an employee for another Tribal-related business venture. SAC ¶¶ 13-17. That business is Lenape Lighting and Manufacturing, LLC ("Lenape"). Plaintiff and Lenape entered into an employment agreement wherein he served as Lenape's interim CEO. SAC ¶17; Lenape Agmt. (SAC at Ex. 6). As interim CEO Plaintiff was to be paid a salary of $3,500 monthly, plus fringe benefits (including health and dental insurance), and contingent bonuses. SAC ¶ 24; Lenape Agmt. (SAC at Ex. 6).

D. Governance of Unami and Lenape

In Plaintiff's second amended complaint he references and attaches the governing documents applicable to this dispute per the Court's directive from the bench. According to the Tribe's Constitution, the Tribe's Executive Committee possesses specifically enumerated powers set forth in the Constitution. These powers, however, must be exercised **by a majority vote** of the Executive Committee. SAC ¶¶ 6-7; SAC Ex. 1, Art. 6, § 2. By resolution of the Executive Committee, the Tribe created Unami and established the Tribe as the sole member of the LLC. SAC ¶ 9; SAC Ex. 2. As with the Tribe's Constitution, the Unami Operating Agreement requires all decisions (except for financial matters of $2,500 or less) to be approved **by a majority vote** of the Tribe's Executive Committee. SAC ¶ 9; SAC Ex. 2, § 5.2).

Regarding Lenape, the Tribe's economic development arm, the Delaware Nation Economic Development Authority, LLC ("DNEDA"), owns 51% of that company. SAC Ex. 5, Art. 3. According Lenape's Operating Agreement management of Lenape is vested in a

five (5) member Board of Directors, **a majority** of which is required to take action. SAC Ex. 5, Arts. 7.1, 7.3. For its part, the DNEDA Operating Agreement requires all actions to be approved **by a majority vote** of the DNEDA board. SAC Ex. 4, Arts. 7.1, 7.3. Thus, in order for the Tribe to lawfully effectuate its decisions regarding Lenape, DNEDA's board must act and then its representatives on the Lenape board must act.

E. A Review of What Was Done to Plaintiff, By Whom, and When

Plaintiff contends Defendants interfered with and destroyed his two contracts beginning in June 2012 after Defendants Watkins and Peacock enacted an illegal *coup d'état*, ousting the Tribe's president Kerry Holton.[4] SAC ¶ 18. According to Plaintiff's second amended complaint, at the time of the *coup*, Watkins and Peacock served as the Tribe's lawfully elected Vice President and Treasurer respectively. Defendant Kennedy served as the Executive Director, CEO and Controller of DNEDA. Id.

According to Plaintiff's pleading, beginning in June 2012, all Defendants prevented Unami and Lenape from paying Plaintiff his monthly consulting fees, salary, expenses and other remuneration. Their actions to disrupt and interfere with Plaintiff's agreements with the Tribe and Lenape effectively and constructively destroyed those relationships. Id. ¶ 20. At 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.

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[4] The *coup* is relevant to Plaintiff's intentional interference claim because he may need to establish, inter alia, Defendants' insidious motive in damaging Plaintiff's contracts with the Tribal-related entities - a Tribe led by Defendants' archenemy Kerry Holton. See Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania, 2010 PA Super 175, 7 A.3d 278, 288-89 (Pa. Super. 2010) (internal citations and quotations omitted) (reviewing factors to consider in intentional interference case). The fact that Defendants enacted an illegal *coup* may well affect how a jury views Defendants' motives in interfering with Plaintiff's contracts.

Id. ¶ 21. The Tribe's Executive Committee had not acted by a majority vote to terminate Plaintiff's consultancy with Unami. Neither DNEDA's Board nor Lenape's Board had acted by a majority vote to terminate Plaintiff's employment with Lenape. Id. ¶ 21.

F. Defendants Have Not Shown They Enjoy Immunity

The governing documents Plaintiff attached to his second amended complaint make clear that the Tribe's Executive Committee had to act by a majority vote to take action against Plaintiff's contract with Unami, and that the Lenape Board had to act by a majority vote to take action against Plaintiff's contract with Lenape. Taking Plaintiff's allegations as true, because Defendants took action in June 2012 without any such authorization, Plaintiff has established in the pleading phase that Defendants acted beyond the scope of their authority and are therefore not entitled to sovereign immunity. See Tenneco, 725 F.2d at 574; see also Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 1004), cert. denied, 543 U.S. 966 (2004) (affirming trial court dismissal where complaint did not allege individual defendants acted outside the scope of their tribal authority.); cf. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) (Even if the complaint is liberally construed to allege that the tribal officials themselves "blocked" the road, [Plaintiff's] claim that they exceeded their authority fails. There is no allegation that closing the road to [Plaintiff] exceeded the officials' authority granted by the [Tribe]; quite the contrary, the [Tribe] clearly authorized the closure.).

In short, Defendants posit that because the Tribe had the power to terminate the contracts, and because Defendants are Tribal officials, they *per se* acted within their

authority and are therefore cloaked with sovereign immunity. That argument is without merit and the case law verifies it. Sovereign immunity does not protect rogue Indian tribe officials when they venture beyond what a tribe's governing body has authorized. Instantly, these rogue Defendants acted beyond their authority when they took action against Plaintiff. They have no immunity.[5]

IV. Conclusion

For the reasoning offered within, Defendants' motion to dismiss Plaintiff's second amended complaint should be denied. A proposed order follows.

Respectfully submitted,

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[5] Defendants point out, presumably with some ambition, that Plaintiff did not specify whether he is suing them in their individual or official capacities. Obviously, since Plaintiff is alleging that Defendants were acting outside their official capacities when they interfered with and destroyed his contracts (and stopped him from getting paid, and fired him), he's not suing them in their official capacities. Defendants also bemoan a purported lack of specificity in Plaintiff's pleading as to how Defendants interfered with and destroyed his contracts. This is a strange gripe since Defendants do not deny taking action against Plaintiff's interests. They just deny it was done outside of their official capacities. Further, while it's true that Plaintiff does not know and did not plead how the plan was precisely hatched (e.g., over breakfast one day, or whether it was part of their scheme to overthrow President Holton), he has submitted a sufficient and plausible claim for tortious interference. Cf. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007) ("factual allegations must be enough to raise a right to relief above the speculative level."); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (complaint must "plausibly give rise to an entitlement to relief.") (citing Twombly).

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	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2013, upon consideration Defendants' Motion to Dismiss Count One of Plaintiff's Second Amended Complaint (ECF No. 23), and Plaintiff's response thereto, it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

_____
John R. Padova, J.

CERTIFICATE OF SERVICE

I, Marc E. Weinstein, Esquire, hereby certify that on the 20th of May, 2013, I caused the foregoing opposition brief to be filed via ECF and that Defendants' counsel is a filing user under the ECF system. Upon the electronic filing of a pleading or other document, the ECF system will automatically generate and send a Notice of Electronic Filing to all filing users associated with this case. Electronic service by the Court of the Notice of Electronic Filing constitutes service of the filed document and no additional service upon the filing user is required.

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