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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN P. ANDERSON, in his official capacity as the Sheriff of Madera County, and individually,

Plaintiff(s),

v.

JACK DURAN, JR., et al.,

Defendants.

Case No. 3:13-CV-04825-RS

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 11, 2014
Time: 10:00 a.m.
Ctrm: 3
Judge: Hon. Richard Seeborg

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I. INTRODUCTION

A court can only issue an order against a defendant if the Plaintiff has established that the defendant actually took the actions alleged in the Complaint. Thus here, if the Tribe itself never took the actions Plaintiff's Complaint alleges, it would be absurd and unjust for the Court to issue an order against the Tribe. However, Plaintiff cannot establish that the Tribe took the actions alleged in the Complaint without the Court first adjudicating the intra-Tribal dispute. Otherwise, Plaintiff's all-encompassing request, completely divorced from any facts, is purely advisory.

The majority of Plaintiff's opposition is premised on a mistaken understanding of the facts surrounding the governance of the Picayune Rancheria of the Chukchansi Indians ("Tribe") and the intra-Tribal leadership dispute facing the Tribe.

Contrary to Plaintiff's assertions, the Lewis-Reid Faction's position is that the Tribal Council that resulted from a Tribal election conducted on December 7, 2013, as well as the December 23, 2013 seating of the four individuals elected in the 2013 election, is the current composition of the Tribal Council. This Tribal Council is known as the 2013 Lewis/Reid Tribal Council. However, the composition of the 2013 Lewis/Reid Tribal Council does not have any bearing on the composition of the Tribal Council during the times relevant to Plaintiff's Complaint. Rather, who lawfully held the four seats during two-year term beginning on December 26, 2011 and ending on December 23, 2013 remains in dispute between the three factions.

In order to enter the order sought by Plaintiff against the Tribe, the Court must either adjudicate the intra-Tribal dispute – and determine which of the three factions constituted the Tribal government during the times relevant to the Complaint – or issue an advisory opinion regarding all hypothetical tribal courts and factual scenarios. This Court lacks jurisdiction to accomplish either. Accordingly, Defendants respectfully request that the Court grant their Motion for Judgment on the Pleadings[1] and dismiss the instant action for lack of subject-matter jurisdiction.

[1] Plaintiff requests that the Court convert Defendants' Motion to a motion for summary judgment. Defendants assert that they are entitled to their Motion for Judgment on the Pleadings and to a motion for summary judgment. If the Court does convert Defendants' Motion to one for summary judgment, Defendants respectfully request that the Court give the parties an opportunity to present all material that is pertinent to such motion.

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The Ayala/McDonald Faction claims that it is the Tribe's government now and was the Tribe's government during the times relevant to the Complaint.[2] Otherwise, the Ayala/McDonald Faction asserts substantively the same arguments as Plaintiff. Unless otherwise noted, Defendants' responses to Plaintiff's arguments also respond to the Ayala/McDonald Faction's arguments.

II. ARGUMENT

A. Plaintiff's Opposition misunderstands or otherwise misstates important facts regarding the Lewis and Reid Faction's resolution of the intra-Tribal dispute.

Plaintiff states that Defendants "attempt to argue . . . that they are not the Tribe, its entities or court." Plaintiff's Opp'n to MJOP, at 11. Plaintiff is mistaken. Rather, Defendants consistently have observed the factual reality that the composition of the Tribe's government is disputed, and the dispute would require this Court to adjudicate the intra-Tribal dispute before attributing to the Tribe the actions of any one faction.

As this Court is aware, and unless the Ayala/McDonald Faction has abandoned its claims to be the Tribe's government, the Ayala/McDonald Faction also claims to represent the Tribal Defendants, both now and during the times relevant to the Complaint. Unable to determine who constitutes the Tribal government, Plaintiff himself served three factions claiming to be the Tribal Council: the Lewis Faction, the Reid Faction, and the Ayala/McDonald Faction. Thus, it is should be abundantly clear to Plaintiff and the Ayala/McDonald Faction that an intra-Tribal dispute exists.

Plaintiff's misunderstanding seems to stem from a mistaken belief that those claiming to constitute the Tribal government beginning December 23, 2013 claim to have retroactively constituted the Tribal government since December 26, 2011. This is not the case. Rather, the Lewis Faction, Reid Faction, and Ayala/McDonald Faction have disputed, and continue to dispute, who constituted the Tribal government between December 26, 2011 and December 23, 2013. This dispute over the 2011-2013 Tribal Council term is nothing less than a historical fact.

As described previously, the Tribe conducts an annual election for its Tribal Council on the

[2] The faction that began claiming that it constitutes the Tribal government was first known as the "Ayala Faction." The Ayala Faction conducted a purported election on December 7, 2013, and since that time is referred to as the Ayala/McDonald Faction. References to the Ayala Faction refer to the faction prior to the December 2013.

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first Saturday of December. Picayune Constitution (Dkt. # 162-3, Exhibit 48) Art. IV, § 1. The members elected to the Tribal Council in an election are seated on the fourth Monday of December. The seats up for election are staggered, such that four seats are up for election one year, and three seats are up for election the next year. Picayune Constitution (Dkt. # 162-3, Exhibit 48), Art. VII. Once elected, a Tribal Council member serves a two-year term. *Id.*

Four seats were up for election in the December 3, 2011 election. In the election, four members of the Reid Faction – Morris Reid, Dora Jones, Dixie Jackson, and Harold Hammond, Sr. – received the highest number of votes. The Reid Faction asserted that Reid, Jones, Jackson, and Hammond were seated December 26, 2011. The Lewis Faction – which at that time included members of the Ayala Faction – disputed the qualification of Harold Hammond, Sr., however, and on that basis disputed the seating of the Reid Faction members.

The four disputed terms from the 2011 election ("2011 Tribal Council terms") terminated as a matter of Tribal law on December 23, 2013. The lawful composition of the 2011 Tribal Council terms has never been resolved as a matter of Tribal law or otherwise. Thus, the composition of the Tribal Council, and therefore the Tribal government, during the times relevant to Plaintiff's Complaint, remains disputed.

The December 7, 2013 Tribal election did not resolve the dispute regarding the 2011 Tribal Council terms. Recognizing the fact that the 2011 Tribal Council terms would be terminating, the Lewis and Reid Factions agreed to join together to conduct an election on December 7, 2013 for the Tribal Council terms beginning on December 23, 2013. Reggie Lewis, Morris Reid, Chance Alberta, and Dixie Jackson were elected in the December 7, 2013 election, and were seated on December 23, 2013. Since December 23, 2013, those four individuals constitute a quorum of the Tribal Council (referred to as the "2013 Lewis/Reid Tribal Council").[3] It is the position of the 2013 Tribal Council that the December 7, 2013 election resolved the intra-Tribal dispute by determining, through an

[3] The 2013 Tribal election elected Reggie Lewis, Chance Alberta, Morris Reid, and Dixie Jackson to two-year terms which are set to end on December 28, 2015. The remaining three seats were not up for election in the December 7, 2013 election. Those three seats have terms which are set to end on December 22, 2014 with the installation of Tribal Council Members elected in the Tribe's annual election held on December 6, 2014. It is the position of the 2013 Tribal Council that the remaining three Tribal Council members are Carl "Buzz" Bushman, Melvin Espe, and David Castillo.

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election of the Tribe's voting membership, the composition of a governing quorum of the Tribal Council beginning on December 23, 2013. However, contrary to Plaintiff's assertions, the December 7, 2013 election did not resolve the dispute over the composition of the Tribal Council's quorum during the 2011-2013 term.

The facts giving rise to Plaintiff's Complaint occurred during the 2011-2013 Tribal Council term. As explained previously, Plaintiff's Complaint alleged that the Lewis Faction was not the Tribal Council and that the Lewis Faction Tribunal was not a Tribal court. As this Court and all parties are aware, both the Reid and Ayala/McDonald Factions have consistently disputed any claim that the Lewis Faction constituted the Tribal Council at the times relevant to the Complaint, during the 2011-2013 term. Further, neither the Bureau of Indian Affairs ("BIA") nor any other federal entity with jurisdiction has recognized any one Tribal faction as having been the Tribe's government during the times relevant to the Complaint. Accordingly, the actions of one Tribal faction during that disputed period cannot be attributed to the Tribe without first adjudicating the intra-Tribal dispute.

B. The order sought by Plaintiff either seeks an advisory opinion or requires an adjudication of the intra-Tribal dispute.

It would be unnecessary to adjudicate the intra-Tribal dispute (and determine whether the Lewis Faction was the Tribe's government at the times relevant to the Complaint) *only if* the Court was to issue an advisory opinion. Plaintiff John Anderson seeks an order that "*no* tribal court may assert jurisdiction over him," Plaintiff's Opp'n to MJOP, at 5 (emphases in original), regardless of whether the "tribal court" is an actual tribal entity or a group of unauthorized individuals (who may or may not be affiliated with the Tribe in the first instance), and regardless of any and all hypothetical facts. This order sought by Plaintiff, which would apply to all potential parties and hypothetical facts, is the definition of an advisory opinion. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

Plaintiff argues that "there is no colorable claim of Tribal Court authority." Opp'n to MJOP, at 5 (emphasis in original). Under Supreme Court precedent, however, there exist several sound, or at least colorable, claims of a tribal court's authority over a county officer, particularly when that

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non-Indian is sued in his individual capacity. However, such colorable claims of tribal court authority could apply only if the entity was indeed a tribal court. If no tribal court existed, there can be no analysis under *Montana*, *National Farmers*, *Hicks*, or any other precedent involving a tribal government or tribal court assertion of authority over a non-Indian.

Plaintiff attempts to avoid the threshold requirement regarding the intra-Tribal dispute by asserting that no tribal court can sue a state officer under any hypothetical set of facts. However, as discussed more fully in Defendants' Opposition to Plaintiff's MSJ, there exists no precedent to support a blanket injunction on "any tribal court," Plaintiff's Opp'n to MJOP (emphasis in original), hypothetical or existent, in the absence of a case or controversy.

As Defendants have previously discussed, Plaintiff has mischaracterized *Nevada v. Hicks*, 533 U.S. 353 (2001), by attempting to radically extend the Supreme Court's narrow holding. The Court explicitly limited the applicability of *Hicks* to the facts before it and even cautioned that a future application of the ruling to a different set of facts would be "a great overreaching." Defendant's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. No. 199) at 7 (quoting *Hicks*, 533 U.S. at 372). Not only did the Supreme Court repeatedly reject the proposition that the decision could be applied broadly, but leading scholars have also agreed that the decision is only applicable to situations closely resembling the facts presented in *Hicks*. Defendant's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. No. 199) at 7-8. The case at hand is easily distinguishable from *Hicks* in several regards. *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. No. 199) at 9. For example, *Hicks* involved *state* officers, not *county* officers. *See Hicks*, 533 U.S. at 356. In addition, here Plaintiff John Anderson is suing in both his personal and official capacities, and *Hicks* does not provide support that a member of an Indian tribe cannot sue John Anderson in his individual capacity in a tribal court. In fact, a government official can be sued in his individual capacity and for actions that are *ultra vires*. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). Finally, because there is no factually specific case or controversy present here, an application of *Hicks* would be advisory. *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. No. 199) at 10. Accordingly, *Hicks* does not support Plaintiff's attempt

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to avoid the fact that the order sought by Plaintiff would require the Court to adjudicate the intra-Tribal dispute as a threshold determination

In addition to attempting to extend *Hicks*, Plaintiff argues that no tribal court could have jurisdiction over the Sheriff in any circumstance because he possesses sovereign immunity from suit under the Eleventh Amendment. Plaintiff's Opp'n, at 21. Once again, Plaintiff is attempting to reach far beyond previous precedents and apply factually-dependent principles to every possible set of facts, hypothetical or otherwise, on an indiscriminate basis. First, It is well-established that the "Eleventh Amendment does not extend its immunity to units of local government." *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).[4] Further, even if he did enjoy a state's sovereign immunity, the Supreme Court held in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), a case cited by Plaintiff, that an Indian tribe (or tribal members) can sue a state official if the suit "falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." *Id.* at 269 (citing *Ex parte Young*, 209 U.S. 123 (1908)). The Court stated that to interpret *Young* in a factual vacuum – in other words in every potential circumstance – "would be to adhere to an empty formalism." *Id.* at 270. Thus, even if it could apply, an application of Eleventh Amendment immunity would require a factual analysis of an actual case or controversy, which does not exist in this case.

Attempting to avoid the necessary threshold determination of the Tribe's governing body, Plaintiff seeks an order against "the Tribal Entities . . . regardless of which tribal faction actually controls the Tribe." Plaintiff's Opp'n, at 6. However, Plaintiff's request "is an abstract dispute about the law," and such "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.' *Alvarez*, 558 U.S. at 93. Accordingly, Plaintiff's arguments demonstrate that this Court would be

[4] Plaintiff concedes that he is not a state officer, but argues that he possesses Eleventh Amendment immunity because he exercises law enforcement authority. However, the cases cited by Plaintiff do not support Plaintiff's argument. *See Brewster v. Shasta County*, 275 F.3d 803 (9th Cir. 2001) ("It requires little extension . . . to conclude that the Sherriff acts for the county, not the state, when investigating a crime in the county."); *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 839 (2004) ("The rule exempting the state and its officers from liability applies to officers such as sheriffs only if they were acting as state agents with final policymaking authority over the complained-of actions.") (internal quotation marks and citation omitted).

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required to either adjudicate the intra-Tribal dispute or issue an advisory opinion. Because this Court lacks jurisdiction to do either, the instant case must be dismissed.

C. This Court does not have jurisdiction over the individually-named Plaintiffs.

While ignoring the implications of *Ex Parte Young* in relation to suits against himself, Plaintiff argues that the Court possesses jurisdiction over the individual defendants under the *Ex Parte Young* exception to sovereign immunity. However, Plaintiff's argument is erroneous.

Ex Parte Young is only invoked in suits against a government official. Indeed, Plaintiff's Complaint named each individually-named Defendant in his or her "purported official capacity." *See* Verified Complaint for Declaratory and Injunctive Relief (Dkt. # 2), at Caption, pp. 1 & 2. As a threshold matter, the individually-named official must be an actual government officer, and the plaintiff must establish that the suit is really against the individual official and not the government itself. Otherwise, the suit would be barred by sovereign immunity. *See Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (sovereign immunity "bars a suit against state officials when the state is the real, substantial party in interest") (internal quotation marks and citation omitted). In this case, if the Lewis Faction was indeed the Tribal government – and therefore the Lewis Faction Tribunal was the Tribe's court – then the injunction sought by Plaintiff would be enforced against the Tribe's government and the *Ex Parte Young* exception to sovereign immunity would not apply. *See Maxwell*, 708 F.3d at 1087. Thus, invoking *Ex Parte Young* first would require a determination that the Lewis Faction was the Tribe's governing body during the time relevant to the Complaint.

To the extent that Plaintiff seeks a ruling against the individually-named Defendants as individual citizens, wholly removed from their purported capacities as Tribal government officials, Plaintiff has failed to identify a federal cause of action prohibiting a group of individuals – who are not determined to constitute a court or any other official entity – from making declarations regarding the duties and obligations of a county sheriff in a forum – which has not been determined to be a court or official entity. Finally, as explained below, the instant action is moot, and therefore the Court lacks jurisdiction over the individually-named as well as the Tribal Defendants.

D. The instant action is moot.

It is well-established that federal courts do not have jurisdiction unless an actual case or controversy exists, and that such case or controversy must exist "at all stages of review, not merely at the time the complaint is filed." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (internal citations omitted); *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167 (2000)[5]; *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). As Defendants have previously explained, the instant action is moot because Plaintiff has acquired all effective relief that this Court can grant, and there no longer exists a case or controversy in this case. *See* MJOP (Dkt. No. 191), at 18-20. For this reason, the Court lacks subject-matter jurisdiction.

Plaintiff cites *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), and other cases to suggest that a "defendant claiming that its voluntary compliance moots a case bears a formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to occur." Plaintiff's Opp'n, at 12 (quoting *Friends of the Earth*). However, in *Friends of the Earth*, the Supreme Court stated that "a defendant's voluntary cessation of a challenged ***practice*** does not deprive a federal court of its power to determine the legality of the ***practice***." *Id*. at189 (citation omitted) (emphases added). *Friends of the Earth* concerned the cessation of an ongoing and repeated practice, the daily discharge of pollutants into a river. The instant case does not involve allegations of a repeated, daily practice.

Further weighing against the Court's rule regarding repeated practices in *Friends of the Earth*, the instant case involves "a litigant's due process right of access to the courts." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (citations omitted). With respect to orders limiting a party's due process right to bring suit, the Ninth Circuit has found that "such pre-filing

[5] Plaintiff observes that *Friends of the Earth* drew a distinction between the "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth*, 528 U.S. at 189. While the Supreme Court noted an "important difference between the two doctrines," the Supreme Court maintained the well-established precedent that the federal courts lack jurisdiction over actions that lack a case or controversy and are therefore moot. *Id.* Thus, Justice Scalia's statement that "the requirement of a continuing case or controversy derives from the Constitution" and therefore "may not be ignored when inconvenient" is an accurate statement of well-established law. *See, e.g., Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause.").

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orders are an extreme remedy that should rarely be used," and only where the allegedly-wrongful actions are "numerous, but also be patently without merit." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057-1059 (9th Cir. 2007). Here, while the merits of the Lewis Faction Lawsuit were never fully adjudicated before it was dismissed, the Lewis Faction only filed that one lawsuit against the Sheriff. Accordingly, the *Friends of the Earth* rule regarding a daily practice does not support Plaintiff's position in this case, and the order enjoining Defendants' "due process right of access to the courts" is inappropriate in this case. *Id.* at 1057.

In any case, Defendants have established, in terms as clear as possible, that the likelihood of repeating the actions of which Plaintiff complains – the Lewis Faction Lawsuit and August 6 TRO – "is sufficiently remote to make injunctive relief unnecessary." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10, (1982)(quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). In an attempt to portray a continuing "threat" that Defendants will sue the Sheriff in the Lewis Faction Tribunal, Plaintiff relies on a mischaracterization of the statements from Defendant's counsel, David Osterfeld, from the November 22, 2013 hearing. At the November 22, 2013 hearing, Plaintiff's counsel stated that Plaintiff was willing to "withdraw or dismiss without prejudice our pending Complaint" if Defendants would "promise not to and stipulate not to sue again in Tribal Court." Transcript of Proceedings, at 8:2-5 (Nov. 22, 2013).

Plaintiff claims that Defendant's Counsel Osterfeld patently rejected this offer. However, this is not the case. In fact, in response to the Court's question regarding Plaintiff's offer, Counsel Osterfeld stated that he could not accept such an offer at the time without conferring with his client. However, Counsel Osterfeld stated that Defendants would continue negotiations with Plaintiff regarding that offer. Transcript of Proceedings, at 15:21-16:12 (stating that Plaintiff's offer "is something on the table" and "there is still room to negotiate moving forward").

Since the November 22, 2013 hearing, Defendants have repeatedly stated that they would not refile the Lewis Faction Lawsuit against the Sheriff. *See, e.g.*, MJOP (Dkt. # 191), at 20-21; Opposition to Plaintiff's MSJ (Dkt # 199), at 14-15. As Defendants have advised Plaintiff and this Court, the reason for dismissing the Lewis Faction Lawsuit without prejudice was to preserve claims

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against the Sheriff in *federal court* for violations under the Civil Rights Act of 1871, Section 1983, as well as other potential federal causes of action.[6] *See* Transcript of Proceedings, at 32:18-33:3; MJOP (Dkt. # 191), at 20-21; Opposition to Plaintiff's MSJ (Dkt # 199), at 14-15. Thus, if any suit is brought against Sheriff John Anderson, the 2013 Tribal Council intends to file suit in *federal court* under federal causes of action. *See* Transcript of Proceedings, at 32:18-22; MJOP (Dkt. # 191), at 20-21; Opposition to Plaintiff's MSJ (Dkt # 199), at 14-15. Defendants will not relinquish the right to sue the Sheriff in the federal or state courts under any applicable state or federal causes of action.

Defendants need not establish that a repeat of the challenged action is impossible, but rather that it is "sufficiently remote." Here, Defendants have done so. Further, even if the Lewis Plaintiff's characterization of Counsel Osterfeld's statements was accurate, those statements would not give rise to an imminent or even remote threat that the Lewis Faction Lawsuit will be refiled.[7]

Plaintiff asserts that the case is not moot by referring to "overwhelming evidence that Defendants' conduct continues unabated." Plaintiff's Opp'n, at 16. Plaintiff's assertion is without merit, and the so-called "overwhelming evidence" is irrelevant. This case involves the Lewis Faction Lawsuit and the August 6 TRO. It does not involve any of the "overwhelming evidence" claimed by Plaintiff, all of which relates to the Tribal factions' litigation in appropriate forums, publicly-stated positions, and petitions to the Sheriff for redress of grievances.[8] It is undisputed that the Lewis Faction Lawsuit and the August 6 TRO – the only underlying conduct relevant to Plaintiff's Complaint – have been dismissed and no longer exist. Accordingly, the instant action is moot.

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[6] The Ayala/McDonald Faction complains that Defendants do not explain why a dismissal of the Lewis Faction Lawsuit with prejudice may operate to preclude claims by the Tribe against the Sheriff in federal court. In fact, Defendants explained that a dismissal with prejudice of the Lewis Faction Lawsuit could "be considered an adjudication on the merits; or even if it weren't that, we would end up wasting tremendous resources arguing over whether it did or didn't." Transcript of Proceedings, at 32:23-33:3 (Feb. 22, 2014). Defendants have a reasonable belief that the Ayala/McDonald Faction would assert such preclusion arguments, along with other arguments, should the 2013 Lewis/Reid Tribal Council file a federal court action against the Sheriff. The Ayala/McDonald Faction's arguments in this case, which are closely aligned with the Sheriff and actually counter the interests of tribal sovereignty, support Defendants' belief.

[7] Although the possibility is sufficiently remote, Plaintiff can re-file the instant action even if the Lewis Faction Lawsuit was refiled. Thus, the challenged action would not evade review, as suggested by Plaintiff.

[8] Plaintiff and the Ayala/McDonald Faction assert that letters to the Sheriff "instruct" that the Sheriff take certain actions. However, neither has established that using insistent language in a petition for redress is actionable or improper. Moreover, the letters themselves specifically use language to "request" the assistance of the Sheriff. Defendants quoted the actual language of the letters to establish this fact. Defendants' MJOP, at 21-22. Neither Plaintiff nor the Ayala/McDonald Faction cited to any language, instead relying on their own conclusory, and incorrect, remarks.

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E. Plaintiff is not an intended third-party beneficiary of the 2007 MOU.

Plaintiff asserts that he has standing to bring this action under the 2007 MOU because he is a third-party beneficiary to the 2007 MOU. However, Plaintiff's argument is without merit.

It is a well-established "principle . . . that only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach." *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012). Incidental beneficiaries may not sue to enforce a contract. *Id.*

In order to establish that a party is a third-party beneficiary, the third party must show that the contract reflects the express or implied intention of the parties to the contract to *benefit* the third party. *Id.* (citation omitted). "*This 'clear intent' hurdle is a high one*." *Id.* (emphasis added). The Ninth Circuit has stated that the burden "is not satisfied by a contract's recitation of interested constituencies, . . . vague, hortatory pronouncements, . . . statements of purpose, . . . explicit reference to a third party, . . . or even a showing that the contract operates to the third parties' benefit and was entered into with them in mind." *Id.* (internal quotation marks and citations omitted).

Even absent the 2007 Settlement Agreement's third-party beneficiary exclusion, Plaintiff has failed to satisfy the high hurdle that he was clearly intended to be a third-party beneficiary to the 2007 MOU. The only argument made by Plaintiff in this regard is that "Section 2.0 [of the 2007 MOU] specifically addresses the duties and obligations undertaken by the Sheriff's Department and relates to the procedures regarding how '. . . both entities [are] to respect and assist each other in fulfilling their *respective* responsibilities as effectively and efficiently as possible." Plaintiff's Opp'n, at 17 (emphasis in original).

Plaintiff fails to cite to any provision of the 2007 MOU that establishes an intent to *benefit* the Sheriff. As Plaintiff himself states, Section 2.0 of the 2007 MOU addresses the *duties and obligations* of the County, which the Sheriff's Office shall fulfill. Creating duties and obligations of a third party does not establish an intent to benefit to that third party. In other words, if anything, Plaintiff is a third-party obligor to the 2007 MOU, not a third-party beneficiary. Third-party obligors do not have standing bring suit to enforce a contract. *GECCMC 2005-C1 Plummer St. Office Ltd.*

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P'ship, 671 F.3d at 1033 ("only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach"). Further, to the extent that Plaintiff relies on the reference to the Sheriff in the 2007 MOU, the Ninth Circuit has established that even explicit references to a third party, such as the Sheriff's Office, does not satisfy the burden to create an intended third-party beneficiary. *Id.*

While a third-party obligor cannot enforce a contract, a party to the contract can bring suite to enforce the provisions of a contract. *See GECCMC 2005-C1 Plummer St. Office*, 671 F.3d at 1033. Thus, while the Sheriff cannot bring suit under the 2007 MOU, the Tribe can bring suit against Madera County, as well as officers of the County, for breach of the 2007 MOU, including the County's duties and obligations to be fulfilled by the Sheriff's office. Should the Tribe ever bring such a suit under the 2007 MOU and Settlement Agreement, the proper venue for such a suit is the Northern District court.[9] Here, the fact that Plaintiff was not an intended third-party beneficiary is further evidenced by the fact that, as Defendants have previously observed, Plaintiff is not attempting to enforce any provisions of the 2007 MOU. MJOP (Dkt. # 101), at 16.[10]

Accordingly, because Plaintiff is not an intended third-party beneficiary to the 2007 MOU, he does not have standing to bring suit under the 2007 MOU.

F. Plaintiff is not entitled to attorney's fees or costs.

Plaintiff asserts that Defendants' argument regarding attorney fees or costs under the 2007 MOU and Settlement Agreement is premature. Plaintiff's Opp'n, at 24; *see* MJOP, at 23-24.

[9] Of course, courts have stated that only the legitimate government of the Tribe can stand for the Tribe as a proper party plaintiff. *See, e.g., Timbisha Shoshone Tribe v. Bureau of Indian Affairs*, 2003 WL 25897083, at *1 (E.D. Cal. Apr. 10, 2003); *Picayune Rancheria of Chukchansi Indians v. Henriquez*, 2013 WL 6903750 (D. Ariz. Dec. 31, 2013). By the same token, allowing an unrecognized faction to stand for a tribe as a defendant, while prohibiting a similarly-situated faction from standing for that tribe as a plaintiff, would be an absurd and unjust result.

[10] *See also* Transcript of Proceedings, at 10:24-11:3, and 11:10-11 (Oct. 21, 2013) (Plaintiff's counsel acknowledging that the Complaint does not seek enforcement of the MOU or Settlement Agreement and is not "suing for, quote, breach of contract"). Plaintiff asserts, without any citation or reference, that the Lewis Faction Lawsuit asserted questions of interpretation and enforcement of the 2007 MOU. This statement is false; the Lewis Faction Lawsuit did not attempt to interpret or enforce the 2007 MOU. Even if the Lewis Faction Lawsuit had arisen under the 2007 MOU, however, a federal court action regarding the parameters of a purported tribal court's jurisdiction, in relation to such an underlying action, would not itself arise under the 2007 MOU.

Defendants acknowledge that a claim for attorney's fees must be made by motion under the federal rules and will respond to such motion if one was filed.

However, Defendants included this argument because Plaintiff made a claim to the Court regarding attorney's fees in response to Defendants' arguments that this case must be dismissed by reason of being moot. At the February 20, 2014 hearing, the Court inquired of Plaintiff's Counsel what Plaintiff seeks beyond the dismissal of the Lewis Faction Lawsuit and Plaintiff's Counsel's responded that, in the absence of a case or controversy, Plaintiff intends to seek attorney fees and costs. *See* Transcript of Proceedings, at 27:6-13 (statement by Counsel Slovak that if the Court finds that the case involves "no case or controversy, or is moot, then we would ask that if that's the ruling of the Court, then we would apply for our attorneys' fees and costs").

Plaintiff now requests that this Court make a finding of "bad faith" due to his belief that the Defendants have made contradictory statements. However, Defendants have neither made contradictory statements nor made statements in bad faith.

The overwhelming majority of Plaintiffs allegations of inconsistent statements concern the governance of the Tribe. *See* Declaration of Lena Wade (Dkt. No. 205), at 3, 31, & 34. As explained in Section II.A above, however, assertions that the 2013 Tribal Council is the current government are not assertions regarding which of the three factions constituted the government during the two-year term between December 26, 2011 and December 23, 2013. Plaintiff appears to confuse the 2013 Tribal Council's assertion that it is the Tribe's current governing body with the Lewis Faction's and the Reid Faction's competing claims over who constituted the Tribal Council at the times relevant to the Complaint. The facts of the intra-Tribal dispute are continually developing. At all times, Defendants have attempted to inform Plaintiff and this Court of the developments concerning the intra-Tribal dispute in good faith. *See, e.g.*, Joint Status Report Providing Court an Update On All Matters BY Reid Faction, Lewis Faction, Jack Duran, Jr., and Donna Howard (Dkt. # 126).

Next, Plaintiff mistakes statements by Defendants' counsel regarding the applicability of the 2007 MOU and the jurisdiction of this Court. First, Plaintiff refers to an in-Court statement by Defendant Counsel that a federal court claim against the Sheriff may "be, we think, under the

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Settlement Agreement and the MOU, because we think that the Sheriff is now in violation of it." Plaintiff mistakes this statement as an admission that the 2007 MOU applies to this case. Declaration of Lena Wade (Dkt. No. 205), at 38. However, the statement by Defendant's Counsel was in relation to a potential future complaint in federal court by the Tribe against the Sheriff, not the Sheriff's instant Complaint. *See* Section III.E above (arguing that the Tribe, as party to the 2007 MOU can sue to enforce, even while Plaintiff cannot because he is not an intended third-party beneficiary).

Plaintiff next refers to the in-Court statement by Defendants' Counsel that "this Court undoubtedly has jurisdiction, under *National Farmers Union* and 1331, over plaintiff's claim in this action." Again, this statement is taken out of context. Defendants' Counsel was responding to a statement by the Court that jurisdiction would flow from the 2007 MOU and Settlement Agreement. This statement by Defendants' Counsel was intended to clarify that the MOU, a contract, cannot itself confer subject-matter jurisdiction to the federal courts. Thus, rather than referring to facts of the instant case, this statement by Defendants' Counsel was an acknowledgement of the law regarding actual tribal courts generally, and was intended to apply *only to the extent* that the Lewis Faction Tribunal would be determined to be a lawful Tribal entity created by a lawful Tribal government as a threshold matter, an issue which this Court cannot adjudicate. Defendants have consistently argued that this Court does not have jurisdiction over the instant case. In fact, Defendants' Counsel in the same hearing pointed out that the purpose of seeking a stay was to allow Defendants an opportunity to file a counter-claim against the Sheriff before this Court dismissed the action for lack of jurisdiction. *See* Transcript of Proceedings, at 15:19-20 (Feb. 20, 2014) ("My concern about the stay is just that Your Honor not dismiss today, so that we have to bring a whole new action."). Defendants apologize for any confusion these statements may have caused Plaintiff or the Court.

Finally, Plaintiff asserts that Defendants have made inconsistent statements regarding whether a threat of violence exists at this time. In fact, Defendants have consistently asserted that there exists a threat of violence, asserting that the threat stems from the Ayala/McDonald Faction itself. Further, Defendants assert that the Ayala/McDonald Faction has imposed strict martial law to affect "peace," and that such martial law in itself is a form of violence. Plaintiff has not pointed out any instance

where Defendants have contradicted their consistent claim that a threat of violence by the Ayala/McDonald Faction exists. In fact, it is the County of Madera who has issued contradictory statements regarding the existence of a threat of violence. *See* Opposition to Plaintiff's MSJ (Dkt. # 199), at 16-17 (comparing County Supervisor Tom Wheeler's statements that no threat of violence exists with Plaintiff's statements to the contrary).

Accordingly, Plaintiff is not entitled to attorneys' fees or costs under the 2007 MOU, the 2007 Settlement Agreement, or under the federal common law.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion for Judgment on the Pleadings, dismissing the instant action for lack of subject-matter jurisdiction.

Respectfully submitted,

Dated this 4th day of June, 2014

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/s/ James Qaqundah
JAMES QAQUNDAH, Attorneys for Defendants: The Picayune Rancheria of the Chukchansi Indians; Chukchansi Economic Development Authority; Chukchansi Indian Housing Authority

Dated this 4th day of June, 2014

ROSETTE, LLP

/s/ Alex Lozada
ALEX LOZADA, Attorneys for Defendants: Reggie Lewis; Chance Alberta; Carl Bushman; Irene Waltz; Lynn Chenot; David Castillo; Melvin Espe; The Picayune Rancheria of the Chukchansi Indians; Chukchansi Economic Development Authority; Chukchansi Indian Housing Authority

Dated this 4th day of June, 2014

KLINEDINST PC

/s/ Gregory T. Fayard
GREGORY T. FAYARD, Attorneys for Defendants: Jack Duran, Jr. and Donna Howard, in their official capacities only

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Suzanne Balluff
Suzanne Balluff

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