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UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

Town of Browning, a Montana Municipal Corporation Plaintiff, v.s. Willis A. Sharp, Jr.; Forrestina Calf Boss Ribs; Paul McEvers; William Old Chief; Cheryl Little Dog; Shawn Lahr; Alvin Yellow Owl; Derek Kline; Harry Barnes; Iliff Kipp; Joe McKay; Earl Old Person; Tyson Running Wolf; and Nelse St. Goddard, Defendants.	)	CAUSE NO.: CV-14-24-6F-BMM-RKS DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT UNDER RULE 12(b)(6)

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INTRODUCTION

Defendants submit this Brief in Support of Motion to Dismiss Amended Complaint under Fed. R. Civ. P. 12(b)(6). This brief incorporates by reference the Statement of Facts contained in defendants' Brief In Support of Motion To Dismiss Amended Complaint Under Rule 12(b)(1) (*ECF* 71).

I. Plaintiff's Amended Complaint Fails To State A Claim For Mail Fraud or For Civil Rico Violations

Count V of the amended complaint incorporates the allegations of the preceeding paragraphs 1 through 52 of the amended complaint. It is unclear whether this count seeks to simply plead a civil claim for the crime of mail fraud under the provisions of Federal Criminal Code, 18 U.S.C. §1341 (ECF 57-Amended Complaint, ¶56), or whether it seeks to plead claims under the Civil Rico Statute, 18 U.S.C. §1961, et seq. Regardless, the Town's Amended Complaint entirely fails to establish either claims.

First, wire fraud and mail fraud are federal crimes under the provisions of 18 U.S.C. §§1341-1343. A civil complaint cannot state a claim for violations of a criminal statute. *Aldabe v. Aldabe,* 616 F. 2d 1089, 1092 (9th Cir. 1980). A plaintiff cannot pursue criminal charges against defendants, because such charges may not be pursued in a civil action. *Id.* Whether to prosecute and what criminal charges to file are decisions to be made by a prosecutor, and the conduct of criminal prosecution is an executive function with the exclusive scope of the

Attorney General. See *United States v. Batchelder,* 442 U.S. 114, 124 (1979).

As for pleading a Rico claim, Plaintiff's Amended Complaint fails to meet the pleading standards of either Rule 8(a) or the heightened fraud pleading rules of 9(b). All pleadings in federal court must now comply with the standards set forth in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcraft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 173 l. Ed. 2d 868 (2009); *Starr v. Baca,* 652 F. 3d 1202 (9th Cir. 2011); *In re Century Aluminum Co. Securities Litigation,* 729 F.3d 1104 (9th Cir. 2013); and *Eclectic Properties East, LLC v. Marcus & Millichap Co.,* 751 F.3d 990 (9th Cir. May 7, 2014).

Rule 8 requires a complaint to include "a short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To meet this requirement, the Supreme Court has held that an "entitlement to relief" requires "more than labels and conclusions…." Factual allegations must be enough to raise a right to relief above a speculative level. *Twombly,* 550 U.S. at 555.

Rule 9(b) requires that "circumstances constituting fraud" must be alleged with particularity. Fed. R. Civ. Pro. 9(b). The plausibility analysis of *Twombly* and *Iqbal* applies equally to Rule 9 as it does to Rule 8. *Cafasso v. General Dynamics C4 Sys. Inc.,* 637 F. 3d 1047, 1055 (9th Cir. 2011).

The Ninth Circuit has synthesized *Twombly* and *Iqbal* to establish this

pleading standard in this circuit:

> First, to be entitled to the presumption of truth, the allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Starr v. Baca, 652 F. 3d at 1216.

Based on *Iqbal,* 556 U.S. at 679, the Court's analysis should proceed by removing the legal conclusions from the amended complaint and the "threadbare [] recitals of a cause of action." *Id.* at 676; *Starr v. Baca, id*; *Eclectic Properties East, LLC v. Marcus & Millichap Co.,* 751 F.3d 990 (9th Cir. May 7, 2014) (analysis of a Rico Complaint under *Iqbal* and *Trombly*

The elements of a civil Rico claim are: 1) conduct; 2) of an enterprise that affects interstate commerce; 3) through a pattern; 4) of racketeering activity or collection of unlawful debt (known as predicate acts); and, 5) causing injury to plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Company, Inc.,* 473 U.S. 479, 496-97 (1985); *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.,* 431 F.3d 353, 361 (9th Cir. 2005); *Eclectic Properties East, LLC v. Marcus & Millichap Co., id.*

At each point of the analysis, the Town's Amended Complaint fails the *Twombly/Iqbal* pleading standards. The amended complaint contains nothing more

than an "incant[ation] [of] labels, conclusions, and the formulaic elements of a cause of action." *Iqbal,* 556 U.S. at 678. Moreover, the Town fails to even recite the above elements of a civil Rico claim. Nor does it allege the specific facts as to these elements.

A "racketeering activity" is an act that is indictable as a criminal offense under specific provisions of Title 18 of the federal criminal code. 18 U.S.C.§1961(1). *Miller v. Yukohama Tire Corp.*, 358 F. 3d 616, 620 (9th Cir.2004) (*c.f. Schreiber Distributing Co. v. Serv-Well Furniture Co. Inc.,* 806 F. 2d 1393, 1399 (9th Cir. 1986)).

A "pattern of racketeering activity" under Rico similarly requires proof. A "pattern" "requires at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. §1961(5); *United States v. Fernandez,* 388 F. 3d 1199, 1221 (9th Cir. 2004). The evidence must establish that the two predicate acts are sufficiently "related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989).

Rico also requires proof of an "enterprise" which includes "any individual, partnership, corporation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). The "enterprise" element under Rico contemplates an entity that is separate and apart from the "pattern of racketeering activity" in which it engages. *Odom v. Microsoft*

Corp., 486 F.3d 549 (9th Cir. 2007) (*c.f. United States v. Turkette,* 451 U.S. 576, 583 (1981). *Turkette* describes an "enterprise as:

> The enterprise is an entity,… a group of persons associated for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

United States v. Turkette, 452 U.S. at 583. An "ongoing organization is a vehicle for the commission of two or more predicate crimes." *Odom,* 486 F. 3d at 552 (citations omitted). To function as a continuing unit, the evidence must establish that the associates' behavior constitutes "ongoing" rather than isolated activity. *Odom,* 486 F. 3d at 553.

The 9th Circuit recently articulated the elements of proof of an "enterprise" in a Rico case involving mail or wire fraud. In *Eclectic Properties East, supra,* the Court noted:

> To show the existence of an enterprise under the second element, plaintiffs must plead that the enterprise has (A) a common purpose, (B) a structure or organization, and (C) longevity necessary to accomplish the purpose. *Boyle v. United States,* 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.2d at 996.

Here, the Town's Complaint fails to present any facts to establish an "enterprise" or a "pattern of racketeering activity." A plaintiff cannot simply allege

general acts of wrongdoing without expressly identifying which acts constitute "predicate acts" for its Rico claim. See *e.g. Graf v. Peoples,* 2008 WL 4189657 (C.D. Cal. 2008); *Leonard, et. al. v. Doyle, et. al.,* 2013 WL 4875033 (D. Mont., Missoula Div. 2013); *Eclectic Properties E. LLC, supra*.

Moreover, the Town has entirely failed to allege predicate acts to establish the "pattern of racketeering activity." For the sake of argument, we assume the "predicate acts" plaintiff seeks to allege are mail fraud under the provisions of 18 U.S.C. §1341.[1] Three elements of proof must be established for mail fraud. They are: a) the formation of a scheme to defraud; b) the use of the mails in furtherance of that scheme; and, c) the specific intent to defraud. The pertinent allegations of the amended complaint are:

> ¶23- On August 27, 2013, Defendants Sharp, Calf Boss Ribs, McEvers, Old Chief, Little Dog, Lahr, Yellow Owl, and Kline sent notice to the Town, that the 1995 MOA and amendments would be terminated effective October 1, 2013. The Notice stated that the Blackfeet Tribe, through its company TMWC, would attempt to take control of water and sewer utility services

[1] In ¶24, ¶25, ¶27, ¶56, ¶57 (*ECF* 57) refer to two pieces of mail (Exhibits B and C attached to the amended complaint.) These paragraphs then use such phrases as "several of the notices fraudulently stated the Blackfeet Indian Tribe owned all water and sewer utility instrumentalities, equipment, facilities, and infrastructure…" ¶25, referring to Exhibits B and C. In fact, these Exhibits say no such thing. ¶56 states "In violation of 18 U.S.C. §1341, Defendants mailed false and fraudulent notices to utility customers…" ¶57 states "Defendants mailed false and fraudulent notices to utility customers…" However, ¶¶56-57 do not otherwise establish the elements of mail fraud under 18 U.S.C. §1341.

pursuant to Blackfeet Ordinance 98. A copy of Blackfeet Ordinance 98 is attached as Exhibit A.

¶24 – Around this time, an agent for Defendant Derek Kline stole the Town's utility customer list.[2]

¶25- The Defendants Sharp, Calf Boss Ribs, McEvers, Old Chief, Little Dog, Lahr, Yellow Owl, and Kline, utilizing the United States Postal Service and the names and addresses from the stolen utility customer list, published and distributed notices to water and sewer customers throughout the Browning community stating that all payment for water and sewer

[2] By ¶24 of Plaintiff's Amended Complaint (*ECF* 57), it asserts, without more, that Defendant Kline "stole" the Plaintiff's customer list. Such a statement assumes that the Town of Browning has some proprietary right to its customer lists that is entitled to protection. Under the 1995 MOA, the Tribe and the Town both formed the Browning Consolidated Utility System and are both entitled to its customer list. (MOA, §3.01) Public officers and bureaucrats do not own proprietary interests in public documents and information. *Yellowstone County v. Billings Gazette,* 2006 MT 218, ¶46, 333 Mont. 390, 143 P.3d 135. Additionally, non-humans have no privacy interests under Article II, Sections 9 and 10 of Montana's constitution. *Great Falls Tribune v. Montana Public Service Com'n,* 2003 MT 359, ¶37, 319 Mont. 38, 82 P.3d 876. Moreover, whether the Town of Browning has a right to assert privacy regarding its customers does not apply here. It does not apply, because the Tribe has a right to the Town's customer lists. *Montana Human Rights Div. v. City of Billings,* 199 Mont. 434, 649 P.2d 1283 (1982) (As part of a HR complaint against the City of Billings, Montana Human Rights Commission is entitled to obtain other employees records); *Hastetter v. Behan,* 196 Mont. 280, 639 P.2d 510 (1981) (one has no expectation of privacy regarding telephone billing records).

Defendant Kline otherwise denies that he "stole" the Town of Browning's customer list. For the purposes of this motion to dismiss, well pleaded allegations are assumed to be true. However, in light of the deficiencies in the amended complaint, this assumption is inappropriate. *Twombly, Iqbal; Starr v. Bacca,* 652 F.3d 1202, 1216 (9th Cir. 2011); *Eclectic Properties East LLC v. Marcus & Millichap Co.,* 2014 WL 1797676, 751 F.3d 990 (9th Cir. May 7, 2014).

> services should be directed to the TWMC as of October 1, 2013. Several of the notices fraudulently stated the Blackfeet Indian Tribe owned all water and sewer utility instrumentalities…Copies of select notices are attached as Exhibits B and C.

Contrary to the Town's assertions in ¶25, Exhibits B and C (*ECF* 57) contain no "fraudulent" statements:

Exhibit B (*ECF* 57) merely describes the dispute between the Tribe and the Town. It says the "exclusive jurisdiction and right to provide water and sewer service on the Reservation to tribal members has always resided with the Tribe. The Town has been providing water and sewer service only because the Blackfeet Tribe has allowed it to provide service through a series of Memorandum of Agreements. These agreements allowed the Town to operate the system. The Tribe has now

terminated the 1995 MOA and the Town no longer has authority to provide service. []The Tribe disputes the Town's ownership of the system. …The Tribe took the step to provide water and sewer service only after significant management concerns were identified which could not be resolved with the Town because of its refusal to meet with the Tribe to discuss the rate structure. The Tribe remains committed to running the system as it should be run, charging only the amount that it takes to actually operate and maintain the system. The Tribe's flat rate system is

based on actual cost of the structures necessary to treat and deliver the water, and to operate and maintain the system on a daily basis, and no more. [] Please direct any questions to Two Medicine Water Company."

Exhibit C (*ECF* 57) merely describes an incentive program for water customers and describes upgrades to the water treatment plant, which should save money on electricity bills.

Other than its use of the term "fraudulently" throughout its amended complaint, plaintiff otherwise fails to specify the "fraud." Contrary to plaintiff's assertion, all Exhibit B states is that the Tribe "disputes the Town's claim of ownership of the system." Exhibit B further explains, "IHS monies have funded the majority of the system in Browning and the surrounding community. The system delivers Two Medicine Lake water - the Tribe's water - and the water is treated through the new water treatment facility in East Glacier, owned by the Tribe. The Tribe invested over $19 million to develop the new system primarily through funds available only to the Tribe and its members - not the Town of Browning, a local state government."

The Town fails to explain how the Tribe's characterization that it "disputes" the Town's claim of ownership is fraudulent. Moreover, it fails to specify how the Tribe's explanation for its dispute is fraudulent.

The Town's "Mail Fraud" claim in Count V otherwise fails to offer "enough

heft to *show* an *entitlement to relief"* as required by *Twombly* and *Iqbal.* Plaintiff merely states:

> ¶54- Pursuant to 18 U.S.C. §1961(1)(B), Defendants engaged in an unlawful pattern of racketeering activity by devising a scheme to defraud the Town of money and property through false and fraudulent representations.

Other than this mere recitation of the element of mail fraud, the Town's amended complaint offers nothing. In pleading mail fraud for Rico purposes, Rule 9(b) requires the pleader to state the time, place, and the specific content of the false representation, as well as the identities of the parties to the misrepresentation, plus the role of each defendant in the scheme. *Schreiber Dist. Co. v. Serv-Well Furniture,* 806 F.2d at 1403. Here, based upon a reading of the two exhibits attached to the Town's amended complaint, the Tribe, as opposed to the defendants, did nothing more than communicate its interpretation of the dispute between the Tribe and the Town. Such communications do not constitute a "scheme or artifice," nor do they evidence a specific intent to defraud. *Westways World Travel, Inc. v. AMR Corp,* 265 Fed. Appx. 472, 474 (9th Cir. 2008) (*c.f. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc,* 904 F.2d 7886, 791-92 (1st Cir. 1990); *United States v. Kreimer,* 609 F. 2d 126, 128 (5th Cir. 1980); See *also Miller v. Yokohama Tire Corp.,* 358 F.3d 616, 620-22 (9th Cir. 2004). "[T]he [mail fraud] statute does not reject all business practices that do not fulfill expectations,

nor does it taint every breach of a business contract." *United States v. Kreimer*, id.

II. Plaintiff's Amended Complaint Fails to State a Claim for Conversion

To allege a valid conversion claim, a plaintiff must plead: (1) property ownership by the plaintiff; (2) plaintiff's right of possession of the property; (3) defendant's unauthorized control over the property; and (4) damages. *St. Peter & Warren, P.C. v. Purdom,* 2006 MT 172, ¶19, 333 Mont. 9, 140 P.3d 478 (citing *King v. Zimmerman,* 266 Mont. 54, 60 (1994)). Conversion is "a distinct act of dominion wrongfully exerted over one's property in denial of, or inconsistent with, the owner's right…" *Bird v. Hiller*, 270 Mont. 467, 472 (1995) (citing *Gebhardt v. D.A. Davidson & Co.,* 203 Mont. 384, 389 (1983). In other words, plaintiff must plead "wrongful conversion of personal property" in order to establish a claim of conversion. See 27-1-320 MCA.

Here, plaintiff's amended complaint fails to state a plausible conversion claim against members of the BTBC and Tribal employees for their "attempt to take control" of plaintiff's purported property. (*ECF* 57-Amended Complaint, ¶23). Other than mere recitation of the elements of conversion, the Town's amended complaint offers nothing. The Town fails to plead that the Tribal defendants have taken control of its purported property on Blackfeet Indian lands. (*ECF* 57-Amended Complaint, ¶¶23, 26). The Town pleads only an "attempt" to take control. Therefore, plaintiff's claim for conversion fails. *Rocky*

Mountain Biologicals, Inc. v. Microbix Biosystems, Inc., 986 F. Supp.2d 1187 (D. Mont, 2013) (citing *Feller v. First Interstate Bancsystem, Inc.,* 369 Mont. 444 (2013) (Conversion requires "a distinct act of dominion" over one's property inconsistent with their right.)

The Town has also failed to plead that the water and sewer infrastructure at issue is personal property of the Town to establish a valid claim for conversion. The Town is a Montana municipal corporation located within the exterior boundaries of the Blackfeet Indian Reservation. *ECF* 57-Amended Complaint, ¶1. The water and sewer infrastructure is used for the public purpose of providing essential government services of water and sewer inside and outside the Town's municipal limits. (*ECF* 57-Amended Complaint, ¶18). Since the water and sewer infrastructure is affixed to land and used for a public purpose, it is public property and not personal property within the meaning of 27-1-320 MCA (Plaintiff must claim that property converted is "personal property".) The plaintiff's amended complaint therefore fails to state a claim of conversion.

Moreover, the state law claim of conversion is not a claim over which this court would ordinarily have federal question jurisdiction. By labeling its claim "conversion" and naming tribal officials, the Town is attempting to circumvent the fact that the court has no jurisdiction under its asserted basis for jurisdiction – the Indian Civil Rights Act. The court should not allow the Town to do, through a

pleading device, what they cannot do directly, i.e. bring a state law claim against tribal defendants in federal court under the Indian Civil Rights Act.

III. Plaintiff's Amended Complaint Fails To State A Claim For Tortious Interference With Business Relations

Count II seeks to make a claim for Tortious Interference with Business Relations. (*ECF* 57-Amended Complaint, ¶¶36-41). Application of the *Twombly/Iqbal* pleading standards discussed above subjects this claim to dismissal as well. The claim merely recites the elements of the tort, without setting forth the basis for such a claim. The preceding paragraphs of the amended complaint otherwise do not add the necessary factual basis for this claim.

A prima facie claim for Tortious Interference with Business Relations requires the plaintiff to establish the defendant's acts: 1) were intentional and willful; 2) were calculated to cause damage to the plaintiff in his or her business; 3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and, 4) that actual damages and loss resulted. *Maloney v. Home Inv. Center, Inc.,* 2000 MT 34, ¶ 41, 298 Mont. 213, ¶41, 994 P.2d 1124, ¶ 41; *Hardy v. Vision Serv. Plan*, 2005 MT 232, ¶18, 328 Mont. 385, 120 P.3d 402, 406 (Mont. 2005), *c.f. Grenfell v. Anderson,* 2002 MT 225, ¶ 64, 311 Mont. 385, ¶64, 56 P.3d 326, ¶64.

The Montana Supreme Court has explained that the focus of the legal inquiry of this tort is on the intentional acts of the "malicious interloper" in

disrupting a business relationship, *Maloney v. Home Investment Center, Inc.*, id. ¶42, and a plaintiff cannot prove malice based on otherwise legal actions of a defendant. Federal Courts in Montana have held the same. *Statewide Rent-a-Car, Inc. v. Subaru of America,* 704 F.Supp. 183, 186 (D.Mont.1988)(Legal action, taken for legitimate business reason, cannot substantiate liability for tortious interference.) In *Statewide,* the court dismissed the plaintiff's claim of tortious interference because the actions of the defendant had been otherwise legal and allowed by law. Such is the case here.

The actions of the Defendant were lawful when the Tribe terminated the 1995 MOA under the Blackfeet Constitution. See Anderson Affidavit-Exhibit 4, Resolution 302-2013 (six (6) members of Council approved termination); BLACKFEET CONST. BY-LAWS OF THE BTBC §2 (Two-thirds (2/3) of the members of the entire BTBC must be present to constitute a quorum to legally transact the business of the BTBC.) Despite the fact that only two of the members of Council named as defendants had any involvement in the matter here, the actions of Defendants Sharp and Calf Boss Ribs were legal and for the legitimate business reason of promoting the health, safety and welfare of the community, which was otherwise being affected by the Town's failures under the 1995 MOA. See *ECF* 57-Amended Complaint, ¶23 (referencing "notice" which is attached as Anderson Affidavit-Exhibit 6). Subsequent actions of Defendants Yellow Owl, Lahr and

Kline, were lawfully authorized by Resolution 302-2013 and within the legitimate business reason of providing Blackfeet Tribal members with safe drinking water, sanitary sewer services, and consistent garbage removal on the Blackfeet Indian Reservation. Therefore, such actions by defendants cannot be deemed "malicious" to substantiate liability for interfering with a business relationship.

Plaintiff's claim that it has an economic relationship with water, sewer and garbage collection, and disposal utility service customers and defendants had knowledge of this relationship. (*ECF* 57-Amended Complaint, ¶¶37-38). This assertion is premised on the provisions of the 1995 MOA, which has since been terminated. (*ECF* 57-Amended Complaint, ¶21). The Town's assertion that the Blackfeet Tribal Government is unlawfully providing essential government services to Blackfeet Tribal members on the Blackfeet Reservation is unfounded and does not interfere with any purported "business relationship" plaintiff claims to have with such tribal members. As a result, plaintiff does not plausibly state a claim for tortious interference with business relations.

For a claim of tort of tortious interference with business relation, the conduct in question must be "wrongful or unlawful or without justification." *Taylor v. Anaconda Fed. Credit Union*, 550 P.2d 151, 154 (Mont. 1976). This wrongful conduct requires proof of malice in the legal sense of the term, "meaning the intentional doing of a wrongful act without justification or excuse." Malice is "an

essential element of an action for interference with contract. Such malice is not presumed and cannot be inferred from the commission of a lawful act." *Taylor, id. c.f. Simonsen v. Barth*, 64 Mont. 95, 208 P. 938; *Burden v. Elling State Bank*, 76 Mont. 24, 245 P. 958; *Quinlivan v. Brown Oil Co*., 96 Mont. 147, 29 P.2d 374.

In a recent tortious interference case, Judge Christensen explained:

> "A party may be "instrumental in procuring the severance of an agreement" and remain free from liability for tortious interference so long as its primary purpose is "the honest furtherance of [its] own business enterprise." *Quinlivan v. Brown Oil Co.,* 96 Mont. 147, 29 P.2d 374, 375 (1934). A party "should be allowed, under the law, to exercise its business judgment to protect its own financial interests free from liability under the tort of malicious interference with contract." *Statewide Rent–A–Car, Inc. v. Subaru of America,* 704 F.Supp. 183 (D.Mont.1988).

Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc., 986 F. Supp.2d 1187 (D. Mont. 2013).

As Judge Christensen further noted in the *Rocky Mt. Biologicals* case:

> The intent of a tortious interference defendant is of primary importance. Montana law provides that action taken in the good faith belief that it is performed with right and justifiable cause cannot serve as the basis for a tortious interference claim, even if it turns out that, in fact, the action is not legally justified. *Grenfell v. Anderson,* 311 Mont. 385, 56 P.3d 326, 336–337 (2002).

Rocky Mt. Biologicals, Inc. v. Microbix Biosystems, Inc., *id*. In accordance with *Rocky Mt. Biologicals* case, Exhibits B and C (*ECF* 57) merely show that the Tribe was operating in the furtherance of its own business enterprise to protect its financial interests. It cannot be held liable for tortious interference. And, as *Rocky*

Mt. Biologicals explains, even if it were to turn out that the Tribe's actions in terminating the MOAs were not legally justified (an event that the Tribe does not expect), such an event would not, in itself, give rise to a tortious interference claim.

Where a contracting party is shown to have breached its contract, the non-breaching party's actions in terminating the contract is deemed "justified" in the context of the breaching party's claim for tortious interference with contractual relations. *Hardy v. Vision Serv. Plan,* ¶¶21-24; *Grenfell v. Anderson,* 2002 MT 225, 311 Mont. 385, 56 P.3d 326 (Landlord's termination of tenancy for breach of the lease and lockout of subtenant does not give rise to tenant's claim for tortious interference even if landlord's termination notice was not properly received by breaching tenant.); *Richland Nat. Bank & Trust v. Swenson,* 249 Mont. 410, 816 P.2d 1045, 1051 (1991) (In the context of bank's claim on a note and foreclosure of security agreement, bank did not tortiously interfere with borrower's accounts receivable when the security agreement authorized it to do so.)

Moreover, regulatory bodies, which in the course of their regulatory duties interfere with regulates contracts with third parties, do not give rise to tortious interference claims. See *e.g. Montana Sup. Ct. Commn. on Unauth. Prac. of L. v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200, 209 (State Bar's report to Confederated Salish and Kootenai Tribal Court that a lay advocate was not licensed to practice law in Montana did not give rise to tortious interference

claim.); *State Board of Dentistry v. Kandarian,* 268 Mont. 408, 415, 886 P.2d 954, 858 (Mont. 1994) (Board of Dentistry's release to the press of its complaint for unauthorized practice of dentistry against a denturist did not give rise to his claim for tortious interference.)

IV. Plaintiff's Amended Complaint Fails To State A Claim For Malice

By Count III of Plaintiff's Amended Complaint, it seeks to assert a claim for malice. However, based on the above, no malice exists in this case. The Tribe, and the defendants were acting through the authority of the MOA and its amendments.

Acts done under legal authority are not unlawful, and no presumption or inference that such acts were to harm another person can be made. *Taylor v. Anaconda Federal Credit Union,* 170 Mont. 51, 56, 550 P.2d 151, 154 (1976); *Pospisil v. First Nat'l Bank of Lewistown,* 2001 MT 286, ¶20, 307 Mont. 286, 37 P.3d 704. (Where bank was operating under a mortgage, ex-husband's claim that bank and ex-wife intended to harm him was not legally cognizable). Here, nothing in the amended complaint otherwise indicates defendants acted with intent to harm the plaintiff.

V. Plaintiff's Amended Complaint Fails To Meet the Standards of Fed. R. Civ. P. 65

Based on Count I of its amended complaint, the Town seeks to enjoin and restrain the defendants from interfering with "its ownership of or operating certain

water and sewer instrumentalities …owned by the Town." (*ECF* 57-Amended Complaint, Prayer for Relief, A)

This Court lacks jurisdiction to enjoin the Tribe. See Defendants' Motion to Dismiss Amended Complaint Under Rule 12(b)(1) (*ECF* 70, 71) and Defendants' Motion to Dismiss Amended Complaint Under Rule 12(b)(7) (*ECF* 74, 75). *Tamiami Partners v. Miccosukee Tribe of Indian of Florida*, 999 F.2d 504 (11th Cir. 1993); *Peabody Coal Company v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004); *Gila River Indian Community v. Henningson, Durham & Richardson,* 626 F.2d 798, 714-715 (9th Cir. 1980); *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965). And it is the Tribe, as opposed to these individual defendants, who are taking the actions about which the plaintiff complains. Moreover, as previously noted, this Court otherwise lacks authority under the Indian Civil Rights Act to enjoin either the Tribe or these defendants. And, any remedy the plaintiff ostensibly has must first be exhausted in Tribal Court, *supra*.

The plaintiff has not otherwise identified any basis for injunctive relief. Rule 65 of the Federal Rules of Civil Procedure articulates the procedure for obtaining injunctive relief. However, "[Rule] 65 is not a source of power for a district court to enter an injunction. Rather, it regulates the issuance of injunctions otherwise authorized." *U.S. v. Cohen,* 152 F. 3d 321, 324 (4th Cir. 1998).

VI. No Claims Have Been Pled Against the Newly Named Defendants, And the Claims Against Them Should Be Dismissed

Plaintiff's Amended Complaint added the following people as named defendants: Harry Barnes, Iliff Kipp, Tyson Running Wolf, Joe McKay, and Nelse St. Goddard.[3] (E*CF* 57, ¶¶10-15) Other than identifying these people in their official capacities as officers or members of the Blackfeet Tribal Business Council, these additional people are not otherwise identified. They came onto the Tribal Council after the last election in June 2014. (Anderson Affidavit-Exhibit 24)

Like the other defendants, the amended complaint contains no allegations that the newly named defendants acted either within the course and scope of their authority as Tribal Council members and administrators or outside the scope of their authority. More importantly, the amended complaint contains no allegations identifying any conduct in which these newly named defendants have been engaged. It is like an innocent bystander who shows up at the scene of a car crash, and without more, the plaintiff adds him to the complaint as a defendant. These pleading failures should not be sanctioned under any pleading standards, let alone the heightened standards of *Iqbal/Twombly.*

[3] Defendant Earl Old Person was a member of the original Tribal Business Council. He was not identified as a defendant in the plaintiff's original complaint, but is now listed as a defendant in the plaintiff's amended complaint. (*ECF* 57, ¶14)

CONCLUSION

For the foregoing reasons, this case should be dismissed under Fed. R. Civ P. 12(b)(6) for failure to state a claim.

Respectfully submitted his 20th day of August 2014.

/s/ Lawrence A. Anderson

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that Defendants' Brief in Support of Motion to Dismiss Amended Complaint Under Rule 12(b)(6) is double spaced, proportionately spaced, typed in Time New Roman font, has a typeface of 14 points, and contains less than 6500 words.

/s/ Lawrence A. Anderson