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Attorneys for Defendants
The Honorable Leroy Not Afraid and
The Honorable Sheila Wilkinson Not Afraid

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MICHAEL F. LAFORGE,

Plaintiff,

v.

JANICE GETS DOWN, NATASHA J. MORTON, LEROY NOT AFRAID, SHEILA WILKINSON NOT AFRAID

Defendants.

No. CV-17-48-BLG-BMM-TJC

JUDICIAL DEFENDANTS' OBJECTION TO FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Complaint Filed: May 5, 2017
Trial Date: None Set

On December 28, 2017, United States Magistrate Judge Timothy Cavan issued Findings and Recommendations correctly finding that Defendants the Honorable Leroy Not Afraid and the Honorable Sheila Wilkinson Not Afraid (collectively, the "Judicial Defendants") receive the protections of judicial immunity and of tribal sovereign immunity. Doc. 30. However, the Findings and Recommendations incorrectly recommend that the Judicial Defendants' motion to dismiss be granted without prejudice. The Judicial Defendants are absolutely immune from suit. The deficiency in the Plaintiff's complaint with respect to the Judicial Defendants, *i.e.*, naming defendants who are absolutely immune from suit, cannot be cured by amendment. Therefore, pursuant to Local Rule 72.3, the Judicial Defendants object to and request modification of the italicized portion of the following recommendation:

> (2) The Court grant the Defendants' motions to dismiss for failure to state a claim (Docs. 11 & 20), *without prejudice and with leave to amend.*

Doc. 30 at 18 ¶ 2. The Judicial Defendants do not object to the remainder of the Findings and Recommendations. The Judicial Defendants respectfully submit that their Motion to Dismiss (Doc. 20) should be granted and the complaint against them dismissed *with prejudice and without leave to amend.*

Legal Standard

"[A]ny party may serve and file written objections to [] proposed findings and recommendations." 28 U.S.C. 636(b)(1); D. Mont. L.R. 72.3. Pursuant to 28 U.S.C. § 636(b), this Court "shall make a de novo determination of those portions of . . . the specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

Argument

Acknowledging the general principle that a *pro se* complaint should not be dismissed without leave to amend, the Magistrate Judge recommended that this Court "grant the Defendants' motions to dismiss for failure to state a claim (Docs. 11 & 20), *without prejudice and with leave to amend*." Doc. 30 at 18. However, any general principle regarding leave to amend must yield to the Magistrate Judge's findings that both judicial immunity and tribal sovereign immunity are present. *Id.* at 14-15. No set of facts that the Plaintiff could plead would surmount the Judicial Defendants' judicial immunity and tribal sovereign immunity as they pertain to Plaintiff's claims.

1. Finding and Recommending That Judicial Immunity Applies Requires Dismissal With Prejudice

The Findings and Recommendations correctly find that "the Judicial Defendants enjoy judicial immunity from suit." Doc. 30 at 14-15. Judicial immunity mandates that the Judicial Defendants cannot be held liable in civil actions, "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman,* 435 U.S. 349, 356 (1978) (quoting *Bradley v. Fisher,* 80 U.S. 335, 351 (1871)). Notwithstanding their judicial immunity, there is a recommendation of dismissal of Plaintiff's claims without prejudice.

A finding of judicial immunity is inconsistent with dismissing the claims against the Judicial Defendants without prejudice. No set of facts that the Plaintiff could plead would circumvent judicial immunity, given the Magistrate Judge's Findings and Recommendations. Judicial immunity has only two recognized exceptions: (1) actions not taken in a judicial capacity, and (2) actions taken in the complete absence of all jurisdiction. *Mireles v. Waco,* 502 U.S. 9, 11 (1991). Neither exception applies here.

Plaintiff's allegation of a wrong related to the "judgment of property" is inextricably intertwined with the Judicial Defendants' actions taken in their judicial capacity. "[I]t is clear that the 'judgment of property' about which [Plaintiff] complains is a divorce decree entered by the Crow Tribal Court in and for the Crow Indian Reservation." Doc. 30 at 3. The Plaintiff "has neither alleged nor presented any facts to suggest that the Judicial Defendants were acting outside the scope of their judicial authority when they entered orders and judgment in the underlying divorce." *Id.* at 15.

No exception to judicial immunity could apply because any claim arising from or related to the underlying divorce action derives from decisions that the Judicial Defendants made in their judicial capacity. *See generally* Doc. 21-1. The Judicial Defendants had authority to issue judicial decisions only by virtue of the authority vested in their judicial offices. *Id.* There is no allegation that the Judicial Defendants acted without jurisdiction. Nor could there be, when the Plaintiff consented to the jurisdiction of the Crow Tribal Court by originally filing suit in that court. *Id.* at 1-6.

Amendment of this claim would be futile given that Plaintiff is challenging a judicial decision. *Mireles*, 502 U.S. at 11 (the doctrine of judicial immunity provides an absolute immunity from suit, not just from an assessment of damages). As this Court has held:

> All of Cox's allegations relate directly to Todd's actions taken in his official judicial capacity. Under the above authority, Todd is absolutely immune from suit. Thus, the Court will grant Todd's motion to dismiss. In doing so, *the Court notes that the deficiency in Cox's Complaint, i.e., naming only a defendant who is absolutely immune from suit, cannot be cured by amendment in light of the type of action and the nature of relief sought.*

Cox v. Todd, No. CV-10-69-BLG-CSO, 2010 WL 3326846, at *3 (D. Mont. Aug. 24, 2010) (emphasis added).

Upon a finding of judicial immunity, an action should be dismissed with prejudice at the initial stage of the litigation. *See, e.g., Aldabe v. Aldabe*, 616 F.2d 1089, 1091, 1094 (9th Cir. 1980) (affirming dismissal of a *pro se* action with prejudice where "[t]he district court dismissed appellant's action against the judge appellees on the basis of judicial immunity"); *Christ v. Montana*, No. CV 13-7S-M-DWM, 2013 WL 5882210, at *1 (D. Mont. Oct. 30, 2013) ("claims against Judge Townsend are subject to dismissal with prejudice, pursuant to Rule 12(b)(6), because Judge Townsend is entitled to judicial immunity"); *Tangwall v. Spaulding*, No. CV-11-39-BLG-RFC-CSO, 2011 WL 2939418, at *1 (D. Mont. July 19, 2011) (adopting findings and recommendations to dismiss a complaint with prejudice where "claims are barred by judicial immunity and those that remain must be dismissed for failure to state a claim for relief that is plausible on its face").

2. Finding and Recommending That Tribal Sovereign Immunity Applies Requires Dismissal With Prejudice

The Magistrate Judge correctly found and recommended that "to the extent LaForge intends to bring these claims against the Judicial Defendants in their official capacities, the claims are barred by the Tribe's sovereign immunity." Doc. 30 at 15. In the absence of Congressional authorization or clear, unequivocal waiver, "Indian tribes, tribal entities, and persons acting on tribes' behalf in an official capacity enjoy sovereign immunity against suit." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (tribe); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.2006) (tribal entity); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (tribal officials).

The Findings and Recommendations correctly find that Plaintiff's allegations concern a decree of the Crow Tribal Court. Doc. 30 at 3. The Crow

Tribe's sovereign immunity covers its judicial branch, the Crow Tribal Court, as well as the judges of that court acting in their official capacity. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *see also United States v. Wahtomy*, No. CRIM.08-96E-BLW, 2008 WL 4693408, at *1 (D. Idaho Oct. 23, 2008), *aff'd*, 382 F. App'x 666 (9th Cir. 2010) ("By questioning the integrity of Judge Coby, Wahtomy is essentially questioning the integrity of the entire Tribal Judicial system. For that reason, Judge Coby is entitled to the full measure of sovereign immunity accorded to the Tribes.") The Judicial Defendants entered the decree, as well as subsequent decisions in the case, in their official capacities as judges of the Crow Tribal Court. *See generally* Doc. 21-1. Plaintiff's allegations unquestionably concern the Judicial Defendants' duties undertaken in their roles as judges of the Crow Tribal Court. For such actions, Judicial Defendants are entitled to the protection of the Crow Tribe's sovereign immunity

Amendment would be futile because Plaintiff cannot circumvent the Judicial Defendants' tribal sovereign immunity. The Findings and Recommendations correctly finds that Congress has not abrogated the Judicial Defendants' protection vis-à-vis the Crow Tribe's tribal sovereign immunity. The "Crow Tribe has [not] waived sovereign immunity for suits based upon violation of constitutional or civil rights, ADA Title II suits, or for private actions based upon treaty rights, or that Congress has authorized such private rights of action against the Tribe." Doc. 30 at 16. As a result, Plaintiff can make no showing that would allow his suit to proceed.

Sovereign immunity "is an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "Indeed even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government." *Id.* Tribal sovereign immunity provides similar protection. "Tribal sovereign immunity

would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed. . . ." *Tamiami Partners v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050 (11th Cir. 1995). Tribal sovereign immunity therefore bars lawsuits and all court process. *Tonasket v. Sargent*, 830 F.Supp. 2d 1078, 1082 (E.D. Wash. 2011); *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992). Protected parties should be dismissed from a lawsuit at the earliest possible opportunity, as their immunity is absolute.

Conclusion

For all of the foregoing reasons, the Honorable Leroy Not Afraid and the Honorable Sheila Wilkinson Not Afraid respectfully object to and seek modification of the Findings and Recommendations of the United States Magistrate Judge. A finding and recommendation that the Judicial Defendants are protected by judicial and sovereign immunity requires the dismissal of the immune parties with prejudice and without leave to amend at the earliest possible opportunity. Therefore the Judicial Defendants respectfully request modification of the Findings and Recommendations, and that their Motion to Dismiss (Doc. 20) should be granted and the complaint against them be dismissed with prejudice and without leave to amend. The Judicial Defendants do not object to any other portion of the Findings and Recommendations.

Dated: January 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

L.R. 5.2(B)

I hereby certify that on this 11th day of January 2018, a copy of the foregoing document was served on the following persons by the following means:

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the undersigned certifies that this brief complies with the requirements of Local Rule 72.3(b). The total word count in the brief is 1,702 words, excluding the caption and certificates of service and compliance. The undersigned relies on the word count of the word processing system used to prepare this brief.

Dated: January 11, 2018

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