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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PETER J. MAGEE, et al., Plaintiffs, v. SHOSHONE PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, et al., Defendants.	Case No.: 3:19-cv-00697-LRH-CLB **DEFENDANTS' OBJECTION TO PLAINTIFFS' SURREPLY [L.R. 7-2]**

Local Rule 7-2 requires permission of the Court before a party may file a surreply.[1] Plaintiffs filed Dkt. 26, "*Plaintiffs' Sur Reply, Objections, and Motions to Strike Declarations of Howard and Eagan [sic] and Evidence of Defendant Magees [sic] Licensure Status*," without the Court's leave. Plaintiffs' filing Dkt. 26 violates Local Rule 7-2 and should be stricken from the

[1] L.R. 7-2 ("Surreplies are not permitted without leave of court").

docket and not considered by the Court.[2]

Even had plaintiffs followed L.R. 7-2, they would not have been entitled to leave to file a surreply.[3] A surreply is only allowed "to address new matters raised in a reply to which a party would otherwise be unable to respond."[4] Plaintiffs raise no such issues: (1) both parties have already briefed whether tribal law governs the extent to which a tribes' sovereign immunity extends to a putative tribal official; (2) this Court is perfectly capable of reading *Eagleman* and *Hoopa Valley Housing Authority* to determine their persuasive value[5]; and (3) plaintiffs'

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[2] "Surreplies are highly disfavored and courts in this district routinely interpret Local Rule 7-2 to allow filing of surreplies only by leave of court and only to address new matters raised in a reply to which a party would otherwise be unable to respond. ... Because the court did not grant plaintiff leave to file a surreply and because defendants' reply to their motion for summary judgment did not raise new matters, defendants' motion to strike is granted. *Simpson v. Devore*, No. 216CV2981JCMVCF, 2019 WL 1284101, at *4 (D. Nev. Mar. 20, 2019) (internal citation omitted); *see also, e.g, Bertsch v. Discover Fin. Servs.*, No. 218CV00290GMNGWF, 2019 WL 1083773, at *3 (D. Nev. Mar. 6, 2019) (striking surreplies in violation of Local Rule 7-2); *McNeal v. Williams*, No. 216CV01618JADGWF, 2018 WL 4088000, at *11 (D. Nev. Aug. 27, 2018) (same); *Gonzalez v. Allied Collection Servs., Inc.*, No. 216CV02909MMDVCF, 2019 WL 489093, at *3 (D. Nev. Feb. 6, 2019); *Gonzalez v. Allied Collection Servs., Inc.*, No. 216CV02909MMDVCF, 2019 WL 489093, at *3 (D. Nev. Feb. 6, 2019) (finding that a motion that "seeks to strike factual arguments and supporting evidence… amounts to a surreply which is impermissible absent leave of court.").

[3] Plaintiffs' Dkt. 26 is a confusingly structured pleading with inconsistent titles: it purports to be both a surreply memorandum and a motion to strike. Defendants' file this L.R. 7-2 objection to Dkt. 26 as a whole. Defendants separately respond to plaintiffs' arguments on the "motion to strike" portions of Dkt. 26, in case the Court chooses to reach the merits of that motion. The Court does not have to reach those arguments; the "motion to strike" is simply an attempt to avoid L.R. 7-2 and can be denied on that basis. *Gonzalez, supra.*; *cf.*, *Hoffmann v. Murphy*, No. 319CV00032RCJCBC, 2019 WL 3017663, at *3 (D. Nev. July 9, 2019) ("The Defendant's Motion to Strike is granted, and the Plaintiff's Motion to "Squash" Reply to Motion to Dismiss will be stricken from the record. Although partially titled and filed as a Motion to "Squash," the Plaintiff's Motion is actually a "surreply" to the Defendant's Motion to Dismiss. However, the local rules do not permit a responding party to file a surreply without leave of court. L.R. 7-2(b). Only the party who files a motion can file a reply to a response from an opposing party; a party opposing a motion is only entitled to file a response. Therefore, the Defendant's Motion to Strike is granted").

[4] *Simpson,* 2019 WL 1284101, at *4.

[5] *Eagleman v. Rocky Boys Chippewa-Cree Tribal Bus. Comm. or Council*, 699 F. App'x 599, 600 (9th Cir. 2017) (citing *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1022–23 (9th Cir. 2016)); *Hoopa Valley Housing Auth. v. Ronnie Dean Davis and Duane Sherman*, 7 NICA App. 34 (Case. No. C-03-001, Hoopa Valley Tribal Court of Appeals, June 21, 2005).

arguments regarding *Davis*[6] and references to the Tribes' Criminal Code merely rehash points made in plaintiffs' two versions of their *Opposition*, Dkts. 16 and 22-1.

Moreover, Dkt. 26 fails to provide new or additional clarity for the Court. The plaintiffs' entire page of argument concerning *Eagleman* appears be a confusing, inaccurately transcribed, and unattributed block of text lifted almost verbatim from that case. *See* Dkt. 26 at 2. Plaintiffs misconstrue *Eagleman*, arguing that it is inapposite "because that case concerned 'tribal members' who were sued by the tribe." *Id*. That is not the point. In *Eagleman*, as here, "tribal sovereign immunity arose as a defense in tribal court" and "the allegation that the tribal court erred in applying the defense is not a question 'arising under' federal law for purposes of § 1331."[7] Plaintiffs' tribal citizenship status is irrelevant to that point of law.[8] Certainly, the question of whether a *tribe* is entitled to sovereign immunity when sued in State or federal court "is a matter of federal law."[9] The question of whether *plaintiffs* are entitled to tribal sovereign immunity when sued in their individual capacities in tribal court, however, is a matter of tribal law.[10]

Similarly, plaintiffs' repeated citation to *Hoopa Valley* is unhelpful. Dkt. 26 at 2-3. That case, at most, shows that a single tribal court, as a matter of tribal law, extended that tribe's sovereign immunity to the former Tribal Chairman for official acts taken in his official capacity and "within the scope of his authority as the Tribal Chairman."[11] This case has no bearing at all

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[6] *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968).

[7] *Eagleman*, *supra*.

[8] Plaintiffs have not, do not here, and cannot credibly dispute that the Shoshone Paiute Tribal Court has jurisdiction over them under *Montana* and the other federal cases concerning tribal jurisdiction over non-members. *See*, *Montana v. United States*, 450 U.S. 544 (1981) *and* Dkt. 10 at 4, n. 8.

[9] *Eagleman, supra.*

[10] *Id.; see also, Pistor v. Garcia* 791 F.3d 1104, 1108 (9th Cir. 2015).

[11] *Hoopa Valley*, *supra*.

on Shoshone-Paiute Tribal law, nor does it take away from the simple fact that Magee and the other plaintiffs are sued in their individual capacities, not in any official capacity.[12]

Plaintiffs' continued reliance on *Davis* is also misplaced.[13] *Davis* was decided *before* the Supreme Court and the Ninth Circuit developed the contemporary law of sovereign immunity for tribal officials sued in their official capacities. To the extent it applies, *Davis* supports defendants, as it stands for the proposition that the extent of a tribal officer's immunity is determined by reference to tribal law. *See* Dkt. 10 at 13. In addition, it is simply not true that "all of [the acts giving rise to the Tribal Court case complaint] were approved by either the Business Committee or Council, with Magee's input as CFO."[14] The Tribes' evidence shows that the plaintiffs' actions were, in fact, improper and unauthorized by the Business Council. Plaintiffs are being "sued for misappropriating nearly $200,000 in tribal funds, among other malfeasance," including breach of contract and professional malpractice.[15]

And there is nothing new in plaintiffs' reference, again, to the Tribes' Criminal Code. The Tribes have not charged Magee or any of the other plaintiffs with any crime. The reference to Ordinance 2013-SPO-01 alleges that plaintiffs' *conduct* was against the law and public policy of the Tribes, and provides evidence of plaintiffs' professional negligence and breach of contract. *See* Dkt. 10 at 11. That does not make the Tribal Court matter a criminal case.

Finally, this Court should also be aware that the plaintiffs established a pattern of filing multiple surreplies, errata, and other supplementary materials—all without leave of court—in the

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[12] *See generally*, Dkt. 25 at 8 – 11.

[13] Dkt. 26 at 3.

[14] *Id*. at 3. It is not clear what the plaintiffs mean by "either the Business Committee or Council." The Tribes are governed by the Shoshone-Paiute Tribal Business Council.

[15] *See,* Dkt. 10-1 at 140-173, Dkt. 25 at 10, and Dkt. 25-8 ¶¶ 14 – 20.

Tribal Court litigation.[16] In this matter, plaintiffs repeat this pattern: they have already filed *three* responses to the Tribes' *Motion to Dismiss*. *See*, Dkt. 16 ("*Opposition to Motion to Dismiss*"); Dkt. 22 (also titled "*Opposition to Motion to Dismiss*," includes a newly revised version of the plaintiffs' initial opposition memorandum and an additional declaration); and Dkt. 26 ("*Plaintiffs' Sur Reply, Objections and Motions to Strike*"). This is improper, and burdensome for both defendants and the Court.

In conclusion, plaintiffs' surreply at Dkt 26 was filed without leave of the Court in violation of Local Rule 7-2. It does not address any new matters raised in the defendants' *Reply* and is instead a transparent attempt to obtain additional briefing on issues already raised in the earlier pleadings. Defendants object. Dkt. 26 should be stricken from the docket.

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[16] For example, in the Tribal Court, plaintiffs filed a "*Supplemental Reply Brief to Tribe's Opposition to Motion to Dismiss*" and "*Sur Reply to Opposition to Motion to Compel and Reply to Opposition to Amended Request for Stay of Discovery and Case Pending Federal Judicial Review*, all without requesting or receiving leave of court. Despite this plethora of pleadings, the Tribal Court denied plaintiffs' motion to stay pending federal judicial review because, at the time, this federal case had not yet been filed and, even if it had, "such an effort would only serve to improperly circumvent tribal exhaustion." *See* Ex. 1 (Tribal Court *Order Denying Motion for Stay*)

Respectfully submitted January 16, 2020, at Juneau, Alaska.

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2020, a true and correct copy of the foregoing document was served via ECF on:

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