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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Eddie Dutchover Plaintiff, v. Moapa Band of Paiute Indians, *et al*., Defendants.	Case No. 2:19-cv-01905-KJD-BNW **RULE 12 MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

MOTION TO DISMISS

The Moapa Band of Paiute Indians (hereinafter, Tribe) and the Tribal entities and individuals (collectively, Defendants) named in Plaintiff's complaint hereby move the Court to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure (Rule) 12(b). **First**, Plaintiff's complaint should be dismissed under Rule 12(b)(2) for lack of personal jurisdiction because Plaintiff failed to properly serve process on Defendants, and under Rule 12(b)(5) for insufficient service of process. Because sovereign immunity forecloses claims against the individual Defendants in their official capacities, failure to perfect individual service is fatal to Plaintiff's

claims against the individual Defendants. **Second**, Plaintiff's claims against the Tribe, the Tribe's Business Council, and individual Tribal defendants in their official capacities should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction due to the Tribe's sovereign immunity from suit, which the Tribe has not waived. **Third**, all claims against "Moapa Tribal Enterprises" should be dismissed because there is no entity created by the Tribe under that name and the Tribe itself is the proper defendant as to matters involving the Tribe's businesses. **Fourth**, all claims against Defendants Bradley, Daboda, and Bow should be dismissed under Rule 12(b)(6) because the complaint fails to allege sufficient facts to state any employment-related claims against them. **Fifth**, Plaintiff's first and second causes of action based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, should be dismissed under Rule 12(b)(6) because Title VII is inapplicable to tribes and to individual employees. **Sixth**, Plaintiff fails to allege sufficient facts to state a claim of retaliation under Title VII. **Seventh**, Plaintiff's third cause of action fails to state a claim under 42 U.S.C. § 1983 because the Tribe is not a "person" subject to suit under § 1983 and Plaintiff fails to allege that any defendant acted under color of state, as opposed to tribal, law. **Eighth**, Plaintiff's claims against Defendant Begay under § 1983 should be dismissed under Rule 12(b)(6) as time-barred because all alleged actions by Defendant Begay occurred more than two years before the filing of Plaintiff's initial complaint. **Ninth,** Plaintiff's fourth cause of action fails to state a claim under 42 U.S.C. § 1981 because disparate-treatment employment discrimination suits against tribes arising out of tribal employment are barred under federal law, and preferential treatment of Tribal members over non-Tribal members is not a racial classification, but a political one. **Tenth**, Plaintiff fails to state a claim against Defendant Lee under § 1981 because Plaintiff alleges no facts demonstrating that Defendant Lee had any authority or ability to deprive Plaintiff of contractual rights nor that race was a 'but-for' cause of Defendant Lee's allegedly

discriminatory statements to Plaintiff. **Finally**, Plaintiff's fifth, sixth and seventh causes of action arise under state law and should be dismissed if all federal law claims against Defendants are dismissed because the Court will have no basis to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3).

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. STATEMENT OF FACTS

Plaintiff filed his initial complaint on October 29, 2019, ECF No. 1, and an amended complaint on May 5, 2020, ECF No. 8. Between February 4, 2020, and September 28, 2020, Plaintiff filed five consecutive motions for extension of time for service. ECF Nos. 5, 14, 16, 18, 22. The Court granted each of Plaintiff's motions for extension of time for service in turn, ECF Nos. 6, 15, 17, 23, with the exception of Plaintiff's third motion for extension of time for service, which the Court granted in part and denied in part, ECF No. 19 at 6.

Plaintiff is a dissatisfied former Tribal employee who claims he was mistreated or discriminated against in his employment prior to his voluntary resignation in August 2018. Plaintiff's amended complaint identifies the Moapa Band of Paiutes, the Moapa Tribal Council, Moapa Tribal Enterprises, and eight individuals as defendants. ECF No. 8 at 1. The Tribe is a federally recognized Indian tribe and sovereign nation, and "Moapa Tribal Enterprises" does not exist. Declaration of Laura Parry ¶¶ 4, 23 (filed herewith); *contra* ECF No. 8 ¶ 8 (alleging that the Tribe "functions in a manner similar to a municipality"). Plaintiff's complaint does not indicate whether the eight individual Defendants are being sued in their personal or official capacities; instead, the amended complaint indicates that all eight are "member[s] of the Moapa Band of Paiute Indians." *Id.* ¶¶ 10-17. Except for Defendant Anderson, no individual defendant currently serves as an elected Tribal official; however, all individual named defendants except Defendant

Lee were elected Tribal officials at some point during the period of allegations contained in Plaintiff's complaint. *See* Parry Decl. ¶¶ 9-16.

On October 21, 2020, Laura Parry, Chairwoman of the Moapa Business Council, was at an off-Reservation restaurant when an individual approached her. Parry Decl. ¶¶ 1, 6-7. When the individual asked, Chairwoman Parry confirmed her identity. *Id*. ¶ 7. The individual then left ten unsealed envelopes on the stool next to Chairwoman Parry. *Id*. Two of the unsealed envelopes bore no name or addressee. Eight of the envelopes were addressed to the following individuals: Gregory Anderson, Leslie Bradley, Samantha Lee, Delaine Bow, Ural Begay, Tyler Samson, Darren Daboda, and Vickie Simmons. *Id.* ¶ 8. Each enveloped contained a summons, a copy of Plaintiff's amended complaint, and a copy of Plaintiff's original complaint. *Id.* As of November 11, 2020, Plaintiff had not filed a proof of service.

II. ARGUMENT

Plaintiff's complaint is rambling and hard to follow, but in substance amounts to a series of discrimination-related claims by a former tribal employee against defendants who: (a) were not properly served with process; (b) are immune from suit; (c) are not subject to suit under the discrimination statutes cited by Plaintiff; and (c) are explicitly permitted to favor employment of Tribal members over non-Tribal members. The complaint suffers from multiple fatal defects that require its dismissal.[1]

A. The Court Lacks Personal Jurisdiction Over Individual Defendants Because Plaintiff Failed to Properly Serve Them.

The Court should dismiss Plaintiff's complaint as against the individual Defendants for

[1] Paragraph 61 of the amended complaint, ECF No. 8, also includes the full name of a minor individual, in violation of Fed. R. Civ. P. 5.2(a)(3).

lack of personal jurisdiction, under Rule 12(b)(2), and for insufficient service of process, under Rule 12(b)(5), because Plaintiff failed to properly serve the individual Defendants per Rule 4.[2] Instead, Plaintiff defectively attempted to serve process on a person who is not an authorized agent of any individual Defendant at a location that is not the dwelling or usual place of abode of any individual Defendant. Plaintiff also failed to file proof of attempted service. Because Plaintiff's attempted service of process on the individual Defendants is deficient, Plaintiff's complaint should be dismissed as to those Defendants. Because sovereign immunity forecloses claims against the individual Defendants in their official capacities, *see* Part II.B, *infra*, failure to perfect individual service is fatal to Plaintiff's claims against the individual Defendants. *See Green v. Moeller*, 2013 U.S. Dist. LEXIS 150200, at *4 (D. Nev. Oct. 18, 2013) ("Where personal service is required, failure to perfect it is fatal to a claim.") (citing *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987)).

"A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986). "Neither actual notice nor simply the naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4." *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (internal citations omitted). "Once service is challenged, plaintiff[] bear[s] the burden of establishing that service was valid under Rule 4." *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

[2] Defendants' filing of the instant Rule 12 motion within 21 days after Plaintiff's defective service of process does not in any manner indicate that Defendants consent to Plaintiff's defective attempt to serve notice.

Rule 4(e) requires service upon an individual defendant by: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(e)(2). "[W]here money damages are sought . . . , personal service, and not service at the place of employment, is necessary to obtain jurisdiction over a defendant in his capacity as an individual." *Daly-Murphy*, 837 F.2d at 355. Under Rule 4(e)(2)(C), service on an individual defendant is insufficient under Rule 12(b)(5) when a plaintiff delivers a copy of the summons and complaint to persons who are *not* agents authorized to accept service of process for the individual defendant. *Collins v. Barber*, 2011 U.S. Dist. LEXIS 165338, *4-5 (C.D. Cal. March 31, 2011) (citing cases).

For example, in *Naufahu v. City of San Mateo*, 2008 U.S. Dist. LEXIS 53633, *4-*8 (N.D. Cal. May 14, 2008), the claims against each of the individual defendants were dismissed for insufficient service of process where the plaintiff improperly attempted to serve the individual police officer defendants via other staff employed by the police department and the municipality. Notably, even receipt and signature of the documents by the executive assistant of one of the individual defendants was insufficient where the assistant had "never been generally authorized by [the individual defendant] to accept service of summons and complaint on [the individual defendant's] behalf." *Id*. at *6 (internal quotation omitted).

Plaintiff's amended complaint fails to allege whether Plaintiff sues the individual Defendants in their official or personal capacities. Plaintiff appears to sue the individual defendants as "member[s] of the Moapa Band of Paiute Indians," ECF No. 8 ¶¶ 10-17, suggesting a personal-capacity suit. It is undisputed that the individual Defendants were neither personally served, nor

were copies of the summons and complaints left at their dwellings or usual places of abode with someone of suitable age and discretion residing there. No appointment or law authorizes the Chair of the Moapa Business Council to receive service of process on behalf of individual Tribal members, which all of the named individual Defendants are. Parry Decl. ¶¶17-19. Plaintiff bears the burden to demonstrate that such a requisite agency relationship exists between Chairwoman Parry and the individual Defendants. *Brockmeyer*, 383 F.3d at 801; *Collins*, 2011 U.S. Dist. LEXIS 165338, at *4-5.

Assuming Plaintiff intended to sue the individual Defendants for money damages in their personal capacities, those defendants must be properly served in their personal capacities before the Court may exercise personal jurisdiction over them. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1128 (9th Cir. 2019).[3] Plaintiff contravened Rule 4 in his defective attempt to serve process and has not cured that defect. Therefore, the individual Defendants were not properly served, and the Court lacks personal jurisdiction over them. Furthermore, because Plaintiff failed to substantially comply with Rule 4, any actual notice cannot provide the Court with personal jurisdiction over Defendants. *Benny*, 799 F.2d at 492.[4] Because the individual Defendants were

[3] Defendants acknowledge that if the individual Defendants are being sued in their official capacities, then service of the complaints and summons upon Chairwoman Parry *may* be sufficient as to the official-capacity claims under Rule 4. However, only one of the individual Defendants currently serves as an elected Tribal official, Parry Decl. ¶¶ 9-16, and Plaintiff's complaint fails to allege the capacity in which Plaintiff intended to sue any individual Defendant.

[4] Additionally, Plaintiff contravened Rule 4(l) by failing to file an affidavit with the Court demonstrating proof of attempted service.

not served in accordance with Rule 4, Plaintiff's complaint should be dismissed under Rule 12(b)(2) for lack of personal jurisdiction and under Rule 12(b)(5) for insufficient service of process as to those Defendants.

B. Plaintiff's Claims Are Barred by the Tribe's Sovereign Immunity.

The Court should dismiss Plaintiff's claims against the Tribe and its officials for lack of subject matter jurisdiction, under Rule 12(b)(1), because the Tribe has not waived its sovereign immunity from suit. Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation because "Indian tribes are domestic dependent nations, which exercise inherent sovereign authority over their members and territories," *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991), and tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-government," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Courts "have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789.

Tribal sovereign immunity is a matter of jurisdiction, which may be challenged by a Rule 12(b)(1) motion to dismiss. *See Pistor v. Garcia*, 791 F.3d 1104, 1111-12 (9th Cir. 2015). Tribal sovereign immunity confers not just immunity from liability but "immunity from suit." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Bay Mills Indian Cmty.*, 572 U.S. at 788. When faced with a Rule 12(b)(1) motion to dismiss on the basis of tribal sovereign immunity, the party asserting subject matter jurisdiction has the burden of proving that immunity does not bar the suit. *Pistor*, 791 F.3d at 1111.

A tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies that act as an arm of the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

Moreover, a tribe's sovereign immunity extends to tribal officials when the essential nature and effect of the relief sought renders the tribe "the real, substantial party in interest." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 994 (9th Cir. 2020). "Suits that seek to recover funds from tribal coffers or establish vicarious liability of a tribe for damages . . . are barred by tribal sovereign immunity even when nominally styled as against individual officers." *Id*. "In any suit against tribal officers, we must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act." *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (internal quotation marks omitted). "Holding the defendants liable for their legislative functions . . . attack[s] 'the very core of tribal sovereignty.'" *Id.* at 1089 (quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995)).

The Tribe has not waived its immunity from Plaintiff's suit. Plaintiff fails to allege any express waiver of the Tribe's sovereign immunity. Nor does Plaintiff's prior employment by the Tribe impliedly waive the Tribe's sovereign immunity from suit. "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. Absent a waiver of immunity, Plaintiff's entire suit against the Tribe must be dismissed for lack of subject matter jurisdiction.

The Tribe's immunity from suit also extends to the other Defendants named in Plaintiff's complaint to the extent that they are being sued in their official capacities and that Plaintiff seeks to establish the vicarious liability of the Tribal government. *See Jamul Action Comm.*, 974 F.3d at 994; *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013). The Moapa Tribal Council, which is

properly known as the Moapa Business Council, is the Tribe's governing body.[5] Parry Decl. ¶ 3. Defendants Simmons and Samson were elected members of the Business Council at the time that Defendant filed his initial complaint in October 2019; Defendant Anderson is currently an elected Business Council member. Parry Decl. ¶¶ 9-11. Defendant Begay was a member of the Moapa Business Council at the time of some of the alleged statements attributed to him in Plaintiff's complaint, and Defendants Bradley, Daboda and Bow were Business Council members for at least some of the period of Plaintiff's employment with the Tribe.[6] Parry Decl. ¶¶ 12-15. Individual

[5] There is no entity known as "Moapa Tribal Enterprises" that is created by or affiliated with the Moapa Band of Paiutes. Parry Decl. ¶ 23. The Moapa Band of Paiutes owns and operates Moapa Tribal businesses, including the Tribe's Travel Plaza. The Business Council delegates day-to-day management of Tribal businesses to subordinate management personnel within the Tribe. *Id.* To the extent that Plaintiff seeks to sue the entity that manages the Tribe's businesses, the Tribe itself is the proper defendant.

[6] All claims against Defendants Bradley, Daboda, and Bow should be dismissed because they are being sued as members of the Tribe, ECF No. 8 ¶¶ 14-16, and the complaint fails to allege that they are or were Tribal officials, or that they engaged in any conduct toward Plaintiff that forms the basis of Plaintiff's claims. The absence of *any* allegations against them compels dismissal of the claims against them. *See Muller v. Morongo Casino, Resort & Spa*, 2015 U.S. Dist. LEXIS 79457, at *19 (C.D. Cal. June 17, 2015) (where "Plaintiff's [amended complaint] provides no other information about . . . who the Individual Defendants are or what wrongdoing they allegedly committed," the plaintiff "failed to allege sufficient facts, as Federal Rule of Civil Procedure 8 requires, to state any employment-related claims against the Individual Defendants").

Business Council members exercise no authority over employment decisions personally; they can only act legislatively by enacting resolutions or ordinances collectively as the Moapa Business Council. *See* Parry Decl. ¶ 20.

Plaintiff's complaint expressly alleges that Defendants "used their position of authority" and "position as the governing entity" to commit wrongs against him, and "permitted, encouraged or otherwise directed members of the tribe to engage in discriminatory behavior towards Plaintiff." ECF No. 8 ¶¶ 41, 108, 115; *see also id.* ¶¶ 83 (alleging Defendant Samson "us[ed] his position as a council member to intimidate the Moapa Tribal Police Department"), 47 (alleging Defendant Begay "used his tribal council position to intimidate Plaintiff"), 44 (accusing the Business Council of "discriminat[ing] without impunity and caus[ing] a hostile work environment by intimidation tactics and racial discrimination tactics."), 43 (accusing "the Moapa Business Council and the Moapa Band of Paiutes Tribal members" of "constantly racially discriminat[ing] against white people" during Plaintiff's employment, "which causes a hostile work environment daily for non-tribal members"). These allegations are directed at the individual Defendants in their official capacities because the Tribe—as governing entity and employer—is the actual target. *See Pistor*, 791 F.3d at 1112 ("[O]fficial capacity suits ultimately seek to hold the entity of which the officer is an agent liable.") (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)).

Plaintiff seeks to hold individual Defendants liable for Defendants' exercise of core governmental functions of the Tribe and Business Council. Such functions include statements regarding potential changes in the number of officers employed by the Tribal Police Department, ECF No. 8 ¶¶ 62 and 74; whether to sign off on a federal grant application, *id.* ¶ 63; whether tribal

police officers can take Tribal vehicles home, *id.* ¶ 64; how the Tribe should spend the proceeds of a litigation settlement, *id.* ¶ 69; whether the Tribal Police Department's handling of seized funds should be investigated by an outside agency, *id.* ¶ 72; whether Business Council meetings should be open to non-tribal members, *id.*; the propriety of the Business Council giving its members a pay raise, *id.* ¶¶ 75-76; and discussions occurring within Business Council meetings regarding the retirement of Plaintiff's K9 companion, *id.* ¶¶ 86-88. As a legislative body, the Business Council can and does take legislative action to direct the Tribe's handling of such core governmental functions. No individual Business Council member could act individually on any of these matters as a matter of Tribal law. Parry Decl. ¶ 20; *accord Miller v. Coyhis,* 877 F. Supp. 1262, 1266 (E.D. Wis. 1995) (suit against tribal council officials was a suit against the tribe because the actions of the tribal council members individually "had no independent legal effect"). Because Plaintiff seeks to hold Defendants liable "for their legislative functions," the remedy sought attacks "the very core of tribal sovereignty" and operates as a suit against the Tribe itself. *See Maxwell*, 708 F.3d at 1089.

In addition, Plaintiff's core allegations relate to the Tribe's Tribal-member employment preference and Tribal officials' repeated statements preferring employment of Tribal members over non-members. *See* Part II.D, *infra.* "The purpose of these preferences . . . has been to give Indians a greater participation in their own self-government . . . and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974). If Tribal officials could be subjected to money damages for speaking about the Tribe's preference of employing Tribal members in on-Reservation jobs, it would greatly interfere with the Tribe's sovereign interests and public administration by chilling the Tribe's use of the Tribal preference to fill jobs within the Tribe's government agencies.

Finally, Plaintiff seeks "back pay, front pay [and] lost benefits" from Defendants. ECF No. 8. ¶¶ 96, 104, 110, 117. These remedies suggest that the Tribe, as employer, is the real party in interest. Individual defendants sued in their personal capacities are not liable for back pay or lost benefits, which are remedies available only from the employer. 42 U.S.C. § 2000e-5(g)(1) (back pay "payable by the employer"); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 n.1 (9th Cir. 1993); *accord Sanders v. Anoatubby*, 631 F. App'x 618, 622 n.9 (10th Cir. 2015) (construing request for "back pay" as relief sought from the Chickasaw Nation and not from individual defendants); *see also Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (state's sovereign immunity from suit barred retroactive award of benefits against state officials).

Because the Tribe and its governing body are the real parties in interest, the Tribe's immunity encompasses the individual Defendants and bars Plaintiff's suit. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291-92 (2017) (sovereign immunity bars suits against employees in their official capacities because the sovereign is the real party in interest); *see also Jamul Action Comm.*, 974 F.3d at 995 (tribal council was real party in interest where plaintiff "named only an arbitrary collection of tribal policymakers as a substitute for the [tribe]" and plaintiff "fail[ed] to articulate any connection between the particular named tribal officers and any allegedly unlawful conduct" or "explain what responsibility any of those individuals have or had for the acts it contends are unlawful").[7] Neither the Tribe nor its officials waived tribal sovereign immunity as to Plaintiff,

[7] Although Defendant Lee has never been a Tribal official and may not be protected by sovereign immunity, Plaintiff fails to state any federal claim against her because there is no individual liability under Title VII; there are no allegations she acted under color of state law as required by 42 U.S.C. § 1983; and Plaintiff's allegations against Defendant Lee make clear that her alleged

therefore Plaintiff's complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.[8]

C. Plaintiff's Title VII Claims Are Not Cognizable Causes of Action Against the Defendants.

A complaint may be dismissed pursuant to Rule 12(b)(6) for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading must contain a "short and

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comments were not motivated by race discrimination as required by 42 U.S.C. § 1981. Instead, Defendant Lee's alleged comments appear motivated by personal animus against Plaintiff because Plaintiff killed Defendant Lee's brother, and because of her own alleged contacts with Plaintiff as a police officer. ECF No. 8 ¶¶ 21 (Defendant Lee called Plaintiff a "killer" who was "unfit to be a cop"), 22 (injuries to Plaintiff caused by Defendant Lee due to Plaintiff "reliv[ing] the night of 12-16-2012" when he shot her brother), 23 (Defendant Lee "slandered, defamed and harassed" Plaintiff on Facebook after Plaintiff issued her citations), 25-26 (since officer-involved shooting in December 2012, Plaintiff has been "harassed and threatened for Plaintiff's safety"). Finally, Plaintiff alleges no facts demonstrating that Defendant Lee had any authority or ability to deprive him of contractual rights of employment in violation of § 1981. *Tnaib v. Document Techs., LLC*, 450 F. Supp. 2d 87, 92 (D.D.C. 2006) ("Section 1981 does not create a ground for a cognizable claim against a co-worker.")

[8] Individual Defendants do not waive any affirmative personal-immunity defenses they may have to the claims against them in their personal or official capacities—including but not limited to, qualified immunity and legislative immunity—and reserve the right to assert those defenses if the Court finds that individual Defendants are not protected by the Tribe's sovereign immunity.

plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court should dismiss, under Rule 12(b)(6), Plaintiff's claims based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), for failure to state a claim because Title VII does not apply to tribes. Plaintiff's first and second causes of action allege that Defendants "violated 42 U.S.C. § 2000e-2(a) by discriminating against Plaintiff because of his race, color and/or national origin," ECF No. 8 ¶ 95, and that Defendants violated 42 U.S.C. § 2000e-3 by "retaliat[ing] against Plaintiff after he complained of acts which he reasonably believed were discriminatory," *id.* ¶ 100. Title VII specifically and expressly exempts tribes from the scope of "employers" governed by the mandates of Title VII: "The term 'employer' . . . *does not include* (1) the United States, a corporation wholly owned by the Government of the United States, [or] an *Indian Tribe* . . . ." 42 U.S.C. § 2000e(b) (emphasis added); *see also Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998) ("Congress . . . exempted 'Indian tribes' from the scope of the definition of 'employer' as used in Title VII.").

Furthermore, individual employees cannot be held liable under Title VII. *Id.* (citing *Miller v. Maxwell's Int'l., Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993)). Thus, there can be no cause of action against any of the Defendants under Title VII. Because the statute on which Plaintiff bases his first and second causes of action is inapplicable to the Defendants, Plaintiff fails to state a claim

on which relief can be granted. Plaintiff's Title VII claims should therefore be dismissed under Rule 12(b)(6).[9]

D. Plaintiff Fails to State a Claim Against the Defendants Under 42 U.S.C. § 1983.

Plaintiff asserts a third cause of action under 42 U.S.C. § 1983 that "Defendant violated Plaintiff's right to equal protection of the laws . . . when it[] used its position as the governing entity to engage in the illegal and discriminatory conduct above. . . ." ECF No. 8 ¶ 108. Read plainly, Plaintiff asserts this claim against the Tribe's "governing entity," and not against any

[9] Even if Defendants could be sued under Title VII, Plaintiff fails to allege sufficient facts to establish his retaliation claim, which requires him to "show (1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two." *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). Plaintiff alleges that he discussed the "racial discrimination process" with the Tribal Human Resources manager on August 13, 2018, which was only 10 days before Plaintiff resigned, ECF No. 8 ¶ 90-92, and well after all other alleged instances of retaliatory conduct by Defendants, *see id.* ¶¶ 53, 63-64. Plaintiff alludes, in a parenthetical, to times that he "[n]otified supervisors and Moapa Band of Paiutes Tribal Council" about "unlawful conduct," *id.* ¶ 30, but fails to allege whether any of those complaints involve activity made unlawful by Title VII. Plaintiff's complaints relating to Defendant Lee's alleged conduct are not protected activity because Defendant Lee's alleged conduct was not prohibited by Title VII. *See* footnote 7, *supra.* Nor does Plaintiff allege an adverse employment action, as he admits that he resigned, ECF No. 8 ¶ 92, and ultimately kept his K9 companion after her retirement, *id.* ¶ 90. *See Brooks*, 229 F.3d at 928-29.

individual Defendant in a personal capacity; thus, the Tribe itself is the real party in interest. *See Lewis*, 137 S. Ct. at 1292. Plaintiff's § 1983 claims against the Tribe, its Business Council and Tribal officials in their official capacities are barred by tribal sovereign immunity. *See* Part II.B, *supra*. In addition, the Tribe and its Business Council are not "person[s]" subject to suit under § 1983. *See Inyo Cnty. v. Bishop Paiute-Shoshone Indians*, 538 U.S. 701, 709, 712 (2003) (assuming "for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983" in holding that tribe is not a "person" who can bring suit under § 1983); *United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 942-943 (9th Cir. 2017) (a "federally recognized Indian tribe[] is presumptively excluded from the term 'person'" under the False Claims Act because "Indian tribes are analogous to States. Like States, Indian tribes are immune from suits unless their immunity is waived or abrogated by Congress.") (citing *Inyo County*, 538 U.S. at 711-12); *Dobbs v. Fond du Lac Reservation Bus. Comm.*, 2019 U.S. Dist. LEXIS 225033, at *13-14 (D. Minn. Nov. 26, 2019) ("[T]he Supreme Court's opinion in *Inyo County* provides strong indication that Indian tribes are not 'persons' subject to suit pursuant to 42 U.S.C. § 1983").

In the alternative, Plaintiff fails to state a claim against any of the Defendants under § 1983 because Plaintiff fails to allege any facts suggesting that Defendants' alleged actions were under color of state law. A § 1983 claim "cannot succeed" against Tribal officials "acting under color of tribal law." *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009). "To maintain an action under section 1983 against the individual defendants, [a plaintiff] must . . . show: (1) that the conduct complained of was committed by a person acting under the color of *state* law; and (2) that this conduct deprived [plaintiff] of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) (emphasis added). Thus, Defendants

can be held liable under § 1983 only if they were acting under color of state, not tribal, law at the time of the alleged misconduct. *See Pistor*, 791 F.3d at 1114-15.

Plaintiff fails to make any allegations that any defendant acted under color of state law. Employment of tribal police officers is a function of the Tribe's inherent sovereignty. *Dry v. United States*, 235 F.3d 1249, 1254 (10th Cir. 2000) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.") (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) and 25 U.S.C. § 1301(2) (defining "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians")). Supervision of the Tribal Police Department's staffing levels and budget is part of the Moapa Business Council's constitutional authority to provide for the maintenance of law and order and administration of justice within the Tribe's Reservation, MOAPA CONST. ART. V, § 1(f) (attached to Parry Decl. as Exhibit 1 per LR IA 10-3(b)), and to manage all economic affairs of the Reservation, *id*. ART. V, § 1(e). Thus, allegations that elected Tribal officials stated a desire to "cut the Moapa Tribal Police Department to four Tribal Police Officers" and "hire only tribal members" are statements made under color of tribal law. ECF No. 8 ¶¶ 62, 74. Such statements reflect the Business Council's legislative authority to maintain law and order within the Reservation by legislating and enacting policies regarding the Tribal Police Department.

Statements regarding use of Tribal vehicles and possible policy changes to require Tribal vehicles used by tribal police officers to remain within the Tribe's Reservation, *see id.* ¶ 64, and statements regarding investigating the Tribal Police Department regarding use of seizure funds, *id.* ¶¶ 72 and 84, also reflect the Business Council's supervisory authority over the Tribal Police Department, as well as the Business Council's constitutional authority to manage Tribal property and funds as the Tribe's legislative body. *See also id.* ¶¶ 69, 75-76 (statements regarding

management of tribal funds won in litigation and compensation of Business Council members). The same is true regarding statements related to the employment and retirement of Plaintiff's Tribal Police K9 companion, which Plaintiff admits was owned by the Tribe. *See id.* ¶¶ 85-88, 91.

Allegations related to preferences for employing Tribal members similarly reflect statements made under color of tribal law. The Tribe has a Tribal-member preference employment policy. Parry Decl. ¶ 24. Under that policy, the Tribe has a hiring preference for enrolled Moapa Band of Paiutes members and enrolled members of other federally recognized Indian tribes. *Id.* Various allegations in the amended complaint are simply expressions of that tribal preference policy. *See* ECF No. 8 ¶¶ 43 (alleging that statements about hiring "native/Indian" employees instead of "white people" or "non-tribal members" constitute racial discrimination against "white people" by the Moapa Business Council and "Tribal members[,]" "caus[ing] a hostile work environment daily for non-tribal members and white people"), 55 (alleging Defendant Begay "[was] saying that white people were taking jobs away from Native tribal members"), 62 (Defendant Samson "directed the Chief of Police to look at ways to hire only native tribal members for a Community Officer position that [Defendant] Samson wants to have on the Reservation"), 63 (Defendant Samson "only wants Native American/Tribal Members on the Moapa Tribal Police Department"), 65 (Defendant Samson "wants all white people gone and have only native tribal members have management jobs with high pay on his tribe"), 72 (Defendant Simmons "believes that our people (referring to Native American) need to be Tribal Police Officers").

Allegations that Plaintiff was told "white people" have no rights within the Reservation, even if true, are made under color of tribal, and perhaps federal, law—but not state law. Although non-Tribal members are not totally devoid of rights within the Reservation, they are subject to the Tribe's right to exclude persons not legally entitled to reside within the Reservation. The Moapa

River Indian Reservation was set aside for use the Moapa Band of Paiutes and its members. Exec. Order (Feb. 12, 1874) (setting aside original Paiute Reservation); Public Law No. 96-491, 94 Stat. 2561 (Dec. 2, 1980) (setting aside over 70,000 acres "to be held in trust by the United States for the benefit and use of the Moapa Band of Paiutes"). Over 99% of the land within the Reservation is owned by the Tribe and held in trust for the Tribe and its members by the United States. Parry Decl. ¶ 5. Only Tribal members are entitled to vote in Tribal elections or hold Tribal office. MOAPA CONST. ART. VI, § 1. The Tribe has the authority to require licensing of non-tribal members who come within the Reservation to hunt, fish, trade or conduct business and to exclude from the Reservation "persons not legally entitled to reside therein." MOAPA CONST. ART. V, § 1(f).

Allegations that Defendants told Plaintiff, "you work for us" and similar statements, ECF No. 8 ¶¶ 43, 46, 53, 59, 60, reflect tribal law and policy regarding organization of tribal government. Tribal police officers report to the Chief of Police, who reports to the Tribal Administrator, and the Business Council retains overall governmental authority over the entire Tribe. Parry Decl. ¶¶ 21-22. Thus, Business Council members' alleged statements to Plaintiff that Plaintiff "works for" Defendants were made under color of tribal law.[10]

[10] Assuming Plaintiff's amended complaint relates back to the filing of his first complaint on October 29, 2019, any allegations of actions or statements by Defendants occurring prior to October 29, 2017 are also outside of § 1983's statute of limitations. *See Wisenbaker v. Farwell*, 341 F. Supp. 2d 1160, 1163 (D. Nev. 2004) (applicable statute of limitations in Nevada is two years). Any § 1983 claim against Defendant Begay must be dismissed on statute of limitations grounds because all allegations relating to conduct by Defendant Begay, ECF No. 8 ¶¶ 46-56, occurred prior to October 29, 2017. Furthermore, Plaintiff alleges that instances of discrimination

E. Plaintiff Fails to State a Claim Under 42 U.S.C. § 1981.

Plaintiff asserts a fourth cause of action under 42 U.S.C. § 1981 that "Defendant engaged in race discrimination in violation of 42 U.S.C. § 1981 when Defendant, permitted, encouraged or otherwise directed members of the tribe to engage in discriminatory behavior towards Plaintiff as outlined above based upon his race." ECF No. 8 ¶ 115. Because only the Tribe as an employer and government could be held responsible for permitting, encouraging or directing tribal members to engage in race discrimination, Plaintiff asserts this cause of action against the Tribe as employer and government body and not against any individual Defendant in a personal capacity. Plaintiff's § 1981 claims against the Tribe, its Business Council and Tribal officials in their official capacity are barred by tribal sovereign immunity. *See* Part II.B, *supra.*

In the alternative, when a plaintiff brings a race-discrimination claim against an Indian tribe under 42 U.S.C. § 1981 based on the same facts as the plaintiff's Title VII claims, the § 1981 claim must be dismissed because Congress has exempted Indian tribes from being subject to disparate treatment employment discrimination suits arising out of tribal employment. *See Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035 (11th Cir. 2001) (dismissing § 1981 claim that was "in substance, . . . a disparate treatment employment discrimination claim" based on explicit Congressional intent found in Title VII); *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672-73 (10th Cir. 1980) (dismissing § 1981 claim against tribal employer when "allegations . . . bring it squarely within" 42 U.S.C. § 2000e-2(a)). Thus, "it would be wholly illogical to allow

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contributing to a hostile work environment occurred between 2012 and August 2017. ECF No. 8 ¶¶ 26, 30, 60, 61, 69, 70, 71, 75. Because these allegations occurred outside of the two-year statute of limitations, they cannot support Plaintiff's § 1983 claims.

plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian employment preference programs simply by allowing a plaintiff to style his claim as § 1981 suit." *Taylor*, 261 F.3d at 1035. This is especially true when the alleged racial discrimination arises from Indian employment preferences because 42 U.S.C. § 2000e-2(i) specifically "clarif[ies] that Title VII's prohibition against racial or national origin discrimination does not extend to preferential hiring of Indians living on or near reservations." *EEOC v. Peabody W. Coal Co*., 773 F.3d 977, 989 (9th Cir. 2014); *accord Yashenko v. Harrah's NC Casino Co*., LLC, 446 F.3d 541, 552 n.2 (4th Cir. 2006). "Congress expressly exempts Indian tribes from the definition of employer under Title VII, and indicates that Indian tribal preference programs cannot serve as the basis for Title VII race discrimination claims." *Taylor*, 261 F.3d at 1035.

Even if § 1981 employment-based claims against tribes were not categorically barred, Plaintiff fails to allege a claim of racial discrimination because most of his allegations relate to discrimination based on tribal membership, which is a political classification. *See Morton*, 417 U.S. at 553 n.24 (Indian employment preference for members of federally recognized Indian tribes "is political rather than racial in nature" because it "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.'"); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986) ("[P]referential treatment for tribal members is not a racial classification, but a political one") (citing *Morton*, 417 U.S. at 553 n.24). 42 U.S.C. §§ 1981 and 1983 are each "a broad, general provision guaranteeing equal rights and equal protection or prohibiting racial discrimination. These broad civil rights provisions do not specifically prohibit preferential employment of tribal members by Indian tribes." *Wardle*, 623 F.2d at 673.

"To prevail [under § 1981], a plaintiff must initially plead and ultimately prove that, *but for race*, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (emphasis added). Plaintiff's complaint demonstrates that a political classification was the alleged motivation behind Defendants' alleged statements because those statements correctly observed that Plaintiff is not a Moapa Tribal member or a member of any federally recognized Indian tribe. Thus, Plaintiff has failed to plausibly allege that his race was the 'but-for' cause of the alleged discrimination.

F. Because All Federal-Law Claims Against All Defendants Must be Dismissed, the Court Lacks Supplemental Jurisdiction Over Plaintiff's State-Law Tort Claims.

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 "as this is an action brought against the Moapa Band of Paiute Indians, a federally recognized Indian tribe, arising under the laws of the United States." ECF No. 8 ¶ 1. Plaintiff misreads 28 U.S.C. § 1362, which provides federal district courts with jurisdiction over civil actions "*brought by* any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior . . . ." (Emphasis added). Thus, § 1362 provides federal-court jurisdiction only when an Indian tribe is *a plaintiff*. Because Plaintiff can rely only on § 1331 to provide jurisdiction based on claims arising under federal law, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state-law claims if the Court dismisses all the claims that arise under federal law. *See* 28 U.S.C. § 1367(c)(3); *accord Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1019-20 (9th Cir. 2007) (district court "could not assert supplemental jurisdiction over any remaining state law claims" after it dismissed "the only claim that might have established original jurisdiction" under 28 U.S.C. § 1331 for lack of subject matter jurisdiction).

Plaintiff's first four causes of action arise under Title VII, § 1983 and § 1981, and provide the only claims that could establish federal-question jurisdiction under 28 U.S.C. § 1331. Plaintiff cites 25 U.S.C. §§ 81 and 2711 as additional laws that the action arises under, ECF No. 8 ¶ 1, but neither statute is applicable to this case: 25 U.S.C. § 81 governs contracts with Indian tribes "that encumber[] Indian lands," and § 2711 governs management contracts for the operation and management of tribal gaming establishments. Therefore, if the Court grants this motion to dismiss Plaintiff's first four causes of action against all Defendants, the Court will no longer have any basis to exercise supplemental jurisdiction over Plaintiff's fifth, sixth and seventh causes of action, which arise under state law. "In the *usual* case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims." *Schneider v. TRW, Inc*., 938 F.2d 986, 993 (9th Cir. 1991) (emphasis in original) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1980)).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's complaint.

Signed this 12th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2020, a true and correct copy of the foregoing **RULE 12 MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By */s/ Christie Rehfeld*
Christie Rehfeld, an Employee of
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