UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James Van Nguyen

Plaintiff,

vs.

Patricia Foley, in her individual and official capacity, Jody Alholinna, in her individual and official capacity, Nancy Martin in her individual and official capacity, Charles R. Vig in his individual and official capacity, Keith B. Anderson, in his individual and official capacity, Rebecca Crooks-Stratton, in her individual and official capacity, and
Cole W. Miller, in his individual and official capacity,

Defendants.

Civil No. 0:21-cv-00991 (ECT-TNL)

MEMORANDUM OF DEFENDANTS FOLEY, MARTIN, VIG, ANDERSON, CROOKS-STRATTON, AND MILLER IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

James Nguyen, a non-Indian, alleges multiple federal and state law claims against elected tribal leaders and employees of the Shakopee Mdewakanton Sioux Community ("Community"), and a guardian ad litem appointed by the Community's Tribal Court. All should be dismissed.

Nguyen has initiated a series of cases to try to alter or influence the divorce proceeding between him and Amanda Gustafson, a member of the Community, that was decided by the Tribal Court. Nguyen's prior efforts include filing two competing divorce petitions, one in California and one in Hennepin County; suing the Tribal Court in federal court; and bringing a Tribal Court ethics complaint against the attorneys representing Gustafson and the Community's Family and Children Services Department ("Department").

After the Tribal Court determined that it was best for the parents' child, Community member A.N., to be in the sole custody of Gustafson following Nguyen's refusal to abide by a stipulated final judgment, Nguyen filed this latest collateral attack on Tribal Court decisions in the divorce proceeding. However, unlike his last foray into federal court, *Nguyen v. Gustafson* ("*Nguyen I*"), No. 18-cv-00522-SRN-KMM (D. Minn.), he has not sued the Tribal Court or any tribal judges. Instead, Nguyen has sued two former Department employees (Patricia Foley and Nancy Martin), the former Chair of the Community's Business Council (Charles Vig), three current members of the Business Council (Keith Anderson, Rebecca Crooks-Stratton, and Cole Miller; together with Foley, Martin and Vig, the "Community Defendants,"), and the guardian ad litem

("GAL") appointed by the Tribal Court for A.N. in the child welfare proceeding that occurred in 2014 – 2015 (Jody Alholinna).

Long stretches of the Amended Complaint (ECF No. 4) ("Complaint" or "Compl.") contain allegations about non-party Gustafson or recitation of Tribal Court proceedings with no reference to any defendant's actions. (*E.g.*, *id*. ¶¶87-125). The allegations involving the Community Defendants include (1) that Foley wrongly considered e-mails given to her by Gustafson (which Gustafson took from Nguyen without consent) in her investigation involving A.N., e-mails that were also the basis for Nguyen's 2018 ethics complaint; (2) alleged bias on the part of the Department employees and the GAL in the child welfare proceeding; and (3) the Business Council's notices to Nguyen not to trespass on the Community's reservation.

Nguyen's claims against the Community Defendants based on those allegations fail as a matter of law.[1] None of Nguyen's claims against the Community Defendants are viable because they are protected from suit by sovereign immunity and because Nguyen has not exhausted his Tribal Court remedies. Further, almost all of his claims are time barred—since the relevant events occurred in 2014 and 2015.

On the substance of Nguyen's allegations:

- Nguyen's Section 1983 claims fail because the Community Defendants were not "persons" acting under color of state law.

[1] The Community Defendants support the GAL's motion to dismiss the claims against her.

- His Indian Civil Rights Act ("ICRA") claims fail because he cannot satisfy the "detention" or "custody" requirements for a habeas petition.
- His Stored Communications Act ("SCA") claim fails because Foley cannot be held secondarily liable for Gustafson's alleged actions.
- And, finally, the Court should decline to exercise jurisdiction over the remaining state-law tort claims, which are meritless anyway.

BACKGROUND

Nguyen and Gustafson Wed and Have a Child, A.N.

Nguyen married Gustafson in 2014. (Compl. ¶21). A.N. was born in September 2014 and, as the child of Gustafson, was enrolled in the Community. (Compl. ¶¶2, 25).

The Department Initiates a Child Welfare Proceeding for A.N., Who Becomes a Ward of the Tribal Court

After receiving reports about physical and emotional abuse, mental health issues, as well as drug use by both parents, Foley filed a petition in Tribal Court on November 26, 2014, on behalf of the Department, alleging that A.N. was a child in need of protection. (Compl. ¶48; Ex. O at 8). In a January 2015 hearing, after receiving a report from Foley,[2] the Tribal Court found A.N. to be a child in need of assistance under Community law, ordered that A.N. become a ward of the Tribal Court, and determined

[2] Foley, an employee of the Department, was only involved in the investigation in the child welfare proceeding. Ex. O to the Complaint, Ms. Foley's report with the Tribal Court, see Compl. ¶85, reflects the docket number of the child welfare proceeding, CC082-14 ("CC" standing for Children's Court), as do the transcripts of Tribal Court hearings at which Foley appears by telephone, see Compl. Exs. G and H. She was not involved in the parents' divorce proceeding, Case No. 867-17.

that the family would receive help from the Department. (Compl. ¶85; Ex. H at 29-30; Ex. O). Nguyen and Gustafson actively participated in the child welfare proceedings. They attended court hearings, attended counseling, and received social services provided by the Department. (*See* Compl. Exs. H at 8-9, K at 4, 6; *see also* Duncan Decl. Ex A at 4 (November 10, 2017 Tribal Court Order in Case No. 867-17)).

The child welfare case was closed in July 2015, but, under the final order in the case, the Tribal Court determined not to alter its earlier ruling that A.N. was a ward of the Tribal Court. (Compl. ¶89). The Tribal Court returned legal and physical custody of A.N. to Gustafson and Nguyen. (*Id.*). Nguyen does not allege that he challenged Tribal Court jurisdiction over the child welfare proceeding, No. CC082-14, or that he appealed the July 2015 final order.

The Community Issues Notices of No Trespass to Nguyen

On November 5, 2014, around the time that the Department opened the child welfare proceeding, the Community's Business Council issued a notice of no trespass to Nguyen. The no-trespass notice, which has been continually renewed, informed Nguyen that he was not permitted on the Community's reservation "EXCEPT for scheduled tribal court hearings and court ordered appointments or visits." (Compl. Ex. B).

Nguyen and Gustafson File Competing Divorce Petitions

Almost two years after the child welfare proceeding closed, Nguyen filed for divorce in California in June 2017.[3] (Compl. ¶106). Gustafson filed her own petition for divorce in the Tribal Court in July 2017. (Compl. ¶108). Gustafson moved the California court to dismiss Nguyen's petition. *See Nguyen I*, 2018 WL 4623072, at *1 (D. Minn. Sept. 26, 2018). After a two-day evidentiary hearing, the California court found that A.N. had not resided in that state for the time required for California to have jurisdiction and the forum was inconvenient. *Id.*

On August 7, 2017, the Tribal Court issued an order confirming the pendency of the action initiated by Gustafson and its intent to proceed with the case. *Id.* The Tribal Court recognized that it "maintains exclusive, ongoing child welfare jurisdiction over the minor child pursuant to the final order issued in [the earlier] child welfare proceeding commenced by this Community." (Duncan Decl. Ex. A at 7 (November 10, 2017 Tribal Court Order at 7)). Recognizing the Tribal Court as the suitable venue, the California court thereupon dismissed Nguyen's petition. *Nguyen I*, 2018 WL 4623072, at *1.

Nguyen filed another dissolution petition in August 2017, this time in Hennepin County District Court. *Id.* District Judge Sande "stayed Nguyen's action as a matter of judicial expedience and comity," in favor of the Tribal Court action. *Id.*

[3] Nguyen alleges that he originally petitioned for divorce in Scott County on October 16, 2014, and Gustafson petitioned for divorce in Tribal Court on October 9, 2014. (Compl. ¶¶30, 31). These petitions were abandoned after the parents reconciled. (Compl. ¶¶97, 105).

Nguyen filed a motion to dismiss the Tribal Court divorce proceeding for lack of subject-matter jurisdiction and personal jurisdiction. *Id.* On November 10, 2017, the Tribal Court issued an order denying that motion. (Compl. ¶113). One factor that the Tribal Court considered in making its determination was that A.N. was currently a ward of the Tribal Court and the parents had participated in the child welfare proceedings. (Duncan Decl. Ex. A at 4-5).

On December 4, 2017, Nguyen appealed the order, arguing that the order was immediately reviewable as a collateral order or that it should be certified for interlocutory review. (Compl. ¶114); *Nguyen I*, 2018 WL 4623072, at*1. Both the Tribal Court and the Tribal Court of Appeals rejected Nguyen's arguments for an immediate appeal. *Nguyen I*, 2018 WL 4623072, at *1.

Nguyen Unsuccessfully Challenges Tribal Jurisdiction in Federal Court

On February 23, 2018, Nguyen filed an action in this Court against Gustafson, a Tribal Court judge, and the Tribal Court seeking (1) a declaration that the Tribal Court, which both California and Minnesota courts deferred to, lacked jurisdiction over the divorce, and (2) an injunction prohibiting the Tribal Court from continuing to exercise jurisdiction. (Compl., ECF No. 1, *Nguyen I*). Judge Nelson dismissed the case on exhaustion grounds because Nguyen had failed to complete the divorce proceeding in Tribal Court. (Order at 1, 9, ECF No. 47, *Nguyen I*).

Nguyen alleges that he has now exhausted his Tribal Court remedies for the jurisdiction issues in the divorce proceeding by completing the appellate process, Compl. ¶130. But he has not sued the Community's judges in this case, is not renewing the

allegations related to jurisdiction that he made in *Nguyen I*, and is not expressly seeking declaratory or injunctive relief in connection with the divorce proceeding. Moreover, Nguyen did not exhaust his Tribal Court remedies on jurisdiction in the appeal that he cites (case number CTAPP049-20); that appeal was related to a visitation schedule and his refusal to disclose his address to Gustafson—not whether the Tribal Court had jurisdiction over the divorce case. (*See* Compl. ¶122 (describing the appeal)).

Nguyen Files an Ethics Complaint Based on E-mails Shared in 2015

On July 20, 2018, Nguyen filed an ethics complaint against Gustafson's lawyer and the Department's lawyer. Nguyen brought a single motion in the case seeking "appropriate" action against the attorneys and a plethora of other relief, including vacating orders in the divorce and child welfare proceedings, rescinding A.N.'s ward status, and orders permitting parents to reopen any case involving Foley. (Duncan Decl. Ex. B at 2-3 (October 17, 2018 Amended Motion)). The gravamen of Nguyen's ethics complaint was that the lawyers knew that Gustafson read privileged and private e-mails to or from Nguyen in January 2015 and sent them to Foley. (*Id.* at 4-5). Nguyen's motion was ultimately denied.

The Tribal Court Awards Custody of A.N. in the Divorce Proceeding

Shortly after Gustafson initiated the divorce proceeding in Tribal Court, the Tribal Court temporarily ordered that the parents share joint custody of A.N. (Duncan Decl. Ex. C at 5 (August 7, 2017 Tribal Court Order)). The temporary order in the divorce proceeding stayed in place until the Tribal Court issued a final judgment on May 3, 2019,

which, ***per the parties' stipulation***, ordered that they share joint custody of A.N. with equal parenting time. (Duncan Decl. Ex. D at 12 (May 3, 2019 Tribal Court Order)).

On October 21, 2019, after Nguyen refused to abide by that agreement, Gustafson filed a motion to modify custody and placement of A.N. (*See* Duncan Decl. Ex. E at 17 (January 6, 2020 Tribal Court Order)). The Tribal Court found that Gustafson was correct, that the parenting order was not being followed and that the parents displayed an inability to cooperate, disagreeing about all aspects of the order and the raising of A.N. (*Id.* at 21).

Ultimately, based on Nguyen's uncooperative behavior and the impact of the parents' acrimonious relationship on the child, the Tribal Court awarded Gustafson sole custody of A.N. (*Id.* at 26). Nguyen seeks to undermine that ruling and start a new round of litigation here.

Nguyen Files This Action to Collaterally Attack the Child Welfare Proceeding, Regain Custody of A.N., and Obtain Monetary Relief

Nguyen filed this case against professionals involved in the child welfare proceeding and members of tribal leadership seeking a writ of habeas corpus for custody of A.N., declarations regarding the defendants' alleged violations of Nguyen's constitutional rights and rights under ICRA, a "declaration vacating" the Tribal Court's 2015 decision to make A.N. a ward of the Tribal Court, and monetary damages. (Compl. at 46). Nguyen alleges that he is entitled to that relief based on two 42 U.S.C. § 1983 claims (one for a violation of his procedural due process rights under the Constitution and one for a violation of his substantive due process rights under the Constitution); a claim

under ICRA; a claim for a violation of the SCA; a claim for abuse of process; and a claim for intentional infliction of emotional distress ("IIED"). (Compl. at 32-46). Nguyen's claims, with the exception of claims against current and former Business Council members, are based on the same 2015 text messages and e-mails as his failed ethics complaint—he even attached the same Exhibit A to the Complaint as he did to his motion. (*Compare* Compl. Ex. A (with bates label "NGUYEN_A000001"), *with* Duncan Decl. Ex. B at 8 (October 17, 2018 Motion) (referencing an exhibit A with the same bates label)). All of these claims should be dismissed.

LEGAL STANDARD

The Community Defendants move to dismiss the Complaint based on sovereign immunity and Nguyen's failure to state a claim. A motion to dismiss based on sovereign immunity is analyzed under Fed. R. Civ. P. 12(b)(1). *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). The Community Defendants' remaining arguments fall under Rule 12(b)(6). Under Rule 12(b)(6), "[t]o 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) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court accepts well-pleaded factual allegations as true, but disregards conclusory allegations. *Iqbal*, 556 U.S. at 678. If the plaintiff fails to "raise a right to relief above the speculative level," then dismissal is warranted. *Twombly*, 550 U.S. at 555.

Generally, the Court may not consider materials "outside the pleadings" on a motion to dismiss. Fed. R. Civ. P. 12(d). However, the Court "may consider some

materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings" without converting the motion into one for summary judgment. *Little Gem Life Scis, LLC v. Orphan Medical, Inc.*, 537 F.3d 913, 916 (8th Cir. 2008) (quotation omitted). Matters necessarily embraced by the complaint include "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). Courts consider, "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Wright & Miller, Federal Practice & Procedure § 1357 (3d ed. 2004)).

ARGUMENT

I. NGUYEN'S CLAIMS AGAINST THE COMMUNITY DEFENDANTS MUST BE DISMISSED BASED ON SOVEREIGN IMMUNITY

Sovereign immunity requires the dismissal of all of Nguyen's claims against the Community Defendants—both in their official capacity and in their individual capacity.

A. The Community Defendants, Acting in Their Official Capacity, Share the Community's Sovereign Immunity

Sovereign immunity is a threshold jurisdictional question that must be addressed before the merits. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*,

523 U.S. 751, 754 (1998). The Community is a federally recognized Indian tribe and possesses sovereign immunity from suit. *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996).

Tribal employees or officials sued in their official capacity share the Community's immunity, because "[a] suit against a governmental actor in his official capacity is treated as a suit against the government entity itself." *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007). "[A] plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 714, 727 (9th Cir. 2008). As Nguyen alleges, all of the Community Defendants are current or former elected officials or employees. (Compl. ¶¶6-12). Therefore, unless Nguyen pleaded and can prove a waiver of the Community's immunity, the claims against the Community Defendants in their official capacity for monetary damages and declaratory relief must be dismissed.

B. The Community Did Not Waive Its Immunity for Official-Capacity Suits Against the Community Defendants

Nguyen "bear[s] the burden of proving that either Congress or [the Community] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685-86; *see also Smith v. Babbitt*, 875 F. Supp. 1353, 1359 (D. Minn. 1995) (This Court adheres to a "strong presumption in favor of tribal sovereign immunity"). Nguyen has not alleged that the Community waived its sovereign immunity with respect to any of the claims he brings against the Community Defendants.

Further, none of the federal laws relied on in the Complaint waive the Community's immunity. Section 1983 does not waive the Community's immunity. *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989); *Hester v. Redwood Cnty.*, 885 F.Supp.2d 934, 947-48 (D. Minn. 2012). ICRA does not waive the Community's sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). There is nothing in the SCA that waives tribal sovereign immunity. And there is no general act that waives tribal sovereign immunity, analogous to the Federal Tort Claims Act, that would permit Nguyen to bring his tort claims against the Community ***in federal court***.[4] Thus, Nguyen's claims against the Community Defendants in their official capacity must be dismissed.

C. Nguyen Fails to Plead a Viable Claim under *Ex Parte Young*

1. *Ex Parte Young* provides a limited exception to sovereign immunity for prospective, injunctive relief

The *Ex Parte Young* doctrine provides a narrow exception to the rule that government officials cannot be sued in their official capacity absent a waiver of sovereign immunity. Under the *Ex Parte Young* doctrine, tribal officials can be sued for acting outside the scope of their authority under federal law. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993). However, the exception "applies only to prospective relief, [and] does not permit judgments against [tribal] officers declaring that they violated federal law in the past . . .

[4] The Community has its own tort claims ordinance that waives sovereign immunity under certain circumstances for cases brought in Tribal Court.

." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf*, 506 U.S. 139, 146 (1993). To state a claim under *Ex Parte Young*, a party must show that "the sovereign did not have the power to make a law" that the official acted under because "then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit." *Prairie Island*, 991 F.2d at 460.

Nguyen requests two forms of prospective injunctive relief: (1) "a writ of habeas corpus to regain custody of A.J.N." under ICRA and (2) a "declaration vacating the Order of the SMSC Tribal Court holding A.J.N. as a Ward of the Court," which based on Nguyen's allegations, is a request that this Court enjoin the Tribal Court from continuing to exercise jurisdiction over A.N. as a ward of the Tribal Court. (Compl. ¶144 and at 46-47). These claims fail because the Community Defendants are powerless to effect such requests and because Nguyen has failed to exhaust his Tribal Court remedies.

2. Nguyen has not sued anyone who can vacate the Tribal Court order

As Nguyen alleges, the defendants in this action include one former Business Council Chairman,[5] the three current Business Council members, a former child welfare officer, a former director of the Department, and a former Tribal-Court-appointed GAL. (Compl. ¶¶4-12). None of them has the power to vacate a Tribal Court order. Nguyen's claims against them for injunctive relief should therefore be dismissed.

[5] Defendant Vig is no longer on the Business Council, as evidenced by him not appearing on the most-recent no-trespass notice attached to the Complaint. (Compl. Ex. B).

3. Nguyen has failed to exhaust his Tribal Court remedies

Nguyen challenges the Tribal Court's jurisdiction to determine that A.N. is a ward of the Tribal Court in the child welfare proceeding, (Compl. ¶144). But Nguyen has not litigated that claim in Tribal Court. In 1985, a unanimous Supreme Court determined that a tribal court, as "the forum whose jurisdiction is being challenged," must have "the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). The "federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning the appropriate relief is addressed." *Id.*; *see also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (affirming dismissal of a challenge to tribal court jurisdiction over a custody case for failure to exhaust). Because Nguyen has failed to exhaust his Tribal Court remedies, his claims for injunctive relief related to A.N.'s status as a ward of the Tribal Court or habeas relief under ICRA[6] must be dismissed. *Cf. Nguyen I*, 2018 WL 4623072, at *3-4 (D. Minn. Sept. 26, 2018).

D. Nguyen's Individual-Capacity Claims Should Also Be Dismissed on Immunity Grounds

1. Nguyen's claims against the Business Council should be dismissed

Nguyen's individual-capacity claims against current and former Business Council members should also be dismissed based on sovereign immunity because, if successful,

[6] As discussed in Section IV.D *infra*, Nguyen's entire ICRA claim should be dismissed for failure to exhaust.

they would interfere with tribal governance. The only allegations regarding the Business Council members are the successive sending of no-trespass notices. (Compl. ¶¶32-36). There are no allegations of action against Nguyen by former Chairman Vig after he left office, nor by Vice Chairman Miller prior to his assuming office.

To determine if sovereign immunity bars a claim, courts ask whether lawsuits brought against officers or employees of the tribe "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). "[C]ourts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clark*, 137 S.Ct. 1285, 1290 (2017). "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.*

"[T]he general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984). Thus, "[a] suit is against the sovereign if 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 Government from acting or to compel it to act." *Id.* at 102, n.11 (quotation omitted).

Nguyen's "individual capacity" claims against the Business Council members here are like the claims against tribal council members that were dismissed by the Ninth Circuit Court of Appeals in *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). In *Hardin*, the court determined that sovereign immunity barred the plaintiff

from suing tribal council members seeking to hold them individually liable for voting to eject the plaintiff from tribal land. *Id.* at 478. To hold otherwise, according to the court, would interfere with the tribe's internal governance. *Id.*; *see also Pistor v. Garcia*, 791 F.3d 1104, 1112-13 (9th Cir. 2015) ("*Hardin* was in reality an official capacity suit, barred by sovereign immunity because the alternative, to hold the defendants liable for their legislative functions would have attacked the very core of tribal sovereignty." (quotation omitted)).

Like the plaintiff in *Hardin*, Nguyen is suing the Business Council members based on their decision(s) to exclude him from the Community's reservation. (Compl. ¶¶158, 172, 195, 203). Nguyen's claims against the Business Council members rest on actions they took on behalf of the Community, exercising the Community's executive function, which Nguyen seeks to curb or restrain—through injunctive or monetary relief. Nguyen's claims must therefore be dismissed.

2. Nguyen's claims against defendants acting on the Department's behalf should be dismissed

Nguyen's individual-capacity claims against Foley and Martin should also be dismissed on immunity grounds. These Community Defendants, even under the "façade of a facially-pleaded individual-capacity lawsuit," fall within the tribe's sovereign immunity if the tribe is the "real party in interest." *Acres Bonusing, Inc. v. Marston*, 2020 WL 1877711, at *5-8 (N.D. Cal. April 15, 2020) (holding that tribal attorneys, judges, and tribal officials all shared the tribe's immunity as to individual-capacity claims). Nguyen's claims are based on Foley and Martin's actions in their roles as child welfare

officer (Foley) and director of the Department (Martin), in the context of a Tribal Court child welfare proceeding. (Compl. ¶¶10, 12). In those capacities, Foley and Martin exercised the core governmental function of protecting a Community member child, A.N. They were not acting on their own behalf or in their individual capacity; their actions "in essence were the tribe's own." *Genskow v. Prevost*, 825 Fed.Appx. 388, 391 (7th Cir. 2020) (holding that tribal police officers were immune from individual-capacity suits).

Nguyen seeks to restrain Foley and Martin's actions as Department officials—as well as actions taken by the Tribal Court—by requesting vacation of Tribal Court orders (including custody decrees), injunctive relief prohibiting the Tribal Court from exercising jurisdiction, and monetary damages. The injunctive relief (which, as already discussed, these defendants cannot provide) obviously would interfere with governmental functions, but imposing monetary penalties on tribal employees exercising core government functions would also have the effect of compelling them to act or restraining them from acting. *Pennhurst*,465 U.S. at 102, n.11. Nguyen is not bringing a garden variety tort claim, like a negligence claim based on a car accident where an individual-capacity claim may survive. All of his claims—whether based on statute or tort law—against Foley and Martin are intertwined with their investigation and prosecution of the child welfare proceeding involving A.N. Under Supreme Court precedent, Nguyen cannot bring claims that would interfere with tribal governance and functions under the guise of an individual-capacity suit. Thus, like the tribal actors in *Acres* and the tribal police in *Genskow*, Foley and Martin are immune from suit. *Acres*, 2020 WL 1877711, at *6-7; *Genskow*, 825 Fed.Appx. at 391.

II. THE COMMUNITY HAS ABSOLUTE AUTHORITY TO EXCLUDE NONMEMBERS FROM THE RESERVATION

Even if Nguyen's claims against the Business Council members could survive sovereign immunity, his claims based on the no-trespass notices should be dismissed for the additional reason that tribes have "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v. Reina*, 495 U.S. 676, 696 (1990), *superseded on other grounds by congressional statute*, 25 U.S.C. § 1301. This power allows tribes to "exclude nonmembers entirely or to condition their presence on the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands"); *Atty's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (internal citation omitted) ("A tribe's 'traditional and undisputed power to exclude persons' from tribal land . . . gives it the power to set conditions on entry to that land."). Thus, Nguyen states no claim related to the no-trespass notices.

III. NGUYEN FAILS TO STATE A CLAIM UNDER 42 U.S.C. § 1983

A. The Community Defendants Named in Their Official Capacities Are Not "Persons" under Section 1983

Section 1983 permits a plaintiff to sue a "person" acting under the color of state law who has deprived them of rights conferred by federal laws, such as the Constitution. 42 U.S.C. § 1983. (*See also* Compl. ¶134).

Courts treat claims against government officials and employees in their official capacity as claims against the government/sovereign itself. *See McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 n.2 (1997) ("A suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent." (quotation omitted)). And a sovereign, such as the Community, is not a "person" under Section 1983. *See Vt. Agency of Nat. Res. v. U.S. ex. rel. Stevens*, 529 U.S. 765, 779 (2000) (noting longstanding interpretive presumption that "person" does not include a sovereign); *Confederated Tribes of Colville Reservation v. Anderson*, 903 F.Supp.2d 1187, 1195 (E.D. Wash. 2011) (holding tribes are not "persons" under Section 1983). Therefore, Nguyen's claims against the defendants ***in their official capacity*** must be dismissed because they are not "persons" under Section 1983.

B. The Community Defendants Were Acting under Tribal Law, Not State Law

The entirety of Nguyen's Section 1983 claims should be dismissed because none of the defendants was acting under state law. To state a Section 1983 claim, the defendants had to be acting under the "color of state law." 42 U.S.C. § 1983. The state action requirement in a Section 1983 claim is satisfied when the party charged with an alleged constitutional deprivation "may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The defendant cannot have been acting under a different government's laws, such as tribal or federal law. *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) ("This court has since held … that actions under section 1983 cannot be maintained in federal court for persons alleging a

deprivation of constitutional rights under color of tribal law."); *Coleman v. Duluth Police*, 2009 WL 921145, at *23 (D. Minn. Mar. 31, 2009) ("[N]o action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law.").

Nguyen makes no plausible allegation that the Community Defendants were acting under state law. Nguyen alleges that all of the Community Defendants were tribal employees or officials performing their duties under tribal law after being hired by the Community (the two Department employees) or elected by the Community under tribal law (the Business Council members).[7] (Compl. ¶¶6-12, 47, 80, 126, 168-172). ***None*** of their actions was taken based on authority given to them by the state of Minnesota and none of them can be said to be state actors.

Nguyen vaguely alleges that the "state actor" requirement is satisfied "due to the federal, state and local policy of transferring custody cases to the SMSC Tribal Court[.]" (Compl. ¶¶137, 150). Nguyen's assertion has multiple fatal flaws. First, Nguyen does not allege a transfer of a child custody case to the Tribal Court. Nguyen's allegations against defendants Foley and Martin (and the GAL) pertain to a 2014-2015 child welfare proceeding that was, he alleges, initiated by Department employee Foley. (Compl. ¶47). Second, the policy, which presumably refers to the Minnesota Department of Human

[7] The separately represented GAL was appointed by the Tribal Court.

Services Indian Child Welfare Manual (the "Manual"),[8] does not apply to the Department—much less make them state actors. The Manual applies to local "county social service agencies and private child-placing agencies," not the Community or its agencies. Manual at 5; *see also Watso v. Lourey*, 929 F.3d 1024, 1026 (8th Cir. 2019). Third, Nguyen's allegation cannot apply to the Business Council, which issued the no-trespass notices independently of any custody case.

Because the Community Defendants were not acting under color of state law, Nguyen's Section 1983 claims must be dismissed, whether cast as "substantive" or "procedural."

C. Nguyen Cannot Maintain Claims Under the Federal Constitution for the Alleged Actions of the Community Defendants

An additional defect in Nguyen's Section 1983 claims is that they must be based on alleged violations of the Constitution or other federal rights. 42 U.S.C. § 1983. Nguyen alleges that he is entitled to relief based on violations of his substantive and procedural due process rights under the Fifth and Fourteenth Amendments. (Compl. ¶¶138-141, 149-158). However, the Constitution and its amendments do not apply to tribes exercising governmental powers. *See United States v. Bryant*, 136 S.Ct. 1954, 1962 (2016); *Talton v. Mayes*, 163 U.S. 376 (1896).

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as

[8] The Manual is available at https://www.dhs.state.mn.us/main/groups/county_access/documents/pub/dhs16_157701.pdf.

limitations on federal or state authority," *Santa Clara Pueblo*, 436 U.S. at 56, including the right to substantive and procedural due process in the Fourteenth Amendment. *Hester*, 885 F.Supp.2d at 939 ("Because Indian tribes possess a sovereignty predating the Framing of the U.S. Constitution, and because Indian tribes were not parties to the U.S. Constitution, the Bill of Rights and other amendments to the U.S. Constitution do not apply to Indian tribes."). Therefore, the Community Defendants are not bound by the federal law that Nguyen alleges as the basis for his Section 1983 claims, and those claims must be dismissed.[9] In particular, Foley was not, as a Department employee, bound by the Fifth or Fourteenth Amendments in undertaking her investigation in 2014-2015 of A.J.N.'s welfare (see Compl. ¶¶153-156, alleging only action by Foley with specificity), nor were the Business Council members in issuing no-trespass orders to Nguyen (see *id*. ¶158).

* * *

Given the multiple fundamental flaws with Nguyen's Section 1983 claims, brought as part of an attempt to collaterally attack Tribal Court orders, the Community

[9] In his "substantive" Section 1983 claim, Nguyen requests, "an injunction requiring the SMSC Tribal Court to relinquish exclusive jurisdiction over the child custody matter of A.J.N., as the SMSC Tribal Court proceedings involving A.J.N. lack subject matter jurisdiction until the federal requirements of the Constitution and ICWA are met." (Compl. ¶144). This allegation does not state a Section 1983 claim against the Community Defendants, who are not the Tribal Court. Further, the naked assertion of lack of jurisdiction is merely a legal conclusion which the Court is not required to accept as true. Indeed, state courts in two states have deferred to the Tribal Court's jurisdiction over the Nguyen-Gustafson divorce proceeding, rulings Nguyen has not appealed. (*See* Compl. ¶¶110-111).

Defendants request that the Court find that the claims are frivolous and without foundation.[10]

IV. NGUYEN FAILS TO STATE A CLAIM UNDER ICRA

Nguyen asserts an ICRA claim for money damages (Compl. ¶¶173-174) and declaratory relief (*id.* at 46) against the Community Defendants based on (1) Foley's alleged receipt and use of emails of his from Gustafson in the child welfare proceeding involving A.N., as an unlawful search and seizure and an equal protection/due process violation (*id.*, ¶¶168-169), and (2) the Business Council's issuance of the no-trespass notices, as an alleged equal protection/due process violation (*id.*, ¶172). Nguyen cannot pursue such claims under ICRA.

Nguyen also requests a writ of habeas corpus to regain custody of A.N. (*Id.* at 46). He fails to meet the requirements under ICRA for such relief.

A. ICRA Does Not Authorize Suits for Monetary Damages, Declaratory Relief, or Injunctive Relief

ICRA "does not [expressly or] impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Santa Clara Pueblo*, 436 U.S. at 51, 72. Nor does it authorize actions for monetary relief. *U.S. ex rel. Kishell v. Turtle Mountain Housing Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("[A] federal court has no jurisdiction to enjoin violations of the Act or to award damages [under ICRA]."). Thus,

[10] Attorneys' fees may be assessed under Section 1983 if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

Nguyen's claims for declaratory, injunctive, or monetary relief under ICRA must be dismissed.

B. Nguyen Fails to State a Habeas Claim under ICRA

The only form of federal relief available under ICRA is a writ of habeas corpus. *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985). A petition for a writ of "habeas corpus entitles [a] prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). Nguyen's request for a writ to change a custody order in a tribal court divorce proceeding is nothing like a petition for a writ requiring a jailer to justify detention of a prisoner. As such, Nguyen cannot fulfill the "detention" requirement to bring a habeas claim under ICRA.

To bring a habeas petition under ICRA, a plaintiff must be "detain[ed] by order of an Indian tribe" in a manner contemplated by 25 U.S.C. § 1303. *Moore v. Nelson*, 270 F.3d 789, 790 (9th Cir. 2001). And although Section 1303 uses the word "detention" and not "custody," "[t]here is no reason to conclude that the requirement of 'detention' set forth in Indian Civil Rights Act § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Id.* at 791.

"Detention" requires a significant restraint on liberty, actual or potential. *Harvey v. State of N.D.*, 526 F.2d 840, 841 (8th Cir. 1975); *see Moore*, 270 F.3d at 790. Nguyen has not pleaded that he was detained or is threatened with detention. Having brought this claim on his own behalf without alleging a detention, it must be dismissed.

Instead of alleging his own detention, Nguyen appears to imply that the Tribal Court's issuance of an order regarding the custody of A.N., which occurred in the divorce proceeding and not the child welfare proceeding, satisfies the detention element for a habeas petition. The Supreme Court has held that habeas petitions are not available to collaterally attack the legality of a child custody determination because such decrees do not satisfy the "in custody" requirement. *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 510 (1982). The petitioner in *Lehman* argued that her children were involuntarily "in custody" of foster parents due to state child custody proceedings. *Id.* The Supreme Court disagreed, reasoning that the children were in "custody" of their foster parents "in essentially the same way, and to the same extent, other children are in custody of their natural or adoptive parents," and their situation "differs little from the situation of other children in the public generally." *Id.* at 510-11.

Lehman's analysis applies with equal or greater force here. Like the children in *Lehman*, A.N. is not in jail or detained. In fact, A.N. is not even with foster parents. A.N.'s mother has custody of her—which makes Nguyen's argument more strained than Lehman's. In truth, Nguyen, like Lehman, "simply seeks to relitigate, through federal habeas, not any liberty interest of [his children], but the interest in [his] own parental rights." *Id.* at 511. Parties cannot collaterally attack tribal court custody orders under the guise of a subsequent habeas petition.

Recognizing *Lehman*'s applicability to ICRA, federal courts have held that persons are "not entitled to habeas corpus relief in federal court to test the validity of a custody decree of an Indian tribal court" because such proceedings do not involve a

"detention." *Azure-Lone Fight v. Cain*, 317 F.Supp.2d 1148, 1151 (D.N.D. 2004); *Sandman v. Dakota*, 816 F.Supp. 448, 451 (W.D. Mich. 1992) ("[A] writ of habeas corpus is not available to test the validity of the child custody decree issued by the tribal court."), *aff'd*, 7 F.3d 234 (6th Cir. 1993); *Weatherwax v. Fairbanks*, 619 F.Supp. 294, 296 (D. Mont. 1985) ("A child custody ruling is not sufficient to trigger federal habeas corpus relief since the custody involved is not the kind which has traditionally prompted federal courts to assert their jurisdiction."). Because Nguyen's claim for habeas relief does not meet the "detention" requirement of Section 1303, it must be dismissed.

Further, Nguyen has not sued the "jailer," or a party that could enforce a successful writ of habeas corpus. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (holding that the proper respondent for a federal habeas petition is the petitioner's custodian). None of the defendants is alleged to have issued any custody orders regarding A.N., to have the authority to do so, or to have actual custody of A.N. Consequently, because they have no power to grant the relief that Nguyen seeks, his ICRA claim must be dismissed independently of his failure to plead the detention of anyone.

C. Nguyen Fails to Allege an ICRA Violation Related to the Custody Order for A.N. that He Attacks

Nguyen's "habeas petition" under ICRA seeks custody of A.N. based on alleged violations of ICRA. But the only custody order for A.N. currently in effect is from the divorce proceeding. *Supra* at 7-8. Although Nguyen includes allegations in the Complaint about Gustafson's fitness as a parent as well as some of the background of the litigation

between A.N.'s parents, ***none*** of the alleged illegal or wrongful acts by the Community Defendants in the Complaint arise out of the divorce proceeding. (*See* Compl. ¶¶32-41, 118-124 (allegations regarding no-trespass notices), ¶¶48-82 (allegations regarding Community Defendants' and the GAL's investigations and reports in the child welfare proceeding)). Nguyen's failure to allege any ICRA violations by the Community Defendants in connection with the proceeding in which a custody order was actually issued further requires dismissal.

D. Nguyen Failed to Exhaust Tribal Remedies for His ICRA Claims

"[T]ribal remedies must ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act[.]" *Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 846 (8th Cir. 1977); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206-1207 (10th Cir. 2012) (same). Nguyen does not allege that he has brought his ICRA claim in Tribal Court (and he has not). Nor does he allege any exception to the general rule that a party must exhaust their tribal court remedies. *See Silversmith*, 699 F.3d at 1207. Instead, he has impermissibly skipped right to filing a federal action. Nguyen's failure to exhaust his tribal court remedies requires dismissal of his ICRA claim.

E. Regardless, Nguyen Fails to Allege an ICRA Claim

Nguyen's ICRA claim is based on (1) Foley's (and the GAL's) "unreasonable search and seizure" related to Gustafson's reading of his e-mails and forwarding them to Foley in 2015; (2) Foley's (and the GAL's) denial of equal protection to Nguyen based

on the same conduct; and (3) the Business Council's no-trespass notices. (Compl. ¶¶168-172).

The first set of allegations fails to state a claim because the protection against unreasonable searches and seizures does not apply to a voluntary search effected by a private party like Gustafson unless Gustafson acted as an agent for the government—which Nguyen does not and cannot allege. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 604 (1989).

The second and third sets of allegations fail to state a claim because Nguyen has failed to plead, or plead facts supporting the inference, that the Community Defendants "intentionally discriminated against [him] because of membership in a protected class" or that he was "treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *See Nolan v. Thompson*, 521 F.3d 983, 989 (8th Cir. 2008) (Section 1983 claim based on alleged equal protection clause violation); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (same). Instead, he just restates the facts he alleges support his unreasonable search and seizure claim and the bare legal conclusion that he was denied equal protection in connection with that supposed search and seizure, and by the Business Council's no-trespass notices.

V. NGUYEN FAILS TO STATE A CLAIM UNDER THE STORED COMMUNICATIONS ACT

A. The Community Defendants Cannot Be Held Liable for Aiding and Abetting or Conspiring to Violate the SCA

Nguyen alleges that "***Ms. Gustafson***, illegally obtained private, confidential and privileged communications between Mr. Nguyen and his attorney." (Compl. ¶52

(emphasis added)). He attempts to hold Foley[11] liable "in her official capacity" by alleging that, "she intentionally accessed Plaintiff's communications without authorization while in electronic storage," in conducting her child-welfare investigation, and that she "had actual knowledge of, and benefited from, [Gustafson's] practice, as it was her intention to benefit Ms. Gustafson's custody case." (Compl. ¶180).

The operative language of 18 U.S.C. § 2701(a)(1), which Nguyen accuses Foley of violating, see Compl. ¶180, provides that whoever "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished[.]" A person aggrieved by an SCA violation can bring a civil action against the individual who accessed the communication without authorization. 18 U.S.C. § 2707.

Nguyen's allegations about Foley receiving communications taken by another (Gustafson) amount to a claim, at best, that Foley aided and abetted or conspired to violate the SCA. But, because neither aiding and abetting nor conspiracy claims are permitted under the SCA, Nguyen's claims must be dismissed. *Vista Marketing, LLC v. Burkett*, 999 F.Supp.2d 1294, 1296 (M.D. Fla. 2014) ("Park argues that the SCA does not cover secondary liability, i.e., conspiracy claims under the SCA. The Court agrees

[11] Nguyen names only Foley in his allegations pertaining to the SCA, (*see* Compl. ¶¶175-184), though he asserts injuries, "[a]s a result of Defendants' conduct," (*id.*, ¶182). Nguyen cannot simply lump "all defendants together" without "sufficiently alleg[ing] who did what to whom." *Tatone v. SunTrust Mortg., Inc.*, 857 F.Supp.2d 821, 831 (D. Minn. 2012).

because the relevant statutory provisions do not include any aiding-and-abetting language."); *Jones v. Glob. Info. Grp., Inc.*, 2009 WL 799745, at *3 (W.D. Ky. Mar. 25, 2009) ("[S]ince Congress did not criminalize the actions of aiding and abetting violations of 18 U.S.C. § 2701 as part of that statute, and § 2707 authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors, this court will not infer secondary civil liability . . . and will dismiss plaintiff's [SCA claim]."); Clifford S. Fishman & Anne T. McKenna, *Wiretapping & Eavesdropping* § 7:30.10 (2019).

B. Nguyen's SCA Claim Is Time Barred

Suit brought under the SCA must be brought "no later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation." 18 U.S.C. § 2707(f). Nguyen alleges that Gustafson took e-mails without his consent on January 8, 2015, January 9, 2015, and January 16, 2015 and passed them onto Foley. (Compl. ¶¶53, 56, 58, 62, 90). He alleges that Foley used that information during her investigation to write her child-welfare reports. (Compl. ¶¶63, 85; Compl. Ex. O). Given Nguyen's allegation that Foley used the information to write her reports, he discovered or had reason to discover the violation regarding the use of his e-mails no later than when the reports were issued in 2015. (Compl. Ex. O).

To the extent Nguyen seeks to dispute that he knew about the conduct underlying his SCA claim until sometime within the last two years, such a claim is belied by the fact that he filed the ethics complaint against the attorneys in 2018 based on the same conduct. *Supra* at 7.

Because Nguyen discovered or reasonably should have discovered the alleged violations of the SCA more than two years before filing suit, his claim must be dismissed.

VI. THE COURT SHOULD DISMISS THE REMAINING STATE-LAW TORT CLAIMS FOR LACK OF AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION OR FAILURE TO EXHAUST TRIBAL REMEDIES

The Court may decline to exercise supplemental jurisdiction over state law claims when it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c). Because Nguyen's federal claims must be dismissed, the Court should decline to exercise jurisdiction over the remaining state-law tort claims of abuse of process and IIED, for which Nguyen identifies no basis for federal jurisdiction (see Compl. ¶13), and dismiss the case entirely.

Further, Nguyen's tort claims against the Community Defendants should be dismissed for failure to exhaust tribal remedies. Nguyen's claims for abuse of process and IIED are based on alleged wrongdoings in connection with tribal governance, tribal governmental actions, and Tribal Court processes. "It is well-established that principles of comity require that tribal-court remedies *must* be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land." *Malaterre v. Amerind Risk Management*, 373 F.Supp.2d 980, 983 (D. N.D. 2005), *aff'd*, 633 F.3d 680 (8th Cir. 2011). Thus, the Tribal Court would have to hear these claims in the first instance.

If the Court were to address the tort claims, it should dismiss them for the reasons given below.

VII. NGUYEN FAILS TO STATE A CLAIM FOR ABUSE OF PROCESS

A. Nguyen's Claims for Abuse of Process Against Foley and Martin Are Time Barred

Nguyen's claim for abuse of process is time barred based on the allegations in the Complaint. The statute of limitations for an abuse of process claim is two years. Minn. Stat. § 541.07(1). Under Minnesota law, an abuse of process claim accrues, and the statute of limitations begins to run, when "some damage" has occurred as a result of the alleged abuse of process. *See Hansen v. U.S. Bank N.A.*, 934 N.W.2d 319, 327 (Minn. 2019). That damage, which refers to "any compensable damage," includes damage "created either by financial liability or the loss of a legal right." *Id.* at 327-28.

Nguyen's claims against Foley and Martin (and the separately represented GAL) for abuse of process are based on (1) an investigation into Nguyen and Gustafson in the child welfare proceeding at the end of 2014 and beginning of 2015, (2) the reports from that investigation that were submitted to the Tribal Court in January 2015, and (3) testimony at a Tribal Court hearing in January 2015. (Compl. ¶¶55-64, 74, 83-85). Nguyen alleges that those defendants "used false and biased information, and omitted information that did not suit their purposes, to make recommendations that A.J.N. should remain a ward of the SMSC Tribal [C]ourt indefinitely." (Compl. ¶193). The Tribal Court ordered that A.N. become a ward of the Tribal Court on January 23, 2015. (Compl. ¶85 ("Judge John E. Jacobson ordered that A.J.N. shall stay a ward of the Tribal Court." (citing hearing transcript))). Nguyen claims that ruling "deprived [him] of his fundamental due process rights." (Compl. ¶¶138, 140, 193).

Thus, Nguyen alleges suffering "some damage" when A.N. was made a ward of the Tribal Court on January 23, 2015 (the legal right that Nguyen claims he lost)—***more than six years before the Complaint here was filed***. Because the statute of limitations on Nguyen's abuse-of-process claim related to the child welfare proceeding expired more than four years ago, that claim must be dismissed.

B. Nguyen Fails to State a Claim for Abuse of Process

There are two elements to a claim for abuse of process: "(a) the existence of an ulterior purpose, and (b) the act of using the process to accomplish a result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not." *Pow-Bel Constr. Corp. v. Gondek*, 192 N.W.2d 812, 814 (Minn. 1971). The test is "whether the process was used to accomplish an unlawful end for which it was not designed or intended." *Kittler & Hedelson v. Sheehan Props., Inc.*, 203 N.W.2d 835, 840 (Minn. 1973).

Nguyen alleges that Foley's and Martin's (and the GAL's) work in connection with the child welfare proceeding was completed for the improper purpose of "sway[ing] jurisdiction of Plaintiff and Ms. Gustafson's dissolution proceeding pending in Scott County," (Compl. ¶191), because Minnesota courts "historically yield[] to Tribal Court jurisdiction in the dissolution matter if there is [a] child welfare matter open." (Compl. ¶¶192-93). Fatal flaws with Nguyen's allegations doom his claim.

First, Nguyen alleges that these three defendants were trying to sway jurisdiction in the Scott County divorce proceeding he initiated in 2014. (Compl. ¶31). But he pleads no jurisdictional challenge in the 2014 divorce proceeding out of Scott County or the

2014 Tribal Court divorce proceeding initiated by Gustafson (*id.*, ¶30). And he fails to plead that either court made any decisions in those divorce proceedings that ultimately harmed him, as both were dismissed after the parents reconciled.[12]

Second, in connection with the child welfare proceeding, Foley and Martin worked on behalf of the Department, as alleged, to investigate the wellbeing of A.N. and determine what was best for her. (Compl. ¶49).[13] Alholinna was the court-appointed guardian ad litem in the same proceeding. They conducted their investigations, issued their reports, and testified consistent with their investigations, as they were supposed to do. Nguyen does not plead that he objected to the accuracy or "bias" of their work at the time and there is no indication of that in the transcripts he attaches to the Complaint. The Tribal Court then used the work that Foley, Martin, and the GAL completed to determine what was best for A.N. (Compl. ¶¶85-88). Their work was thus used to accomplish the lawful end for which it was designed.

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[12] It would not be "plausible on its face," *Iqbal*, 556 U.S. at 678, for Nguyen to allege that Foley, Martin, and the GAL conducted their investigations, issued their reports, and gave their testimony in the child welfare proceeding involving A.N. that ***ran from 2014-2015*** in a biased manner to sway jurisdiction of the later dissolution proceedings between Nguyen and Gustafson that ***started in 2017***—the suits in which there actually were jurisdictional disputes and decisions regarding the parents' custody rights. Nguyen does not allege, and it is not possible, that Foley, Martin, or the GAL would somehow know that Nguyen and Gustafson would be involved in a jurisdictional dispute in cases that were not started until more than two years after they conducted their investigations, issued their reports, gave testimony, and the child welfare proceeding was closed.

[13] Nguyen errantly refers to the investigation as part of the "dissolution of marriage," but all of the alleged actions committed by Foley and Martin (and the GAL) pertain to the child welfare proceeding, not any of the marriage dissolution actions.

Because Nguyen's abuse-of-process claims against Foley and Martin (and the GAL) are meritless, they should be dismissed.

C. Nguyen Cannot Bring a Claim for Abuse of Process Based on the Community's No-Trespass Notices

To plead a claim for abuse of process, a plaintiff must plead that there was "process" that was abused. *Fredin v. Miller*, 2020 WL 3077708, at *8 (D. Minn. June 10, 2020). "Process" under Minnesota law is defined as "proceedings in any action or prosecution; a summons or writ, esp. to appear or respond in court." *Id.* Nguyen's claims against the current and former Business Council members are based on no-trespass notices. (Compl. ¶195 and Ex. B). The notices are letters that were sent from the Business Council to Nguyen notifying him that he was not permitted to be on the Community's reservation, with certain exceptions. (*Id.*, Ex. B ("NOTICE OF NO TRESPASS")). They were not issued in the context of any court proceeding. Therefore, a no-trespass notice is not "process," and Nguyen's claims against the Business Council members for abuse of process must be dismissed.

VIII. NGUYEN FAILS TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Nguyen alleges two types of IIED claims. The first is against Foley (and the GAL) based on Foley allegedly considering e-mails that Gustafson took from Nguyen without his permission. (Compl. ¶¶200-202). The second is against the current and former Business Council members based on the repeated no trespass orders." (Compl. ¶¶203). The former is barred by the statute of limitations and both fail to meet the high bar for "extreme and outrageous" conduct required to state an IIED claim.

A. Nguyen's IIED Claim Against Foley is Time Barred

The statute of limitations for this claim is two years. Minn. Stat. § 541.07(1); *Christenson v. Argonaut Ins. Cos.*, 380 N.W.2d 515, 518 (Minn. App. 1986). Nguyen's IIED claim against Foley (and the GAL), as best the Community Defendants can tell, is based on Gustafson's taking of Nguyen's e-mails and her forwarding them on to Foley. (Compl. ¶¶200-202). As discussed above, Nguyen knew about those actions and suffered some alleged harm from them in 2015. (Compl. ¶202); *see also supra* Section V.B. As such, Nguyen's IIED claim related to the e-mails is time barred.

B. The Alleged Conduct of the Community Defendants Was Not Extreme and Outrageous as a Matter of Law

To succeed in an IIED claim, a plaintiff must prove that a defendant intentionally engaged in conduct that was extreme and outrageous. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). "Conduct is extreme and outrageous when it is so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 865 (Minn. 2003) (quotation omitted). The tort is "sharply limited to cases involving particularly egregious facts[.]" *Id.* at 864.

Nguyen's IIED claims must be dismissed because the Community Defendants' conduct, as alleged, does not rise to the level of "extreme and outrageous" as a matter of law. Nguyen alleges that ***Gustafson's*** taking of his e-mails and forwarding them to Foley, and Foley's subsequent consideration of the e-mails in her work on the child welfare proceeding, constitutes extreme and outrageous conduct. (Compl. ¶¶201-202). The

Community Defendants submit that it was not "utterly intolerable to the civilized community" for Foley, an employee of the Department charged with looking out for the best interests of the Community's member children, to consider e-mails that one parent of a Community member took from another parent and forwarded to her.

Nguyen's IIED claims against current and former Business Council members (added in the Amended Complaint, ¶203) are even more strained. As discussed above, the Business Council, acting on behalf of the Community, had absolute authority to exclude individuals from the Community's reservation. *Supra* Section II. As a matter of law, it cannot be extreme and outrageous for governmental representatives to take action they are clearly permitted to do.

Because the conduct that Nguyen bases his IIED claims on was not extreme and outrageous, they must be dismissed.

CONCLUSION

The Court should dismiss Nguyen's Complaint.

Dated: June 2, 2021

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