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President of the Round Valley Indian Tribal Council*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FRANK PACINO,

Plaintiff,

v.

LUIS OLIVER, et al.,

Defendants.

Case No.: 3:18-cv-06786-RS

**DEFENDANT RUSS' REPLY TO
PLAINTIFF'S OPPOSITION TO
DEFENDANT RUSS' MOTION TO
DISMISS**

DATE: April 8, 2021

TIME: 1:30 p.m.

CTRM: 3

HON. RICHARD SEEBORG

I. INTRODUCTION

Plaintiff's Opposition underscores that this dispute is an internal governance matter that properly lies with the Round Valley Tribal Council. Because Plaintiff cannot establish the Court has subject matter jurisdiction over the claims asserted in Plaintiff's Second Amended Complaint, and Plaintiff failed to respond to Defendant Russ' Rule 12(b)(6) failure to state a claim argument, the Second Amended Complaint should be dismissed with prejudice.

II. ARGUMENTS

A. Plaintiff's Opposition does not establish the Court has subject matter jurisdiction over Plaintiff's claims.

Plaintiff argues that the doctrine of *Ex parte Young* gives this Court jurisdiction over his claims against Defendant Russ. That argument is wrong for two reasons. First, President Russ does not have "the requisite enforcement connection to" the Resolution granting life tenure to Ms. Oliver, and therefore the *Ex Parte Young*, 209 U.S. 123 (1908) doctrine does not apply. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (Tribal sovereign immunity shielded Tribal Chairman from railroad's suit where Tribal Chairman was responsible for exercising executive authority over the tribe, but railroad had not alleged that Tribal Chairman was in any way responsible for enforcing the tax at issue.). Second, Plaintiff's claims seek relief that would operate against the Round Valley Indian Tribes, who have immunity from unconsented suit. Plaintiff admits he does not seek relief against President Russ. *See* ECF No. 77 at 2. Rather, he has asked the Court to invalidate the Resolution. Properly understood, Plaintiff seeks relief against the Round Valley Indian Tribes and the Tribal Council. Because a lawsuit against President Russ is in effect a lawsuit against the Round Valley Indian Tribes, Plaintiff's claims are "barred by tribal sovereign immunity." *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015). The Tribes' immunity requires dismissal.

1 Plaintiff also argues that the Court has subject matter jurisdiction over Plaintiff's Second
2 Amended Complaint because the Round Valley Indian Tribes inserted themselves in the civil
3 dispute between the Plaintiff and Defendant Sanchez Freeman Oliver, and had the Tribes not
4 "wrongfully interfered," Plaintiff would have prevailed in his "original action." ECF No. 77 at
5 3. The likelihood of prevailing in a separate action has nothing to do with the question of this
6 Court's subject matter jurisdiction. Even if it were relevant, Plaintiff's arguments regarding the
7 likelihood of prevailing on his claims are speculative and not supported by facts. At the heart of
8 Plaintiff's Second Amended Complaint are internal tribal affairs and self-governance matters,
9 i.e., the Round Valley Indian Tribes' and Tribal Council's authority over lands and persons
10 within the boundaries of the Round Valley Indian Reservation. Intervention in such matters
11 would require the Court to interpret the Tribes' Constitution and tribal law and would
12 impermissibly infringe on the Round Valley Indian Tribes' tribal sovereignty. Because
13 Plaintiff's claims implicate internal, self-governance matters outside the jurisdiction of the Court,
14 the Second Amended Complaint should be dismissed with prejudice.
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17 Last, Plaintiff argues that he was not obligated to exhaust his tribal court remedies before
18 filing this lawsuit because of alleged bias by the Tribal Court. ECF No. 77 at 4-7. However,
19 Plaintiff has failed to demonstrate that he pursued tribal remedies that the Tribal Council itself
20 could have provided. ECF No. 71 at 9-10. Plaintiff alleges that he attempted to have a private
21 conversation with then-Secretary of the Tribal Council, Lewis Whipple, who appropriately
22 confirmed he could not informally and unilaterally address the issue outside the Tribal Council.
23 Further, Plaintiff alleges he attempted to enlist the assistance of the then-Personnel Director to
24 speak with the Tribal Council. ECF No. 77 at 4-5. Plaintiff failed to follow procedures the
25 Tribal Council has in place for members to bring matters before it. The Tribal Council has
26 adopted an Agenda Item Request form that triggers procedures for tribal members to raise
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1 matters before the Tribal Council and on the Tribal Council agenda.¹ Plaintiff has failed to
2 allege any facts to demonstrate an effort to use the formal procedures for tribal members to raise
3 matters before the Tribal Council.

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5 With regards to tribal court remedies, Plaintiff mistakenly argues that the Tribal Court of
6 Appeals issued a decision in this matter, and therefore he could not appeal the decision. ECF
7 No. 77 at 5,7-8. Plaintiff filed his complaint in the Round Valley Indian Tribes Tribal Court, not
8 the Tribal Court of Appeals. ECF No. 27-1 at 19. Tribal court remedies are not exhausted until
9 all available avenues of appeal are also exhausted. Plaintiff's failure to appeal the Tribal Court's
10 decision to the Tribal Court of Appeals is fatal to his exhaustion argument.

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12 Plaintiff's remaining arguments regarding exception from exhausting his tribal remedies
13 are similarly flawed. Plaintiff argues that he was not required to exhaust his tribal remedies
14 because of alleged bias by the Tribal Court. Plaintiff alleges bias because similar cases before
15 the Tribal Court have reached a different result. However, the facts, law and parties determine
16 the outcome of each case. Even if the Tribal Court were to reach a different ruling in another
17 case, with different facts and parties, involving an allotment on the Reservation, that alone does
18 not establish bias by the Tribal Court towards the Plaintiff. Further, Plaintiff alleges bias and
19 harassment by Tribal Court staff, but he fails to support such serious allegations with a shred of
20 evidence. "In considering a motion to dismiss for failure of jurisdiction, the district court may
21 not deem [tribal] remedies futile if the plaintiff's allegations of bias are purely speculative."
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27 ¹ President Russ respectfully requests that the Court take judicial notice of the Round Valley
28 Indian Tribes' Agenda Item Request Form. *See* President Russ' Request for Judicial Notice
(March 25, 2021); *see also* Rule 201 of the Federal Rules of Evidence.

1 *Anderson v. Babbitt*, 230 F.3d 1158, 1164 (9th Cir. 2000) (internal quotations omitted). Having
 2 failed to pursue available tribal remedies, Plaintiff cannot now invoke the jurisdiction of this
 3 Court.

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 5 **B. Plaintiff failed to oppose Defendant Russ’ Rule 12(b)(6) failure to state a
 6 claim argument and therefore waives his opposition to that issue.**

7 President Russ included two arguments in his motion to dismiss, with prejudice,
 8 Plaintiff’s Seconded Amended Complaint: (1) under Federal Rule of Civil Procedure 12(b)(1),
 9 the Court lacks subject-matter jurisdiction; and (2) under Federal Rule of Civil Procedure
 10 12(b)(6), Plaintiff has failed to state a claim upon which relief can be granted against President
 11 Russ. Plaintiff’s failure to respond to Defendant Russ’ 12(b)(6) motion cannot be excused by his
 12 *pro se* status. “Failure to oppose constitutes a waiver or abandonment of the issue.” *Columbia*
 13 *Sussex Mgmt., LLC v. City of Santa Monica*, 482 F. Supp. 3d 1002, 1016 (C.D. Cal. 2020).
 14 Plaintiff has waived any opposition he may have against Defendant Russ’ failure to state a claim
 15 argument, so the Second Amended Complaint should be dismissed with prejudice.
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17 **C. Plaintiff’s Non-Opposition to the US’ Motion to Dismiss may establish an
 18 additional basis for dismissing Plaintiff’s Second Amended Complaint.**

19 In light of the United States’ Motion to Dismiss, ECF No. 73, and Plaintiff’s notice
 20 confirming he does not oppose the United States’ Motion to Dismiss, ECF No. 76, the Court may
 21 have yet another basis for dismissal. If the Court grants the United States’ motion and the United
 22 States is dismissed as a party, it would be President Russ’ position that the United States is a
 23 necessary and indispensable party within the meaning of Federal Rule of Civil Procedure 19.
 24 That is an argument Russ would make relying on Federal Rule of Civil Procedure 19(b) and the
 25 United States’ status as trustee and holder of legal title of the allotment. *See* 25 U.S.C.A. § 345
 26 (“the parties [to the action] shall be the claimant as plaintiff and the United States as party
 27 defendant”); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907) (confirming suits authorized to be
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1 brought in the circuit courts of the United States respecting allotments of Indian lands pursuant
2 to § 345 expressly require “the parties thereto shall be the claimant as plaintiff and the United
3 States as party defendant.”). If the Court grants the United States’ motion to dismiss, Defendant
4 Russ intends to file a motion to dismiss on Rule 19 indispensable party grounds.
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6 **III. CONCLUSION**

7 For the reasons set forth above, and in Defendant Russ’ motion and accompanying
8 papers, Defendant Russ respectfully requests this Court to grant the motion to dismiss.
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10 DATED: March 25, 2021

Respectfully submitted,

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12 By: /s/ Erica Costa

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14 *Attorneys for Defendant James Russ,*
15 *President of the Round Valley Indian*
16 *Tribal Council*
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