

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE DIVISION

O'NEIL J. DARDEN, JR.

CIVIL ACTION NO. 6:22-cv-00404 SEC P

VS.

JUDGE ROBERT R. SUMMERHAYS

ROBERT C. VINES, et al.

MAGISTRATE JUDGE KATHLEEN  
KAY

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS APRIL WYATT,  
MELISSA DARDEN, JOHN PAUL DARDEN, JACOB DARDEN, TOBY DARDEN, AND  
JACQUELINE JUNCA'S MOTION TO DISMISS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND .....	2
I. The Tribal Council Defendants.....	2
II. Allegations in the Complaint. ....	3
III. This Court Recently Confirmed the Tribal Council Defendants’ Official Immunity Against Similar Claims Arising From the Same Underlying Facts.....	6
LEGAL STANDARD.....	7
ARGUMENT .....	7
I. Plaintiff’s Claims Against the Tribal Council Defendants Should be Dismissed Under Fed. R. Civ. P. 12(b)(1) on the Basis of Tribal Sovereign Immunity.....	7
A. The Chitimacha Tribe’s Sovereign Immunity Applies to the Tribal Council Defendants for Acts in Their Official Capacities .....	7
B. Plaintiff Alleges No Adequate Individual Capacity Claims Against the Tribal Council Defendants. ....	9
II. Claims Based on the Tribal Council Defendants’ Witness Testimony Should be Dismissed Under Fed. R. Civ. P. 12(b)(6) on the Basis of Witness Immunity.....	16
III. Qualified Immunity Bars All Claims Against the Tribal Council Defendants Under Fed. R. Civ. P. 12(b)(6).....	16
IV. Plaintiff’s Allegations are Vague and Conclusory, and Therefore Cannot Support any Claim for Relief Under Fed. R. Civ. P. 12(b)(6). ....	17
A. Plaintiff’s Allegations Are Not Adequate to State a Claim Under § 1983.....	18
B. Plaintiff’s Allegations Are Not Adequate to State a Claim Under § 1985.....	22
C. Plaintiff’s Allegations Are Not Adequate to State a Claim Under Art. 2315. ....	23
V. The Court Should Dismiss Plaintiff’s Claims with Prejudice. ....	23
CONCLUSION.....	25

## TABLE OF AUTHORITIES

### Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	7, 17
<i>Backe v. LeBlanc</i> , 691 F.3d 645 (5th Cir. 2012).....	16, 17
<i>Banks v. Dallas Hous. Auth.</i> , 271 F.3d 605 (5 <sup>th</sup> Cir. 2001) .....	18
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	7
<i>Blessing v. Freestone</i> , 520 U.S. 329 (1997) .....	18
<i>Briscoe v. LaHue</i> , 460 U.S. 325 (1983).....	16
<i>Bryant v. Military Dep’t of Mississippi</i> , 597 F.3d 678 (5 <sup>th</sup> Cir. 2010) .....	18
<i>Burrell v. Armijo</i> , 456 F.3d 1159 (10 <sup>th</sup> Cir. 2006).....	21
<i>Carrol v. Abide</i> , 788 F.3d 502 (5th Cir. 2015) .....	7
<i>Chambliss v. Foote</i> , 562 F.2d 1015 (5th Cir. 1977), <i>aff’g</i> , 421 F.Supp. 12, 15 (E.D. La. 1976) ..	23
<i>Corn v. Mississippi Dep’t of Pub. Safety</i> , 954 F.3d 268 (5 <sup>th</sup> Cir.), <i>cert. denied</i> , 141 S. Ct. 672 (2020).....	8
<i>Cornish v. Correctional Services Corp.</i> , 402 F.3d 545 (5 <sup>th</sup> Cir. 2005).....	21
<i>Crawford v. Caddo Par. Coroner’s Office</i> , CV 17-01509, 2019 WL 943411 (W.D. La. Feb. 25, 2019) .....	24
<i>Denezpi v. U.S.</i> , 142 S.Ct. 1838 (2022) .....	11
<i>Doe v. Rains County Indep. Sch. Dist.</i> , 66 F.3d 1402 (5th Cir.1995).....	19
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963).....	9
<i>E.F.W. v. St. Stephens Indian School</i> , 264 F.3d 1297 (10th Cir. 2001).....	22
<i>Ellison v. De La Rosa</i> , 685 F.2d 959 (5 <sup>th</sup> Cir. 1982) .....	18
<i>Elmakiss v. Elmakiss</i> , No. 6:07-CV-136, 2007 WL 9728431 (E.D. Tex. Aug. 17, 2007) .....	21

<i>Estate of Davis v. City of N. Richland Hills</i> , 406 F.3d 375 (5th Cir. 2005).....	16
<i>Evans v. McKay</i> , 869 F.2d 1341 (9 <sup>th</sup> Cir. 1989) .....	21
<i>Ex parte New York</i> , 256 U.S. 490 (1921) .....	9
<i>Freedom From Religion Found., Inc. v. Mack</i> , 4 F.4 <sup>th</sup> 306 (5 <sup>th</sup> Cir. 2021) .....	18
<i>Frigard v. U.S.</i> , 862 F.2d 201, 204 (9th Cir. 1988) .....	24
<i>Gomez v. Galman</i> , 18 F.4th 769 (5th Cir. 2021) .....	21
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002) .....	18
<i>Hare v. City of Corinth</i> , 135 F.3d 320 (5th Cir. 1998) .....	16
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	16
<i>Hester v. Redwood Cnty.</i> , 885 F. Supp. 2d 934 (D. Minn. 2012) .....	18
<i>Hitt v. City of Pasadena</i> , 561 F.2d 606 (5th Cir. 1977) .....	24
<i>In re Katrina Canal Breaches Litigation</i> , 495 F.3d 191 (5th Cir. 2007) .....	7
<i>Kentucky v. Graham</i> , 473 U.S. 159 (1985) .....	8
<i>Kiowa Tribe of Okla. V. Mfg. Techs., Inc.</i> , 523 U.S. 751 (1998) .....	8
<i>Knowlton v. Shaw</i> , 704 F.3d 1 (1st Cir. 2013) .....	23
<i>Kostmayer Construction, LLC v. Port Pipe &amp; Tube, Inc.</i> , No. 2:16-CV-01012, 2016 WL 6143075 (W.D. La. Oct. 19, 2016) .....	7
<i>Langley v. Edwards</i> , 872 F. Supp. 1531 (W.D. La. 1995), <i>aff'd sub nom. Langley v. Dardenne</i> , 77 F.3d 479 (5th Cir. 1996) .....	22
<i>Lewis v. Clarke</i> , 137 S. Ct. 1285 (2017) .....	8, 9, 16
<i>Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.</i> , 942 F.3d 258 (5th Cir. 2019) .....	17
<i>Marrogi v. Howard</i> , 805 So.2d 1118 (2002) .....	16
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014) .....	8

<i>Mitchell v. Bailey</i> , 2019 WL 11340109 (W.D. Tex. Feb. 4, 2019), <i>aff'd in part, vacated in part, rev'd in part</i> , 982 F.3d 937 (5 <sup>th</sup> Cir. 2020), <i>as revised</i> (Dec. 30, 2020) .....	8
<i>Mortensen v First Federal Savings and Loan Association</i> , 549 F.2d 884 (3rd Cir. 1977).....	7
<i>Rehberg v. Paulk</i> , 566 U.S. 356 (2012) .....	16
<i>Rodriguez v. Transnave Inc.</i> , 8 F.3d 284 (5th Cir. 1993) .....	24
<i>Runs After v. United States</i> , 766 F.2d 347 (8th Cir. 1985) .....	23
<i>Sandoval v. Lujan</i> , No. CV 03-01431 JEC/ACT, 2004 WL 7337521 (D.N.M. Oct. 14, 2004) ....	21
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	8
<i>Spivey v. Chitimacha Tribe, et al.</i> , Case No. 21-CV-02257 (W.D. La.).....	1, 6, 7
<i>Spivey v. Chitimacha Tribe, et al.</i> , Case No. 22-CV-00491 (W.D. La.).....	1, 6, 7
<i>Stanko v. Oglala Sioux Tribe</i> , 916 F.3d 694 (8th Cir. 2019) .....	24
<i>Stewart v. Coffey</i> , 368 Fed. Appx. 924 (10 <sup>th</sup> Cir. 2010) .....	21
<i>Superior MRI Servs. v. All. HealthCare Servs.</i> , 778 F.3d 502 (5th Cir. 2015).....	10
<i>Thomas v. City of New Orleans</i> , 883 F. Supp. 2d 669 (E.D. La. 2012).....	8
<i>Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.</i> , 476 U.S. 877 (1986).....	8
<i>Truman v. U.S.</i> , 26 F.3d 592 (5th Cir. 1994) .....	7
<i>Tubular Inspectors, Inc. v. Petroleos Mexicanos</i> , 977 F.2d 180 (5th Cir. 1992) .....	24
<i>United Broth. of Carpenters &amp; Joiners of Am., Local 610, AFL-CIO v. Scott</i> , 463 U.S. 825, (1983).....	23
<i>U.S. v. Wheeler</i> , 435 U.S. 313 (1978)....	11
<i>Walker v. Livingston</i> , 381 Fed. Appx. 477 (5th Cir. 2010).....	24
<i>Will v. Michigan Dept. of State Police</i> , 491 U.S. 58 (1989).....	9, 18

<i>Williams v. Ascension Parish School Bd.</i> , No. CIV.A. 10-453-BAJ, 2011 WL 2011481 (M.D. La. May 16, 2011).....	7
<i>Williamson v. Tucker</i> , 645 F.2d 404 (5th Cir. 1981) .....	7

## Statutes

25 U.S.C. § 2701(2) .....	21
25 U.S.C. § 2710(b)(2)(E) .....	12
25 U.S.C. § 2710(d)(3)(C) .....	21
42 U.S.C. § 1983.....	<i>passim</i>
42 U.S.C. § 1985.....	<i>passim</i>
42 U.S.C. §§ 1983 and 1985 .....	2, 5
La. Civil Code art. 2315.....	6, 7, 17, 23

## Other Authorities

Compl., Feb. 4, 2022, ECF No. 1 .....	<i>passim</i>
Compl., <i>Spivey v. Chitimacha Tribe, et al.</i> , Case No. 21-CV-02257, ECF No. 1 (W.D. La. Feb. 23, 2022) .....	6, 7
Exhibit 2, Tribal-State Compact for the Conduct of Class III Gaming Between the Chitimacha Tribe of Louisiana and the State of Louisiana (2001) .....	<i>passim</i>
Exhibit 3, Chitimacha Tribal Council Res. CHI-TC #52-16 .....	11
<i>Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs</i> , 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022).....	3
R & R, <i>Spivey v. Chitimacha Tribe et al.</i> , Case No. 21-CV-02257, ECF No. 24 (W.D. La Feb. 23, 2022) .....	8, 10, 12

## Rules

Fed. R. Civ. P. 12(b)(1).....	7, 8, 23
Fed. R. Civ. P. 12(b)(6).....	<i>passim</i>

**Constitutional Provisions**

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. V, § 1 .....3

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. VII, § 1 .....3

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. VII, §1(a) ..... 13

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. VII, §1(b) .....14

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. VII, §1(c), (f) ...15

Exhibit 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. X, § 1 .....15

La. Const. Art. I, § 25 .....13

## INTRODUCTION

This is a lawsuit against officials of the Chitimacha Tribe of Louisiana (“Tribe”), which owns and operates the Cypress Bayou Casino Hotel (“CBCH”). In fact, this is one of three lawsuits levied against the Tribal officials—one filed in federal court, a second in state court (now removed to this Court), and a third brought in the Chitimacha Tribal Court. Under well-established law—including a recent decision from this Court in a similar case arising from the same underlying facts (Case Nos. 21-CV-02257 and 22-CV-00491)—the claims are barred by tribal sovereign immunity. While that is sufficient to dispose of the entire action, the Complaint could also be dismissed on the basis of witness immunity, qualified immunity, and failure to state any claim for relief.

The Tribe’s regulation of gaming prohibits Tribal Council members from realizing a financial gain from CBCH. Despite this prohibition, the Plaintiff, Mr. O’Neil Darden, Jr., accepted a bonus payment from CBCH while serving as the Tribe’s Chairman. His conduct triggered duties under the Tribal-State Compact for the Conduct of Class III Gaming Between the Chitimacha Tribe of Louisiana and the State of Louisiana (2001) (“Compact”) on the part of Tribal and State officials, including the investigation and, eventually, prosecution of Plaintiff. On February 9, 2021, Plaintiff was acquitted in Louisiana State Court of charges for theft and computer fraud against the Tribe. Rather than allowing his acquittal to rest the matter, Plaintiff brought this lawsuit attacking the Tribal and State officials—current and former members of the Tribal Council (“Tribal Council Defendants” or “Defendants”), and the District Attorney—who carried out their Compact duties. Plaintiff’s attack is meritless, and there are multiple bases for dismissal.

First, the Tribal Council Defendants, as Tribal officials acting in their official capacities, are protected by the Tribe’s sovereign immunity. The Tribal Council is the Tribe’s governing body, responsible for managing the Tribe’s economic affairs and dealing with the federal and state government. Plaintiff’s allegations are directed at the Tribal Council for carrying out those duties,



and he fails to allege any personal capacity claim that is not subject to sovereign immunity.

Second, many of Plaintiff's claims are based on the Tribal Council Defendants' testimony in his criminal trial. Absolute witness testimony immunity bars those claims.

Third, Plaintiff is suing government officials and is therefore required to plead with specificity facts sufficient to show that qualified immunity does not apply. But Plaintiff only makes conclusory allegations of "established law" and rights that are "sufficiently clear."

Finally, Plaintiff's allegations are conclusory and could not state any plausible cause of action even if the various immunities do not apply. Plaintiff fails to allege the essential elements for claims under 42 U.S.C. §§ 1983 and 1985, or malicious prosecution under state law. Plaintiff only repeats a litany of grievances—claiming that the Tribal Council Defendants wanted him out of office and gave false testimony to accomplish that—and hopes that this will somehow amount to a colorable claim. As such, Plaintiff fails to allege the specific federal rights, or how they were violated under color of state law, necessary to state a claim under § 1983. Plaintiff fails to allege any of the specific classes of conspiracy—relating to holding a United States office, impeding state court proceedings, or going in disguise on a highway—that are actionable under § 1985. The malicious prosecution claim is based solely on the allegation that the defendants gave false testimony and fails to allege that the Tribal Council Defendants actually prosecuted him.

For these reasons—all of which operate as independent bases for dismissal of the Complaint in its entirety—the Complaint should be dismissed with prejudice, as there is no plausible argument that any amendment could cure the defects warranting dismissal.

## **BACKGROUND**

### **I. The Tribal Council Defendants.**

The Tribal Council Defendants, April Wyatt, Melissa Darden, John Paul Darden, Jacob Darden, Toby Darden, and Jacqueline Junca, are current and former members of the Tribal Council

of the Chitimacha Tribe of Louisiana, a federally recognized tribal government. *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022). The Tribal Council comprises five persons elected by the Tribe and serves as the Tribe’s governing body. Ex. 1, Constitution and Bylaws of the Chitimacha Tribe of Louisiana, Art. V, § 1, (hereinafter cited to as “Const.”).<sup>1</sup> The Tribal Council is vested with the Tribe’s inherent authority to protect the general health and safety of the Tribe, which includes supervising and managing “tribal economic affairs and enterprises,” “employ[ing] legal counsel,” and representing the Tribe in matters “with the Federal, State, and local governments.” *Id.*, Art. VII, § 1. The Council also has specific duties pursuant to the Tribe’s gaming Compact with the State, including the duty to investigate and determine which sovereign—the Tribe or the State—will prosecute certain crimes committed at CBCH that the United States declines to prosecute. Ex. 2, Tribal-State Compact for the Conduct of Class III Gaming Between the Chitimacha Tribe of Louisiana and the State of Louisiana, § 4(A) (2001).<sup>2</sup>

## **II. Allegations in the Complaint.**

Plaintiff names eight defendants; six of them are current or former members of the Tribe’s governing body, the Chitimacha Tribal Council, for actions of the Council. Compl., ¶¶ 10-15; 30, Feb. 4, 2022, ECF No. 1. Plaintiff alleges that “The Tribal Council is the governing body over all the enterprises of the Chitimacha Tribe, including [CBCH].” *Id.* ¶ 32.

Plaintiff alleges that he was elected Tribal Council Chairman in June 2015. *Id.* ¶ 29. Before he was elected, Plaintiff was employed by CBCH as the Event/Catering Director. *Id.* Plaintiff alleges that CBCH offered employee bonus payments in 2015, but his bonus eligibility was

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<sup>1</sup> Available at: <https://chitimacha.gov/tribal-government/constitution-and-comprehensive-codes-justice>.

<sup>2</sup> Available at: <https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/oig/pdf/idc-038278.pdf>.

complicated by his election as Chairman because Tribal law prohibits Council Members from receiving any payment from the Casino. *Id.* ¶¶ 33, 36.

Plaintiff alleges that, in November 2015, the Tribal Council met and agreed that he should receive a CBCH bonus prorated to his time of employment. *Id.* ¶ 38. Plaintiff admits that he received the bonus, *Id.* ¶ 40, but then “decided that it was not best to receive it given his position as Chairman,” *Id.* ¶ 42. Plaintiff alleges that he issued a check returning the bonus. *Id.*

Plaintiff alleges that a “complaint was made to the Tribal gaming commission of an alleged ‘misappropriation of bonus monies’” and “[t]he Louisiana State Police was called to investigate.” *Id.* ¶ 43. Plaintiff alleges that as a result of the investigation, “charges against [him] were presented to the United States Attorney for the Western District of Louisiana” who “declined to prosecute.” *Id.* ¶ 44. Plaintiff alleges that “the matter was sent back to the Tribal Council.” *Id.* At that point, Plaintiff alleges that the Tribal Council, acting “pursuant to a Tribal-State Compact,” could refer the matter to “Robert C. Vines as Tribal Prosecutor, to the local state district attorney, or ‘do whatever is best in the interest of justice.’” *Id.*; ¶ 65. According to Plaintiff, the Tribal Council “decided to pursue baseless charges with the Office of District Attorney.” *Id.*; ¶ 66. Plaintiff alleges that Mr. Vines, in “his capacity as assistant district attorney,” agreed to investigate. *Id.* ¶ 45. Plaintiff alleges that Mr. Vines was also employed by the Tribe as the Tribal Prosecutor. *Id.*

Plaintiff alleges that on “orders from said named Defendants,” Mr. Vines “investigated and prosecuted the matter for his own personal and financial gain or motivations.” *Id.* ¶ 50. Plaintiff generally alleges that Defendants could “influence the investigation, prosecution and the critical discretionary decisions” of Mr. Vines. *Id.* ¶ 87. Plaintiff alleges that Mr. Vines was “renegotiating” his employment with the Tribe while criminal charges were pending and met with the Defendants in April 2017 to discuss his contract. *Id.* ¶ 91.

Plaintiff alleges that Mr. Vines, “(and/or M. Bofill Duhe)”, “and/or” the Tribal Council Defendants possessed “statements and affidavits” that would exculpate Plaintiff, but “hid and secreted this information.” *Id.* ¶ 79. Plaintiff also alleges that during his February 8 and 9, 2021 trial, Melissa Darden “would meet in private with Robert C. Vines” to advise him regarding the case. *Id.* ¶ 90. Plaintiff alleges that “Melissa Darden was acting without Tribal Council knowledge or consent in instructing Robert C. Vines how to handle the prosecution.” *Id.* The prosecution ended on February 9, 2021 with “an acquittal.” *Id.* ¶ 55.

Plaintiff alleges that the Tribal Council Defendants took other measures to undermine his role as Chairman. He alleges that on August 11, 2016, during his term as Chairman, the Tribal Council Defendants sought to amend the Tribal Constitution and Bylaws to provide that Council members charged with certain crimes would be suspended until the charges were resolved. *Id.* ¶ 93. Plaintiff also alleges that on January 12, 2017, after he had been on “voluntary leave” for 11 months, the Tribal Council Defendants “significantly reduced” his salary. *Id.* ¶¶ 96, 98.

Plaintiff brings the following claims against the Tribal Council Defendants.

- Count I: Plaintiff alleges that the Defendants are liable under 42 U.S.C. §§ 1983 and 1985 because they “caus[ed] and/or negligently allow[ed] a frivolous investigation and frivolous criminal charges to be brought against Plaintiff.” *Id.* ¶ 197.
- Count II: Plaintiff alleges that the Defendants are liable under § 1983 for “falsification of evidence caus[ing] Plaintiff to suffer significant damages.” *Id.* ¶ 215.
- Count III: Plaintiff alleges that the Defendants are liable under § 1983 for violation of his civil rights because they “testified at Plaintiff’s trial, and they gave false evidence against Plaintiff consistent with the fabrications invented by Robert C. Vines and/or the named Defendants (and/or M. Bofill Duhe) during the investigation.” *Id.* ¶ 223.

- Count IV:<sup>3</sup> Plaintiff alleges that the Tribal Council Defendants are liable under § 1983 for violation of his civil rights because they violated his “constitutional right not be deprived of his liberty, liberty interests of a fair trial by a government officer acting in an investigatory capacity especially where that officer foresees that he himself misusing evidence with a resulting deprivation of liberty.” [*sic*] *Id.* ¶ 233.
- Count VII: Plaintiff alleges that the Tribal Council Defendants “are liable to Plaintiff for malicious prosecution under La. Civil Code art. 2315.” *Id.* ¶ 244.

**III. This Court Recently Confirmed the Tribal Council Defendants’ Official Immunity Against Similar Claims Arising From the Same Underlying Facts.**

Plaintiff’s claims arise from many of the same facts and circumstances as *Spivey v. Chitimacha Tribe, et al.*, Case Nos. 21-CV-02257 and 22-CV-00491 (W.D. La.), and Plaintiff’s claims are similar to those in *Spivey*. Spivey alleged that, as the Chief Financial Officer at CBCH, Compl., ¶ 3, *Spivey v. Chitimacha Tribe, et al.*, Case No. 21-CV-02257, (W.D. La. Feb. 23, 2022), he was responsible for administering the bonus that Plaintiff accepted, *id.*, ¶ 14. The State brought criminal charges against Mr. Spivey, *id.* ¶ 17, but later declined to pursue them, *id.* ¶ 20. Spivey alleged that members of the Tribal Council, acting in their individual capacities, intentionally pursued baseless criminal charges against him when they exercised the Compact duty to refer his case to the State for investigation. Just like Plaintiff, Spivey alleged claims under 42 U.S.C. §§ 1983, 1985, and La. Civ. Code Art. 2315. *See id.* ¶¶ 26-28. Applying official sovereign immunity, this Court dismissed the *Spivey* action against the members of the Tribal Council with prejudice.<sup>4</sup>

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<sup>3</sup> Count V is identical to Count IV, apart from the apparent typographical error of an incomplete sentence in ¶ 237. Compl. at ¶¶ 236-39.

<sup>4</sup> The *Spivey* actions are identical. The Court dismissed case No. 21-CV-02257 without prejudice on February 23, 2022, and dismissed No. 22-CV-00491 with prejudice on June 24, 2022.

## LEGAL STANDARD

When considering a Rule 12(b)(1) motion to dismiss, the Court must accept all *well pleaded* allegations within the complaint as true. *Truman v. U.S.*, 26 F.3d 592, 594 (5th Cir. 1994); *Carrol v. Abide*, 788 F.3d 502, 504 (5th Cir. 2015). This presumption is similar to the standard for Rule 12(b)(6) motions. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981) (citing *Mortensen v First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977)); *See Truman*, 26 F.3d at 594. As such, the Court need not accept any conclusory allegations or legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *see also Williams v. Ascension Parish School Bd.*, No. CIV.A. 10-453-BAJ, 2011 WL 2011481 \*3 (M.D. La. May 16, 2011) (holding that, in ruling on a 12(b)(1) motion to dismiss, a court will not accept conclusory allegations, unwarranted deductions, or legal conclusions); *Kostmayer Construction, LLC v. Port Pipe & Tube, Inc.*, No. 2:16-CV-01012, 2016 WL 6143075 \*3 (W.D. La. Oct. 19, 2016) (holding that conclusory damage allegations will not withstand a 12(b)(1) motion to dismiss).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim of relief that is plausible on its face and rises above the purely speculative level. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court is not bound to accept factual assumptions, conclusory allegations, or legal conclusions as true. *Iqbal*, 556 U.S. at 678-79.

## ARGUMENT

### **I. Plaintiff's Claims Against the Tribal Council Defendants Should be Dismissed Under Fed. R. Civ. P. 12(b)(1) on the Basis of Tribal Sovereign Immunity.**

#### **A. The Chitimacha Tribe's Sovereign Immunity Applies to the Tribal Council Defendants for Acts in Their Official Capacities**

Plaintiff's claims against the Tribal Council Defendants are barred by the Tribe's sovereign immunity because those Defendants are Tribal officials who are being sued—notwithstanding

Plaintiff's conclusory allegations to the contrary—for actions that they took in their official capacities. As this Court recently confirmed, “Tribal sovereign immunity shields: (1) the Indian tribe; (2) entities of the tribe that function as an ‘arm of the tribe;’ and (3) ‘*all tribal employees acting within their representative capacity and within the scope of their official authority.*’” R & R at 9, *Spivey v. Chitimacha Tribe et al.*, Case No. 21-CV-02257, ECF No. 24 (W.D. La Feb. 23, 2022) (emphasis added) (quoting *Mitchell v. Bailey*, 2019 WL 11340109, at \*2 (W.D. Tex. Feb. 4, 2019), *aff’d in part, vacated in part, rev’d in part*, 982 F.3d 937 (5<sup>th</sup> Cir. 2020), *as revised* (Dec. 30, 2020)). This Court’s decision in *Spivey* was based on the well-established principle that “[a]mong the core aspects of sovereignty that tribes possess—subject to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Tribal immunity “is a necessary corollary of Indian sovereignty and self-governance.” *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g, P.C.*, 476 U.S. 877, 890 (1986). “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 Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). A claim against Tribal officials in their official capacity is “another way of pleading an action against an entity of which an officer is an agent”—in this case, the Tribe—and is thus “barred by sovereign immunity,” just like claims against the Tribe. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017) (citing *Kentucky v. Graham*, 473 U.S. 159, 165–166 (1985)). Thus, unless a tribe expressly waives its immunity or Congress abrogates it, a suit against an official acting in their official capacity is barred by sovereign immunity. *Corn v. Mississippi Dep’t of Pub. Safety*, 954 F.3d 268, 275 (5<sup>th</sup> Cir.), *cert. denied*, 141 S. Ct. 672 (2020); *see Thomas v. City of New Orleans*, 883 F. Supp. 2d 669, 680 (E.D. La. 2012) (“Sovereign

immunity also extends to state officials sued in their official capacity for monetary relief”).

There is no dispute that the Tribe is a sovereign Indian tribe. Compl. ¶ 10; n.1. There is no dispute that the Tribal Council Defendants are being sued for actions they took while serving as members of the Tribal Council. *Id.* ¶¶ 10-15, 30. There is no allegation that the Tribe has waived the immunity of its officials. Thus, Plaintiff’s claims can only proceed to the extent that he adequately alleges claims against the Defendants in their *individual* capacities, *i.e.*, for “personal actions” that may not be subject sovereign immunity. *Lewis*, 137 S. Ct. at 1291.

**B. Plaintiff Alleges No Adequate Individual Capacity Claims Against the Tribal Council Defendants.**

Plaintiff fails to allege any personal capacity claim against the Tribal Council Defendants. Merely including the word “individually” in the Complaint is not sufficient to establish personal capacity claims. Courts “may not simply rely on the characterization of the parties in the complaint,” but “must determine in the first instance” whether the claims are personal or official capacity claims. *Lewis*, 137 S. Ct. at 1290 (citing *Ex parte New York*, 256 U.S. 490, 500–502 (1921)). If the “the relief sought is only nominally against the official and in fact is against the official’s office,” then it is an official-capacity claim, and thus barred by sovereign immunity. *Lewis*, 137 S. Ct. at 1291 (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Dugan v. Rank*, 372 U.S. 609, 611, 620–622 (1963)). As in the *Spivey* cases, Plaintiff’s real complaint is against governmental actions by “the Tribe” that happen to be carried out by its governing body, the Tribal Council.

Plaintiff relies on three categories of alleged conduct to establish “personal” acts by the Tribal Council, but in each case the actions are plainly official duties of the Council recognized by



federal law, the Tribe's Constitution, and Gaming Compact; any allegations of actions outside of official duties are conclusory and not sufficient to support any individual capacity claim.<sup>5</sup>

### **1. Referral of a Matter to the State District Attorney is an Official Act.**

The Tribal Council Defendants' referral of the bonus payment investigation to the State District Attorney is an official action. Indeed, the exact same conduct was at issue in *Spivey*, and this Court held that Tribal Council members were acting in their official capacity, and thus protected by sovereign immunity:

For the purposes of this motion and the issue of sovereign immunity, the question before the Court is whether the referral by the Tribal Council of the incident to the district attorney for the 16<sup>th</sup> Judicial District Court for the Parish of St. Mary was an action taken by the Tribal Council members in their individual or official capacities. It seems clear to the undersigned that these were official capacity actions. The Tribal Council members sued herein were vested with the investigatory power – as a Tribe – to refer the matter to the state district attorney for prosecution, and this power is set forth clearly in the Compact. Under the express language of the Compact, the “**Tribe** may prosecute the matter within its Criminal Justice system or refer the matter for State prosecution.” *See* Compact at Section 4(a) (emphasis added). Here, the Tribal Council members decided – on behalf of the Tribe – to refer the matter to the St. Mary Parish district attorney.

R & R at 17, *Spivey*, Case No. 21-cv-02257.

This reasoning applies with equal force to the allegations in this action and forecloses any claims based on the Tribal Council Defendants' referral.

### **2. Representation of Tribal Interests in a Criminal Prosecution and Communications with Tribal Employees are Official Acts.**

In search of facts sufficient to establish personal capacity conduct, Plaintiff's Complaint includes allegations based on: (1) the alleged assistance that the Tribal Council Defendants provided to Mr. Vines' regarding the prosecution of Plaintiff; and (2) the Tribal Council

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<sup>5</sup> By quoting and referring to the Tribe's Constitution and Compact in his Complaint, Plaintiff incorporates the documents into his pleadings and the Court may consider them in deciding this motion. *Superior MRI Servs. v. All. HealthCare Servs.*, 778 F.3d 502, 504 (5th Cir. 2015).

Defendants’ communications with Mr. Vines regarding his employment with the Tribe. On both fronts, Plaintiff fails to plead personal capacity claims because the conduct alleged falls squarely within the scope of the Tribal Council’s powers, as recognized by the Compact and Constitution.

**a. Representation of Tribal Interests in a Criminal Prosecution is an Official Act.**

With respect to the Defendants’ involvement in the criminal prosecution, Plaintiff alleges nothing more than actions taken by the Tribe—again, carried out by its governing body—that implement its inherent criminal jurisdiction, as recognized by federal law, and its government-to-government relationship with the State, as recognized by both the Compact and Constitution.

First, as an overarching principal, the Tribe possesses the inherent authority to exercise concurrent criminal jurisdiction over the conduct of its Tribal members, including Plaintiff. *U.S. v. Wheeler*, 435 U.S. 313, 328-329 (1978). The Tribe’s criminal jurisdiction is independent, and not constrained by the State’s exercise of its jurisdiction. *Denezpi v. U.S.*, 142 S.Ct. 1838, 1845 (2022) (citing *Wheeler*, 435 U.S. at 328). As the Tribe’s governing body, the Tribal Council is ultimately vested with the Tribe’s inherent authority to exercise criminal jurisdiction over the Plaintiff’s conduct. As such, actions taken by the Tribal Council Defendants that relate to the prosecution of Plaintiff’s criminal conduct are official actions subject to tribal official immunity. Indeed, the Tribal Council’s referral resolution confirmed that Council was acting “to protect the larger financial, regulatory, and governmental interests of the Chitimacha Tribe” and the referral was thus “without prejudice to the Tribe’s retained sovereign right to retain appropriate prosecutorial discretion in the matter of the Tribal Chairman.” Ex. 3, Chitimacha Tribal Council Res. CHI-TC #52-16.<sup>6</sup> Accordingly, the Tribal Council’s official conduct embraces providing

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<sup>6</sup> The Court should disregard Plaintiff’s assertions that this resolution is *ultra vires*, Compl. at ¶¶ 9, 16, 66, and 98, because they are conclusory and constitute bare legal conclusions.

assistance to the State’s prosecution, which informs the Council’s ongoing assessment of whether to independently prosecute the Plaintiff in the Tribe’s own forum.

Second, under the Compact, the Tribe is required to preserve and protect the health, safety, and welfare of CBCH’s employees and patrons. 25 U.S.C. § 2710(b)(2)(E); Compact, § 3(A)(1). To further that requirement, the Compact delineates the Tribe and the State’s respective duties and powers relative to criminal conduct at CBCH. Compact, §§ 3-5. As this Court recognized, the Tribal Council Defendants “were vested with the investigatory power – as a Tribe – to” either “prosecute [Plaintiff’s criminal] matter within [the Tribe’s] Criminal Justice System” or “refer the matter to the state district attorney for prosecution.” R & R at 17, *Spivey*, Case No. 21-cv-02257, (citing Compact, § 4(A)). In addition, “the Tribe may . . . make an appropriate disposition that serves the interest of justice and respects the rights of any victim of such wrongdoing.” Compact, § 4(A). Accordingly, under the Compact, the Tribal Council has the power and duty to: collaborate with the State in the exercise of their concurrent criminal jurisdiction at CBCH; investigate criminal matters; decide how to dispose of criminal matters (whether by criminal prosecution or other disposition); and perform those functions necessary give meaningful effect to that decision (including the decision to refer a criminal matter to the State for prosecution). *Id.*

Thus, the Tribal Council Defendants’ efforts to investigate—in coordination with the Tribe’s Prosecutor—Plaintiff’s alleged criminal conduct is official conduct subject to sovereign immunity. Likewise, the Defendants’ deliberations—conducted in coordination with the Tribe’s Prosecutor—on how to proceed with Plaintiff’s criminal matter is official conduct subject to immunity. Finally, the Defendants’ decision to refer Plaintiff’s criminal matter to the State did not extinguish their power or duty to perform those functions necessary to give meaningful effect to that referral (or to maintain its retained criminal jurisdiction over the Plaintiff). As such, the

Defendants’ cooperation with, and assistance to, State prosecutors—including Mr. Vines in his capacity as an Assistant District Attorney—are also official acts subject to sovereign immunity.

Finally, under the Tribe’s Constitution, the Tribal Council represents the Tribe’s interests in matters that involve the State. Const., Art. VII, §1(a).<sup>7</sup> As noted, Mr. Vines was acting in his capacity as an Assistant District Attorney rather than Tribal prosecutor when he prosecuted Plaintiff—where the Tribe was the victim of the alleged crime. A crime victim has the right to express their views to the prosecutor regarding the case and potential resolution. La. Const. Art. I, § 25. The Tribal Council is charged with representing the Tribe’s interests in matters that involve the State, Const., Art. VII, § 1(a), and has a duty to “respect[] the rights of any victim of” a crime that falls within the scope of Section 4(A) of the Compact. Thus, the Tribal Council Defendants’ official duties include consulting with, providing evidence to, and otherwise assisting the district attorney’s efforts to prosecute crimes where the Tribe is a victim.

By operation of federal law, the Compact, and the Constitution, any claim based on the Tribal Council Defendants’ involvement in Plaintiff’s prosecution is barred by official immunity. The Court should disregard allegations that such actions are nevertheless outside the scope of official duties because Defendants acted dishonestly, because those allegations are vague, conclusory, and speculative. For instance, Plaintiff alleges that the Defendants provided false testimony against him and withheld purportedly exculpatory evidence (*e.g.*, Compl. ¶ 222)—but Plaintiff does not allege any specific false statement by any of the Defendants. He does not even allege general subjects of false testimony. Plaintiff also alleges that the Defendants “were aware or should have been aware of [purportedly exculpatory] written statements and affidavits.” *Id.* ¶

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<sup>7</sup> Article VII, § 1(a) provides that the Tribal Council is responsible for “negotiat[ing] with the Federal, State, and local governments” on all subjects. Under this broad authority, the Tribal Council represents the Tribe in all matters involving its relations with other governments.

78. Plaintiff does not allege any facts or circumstances that would permit any inference that the Defendants “were aware or should have been aware” of the information. Plaintiff does not describe what the information was, or any factual basis that could establish the Tribal Council “should have been aware” of it. Plaintiff also does not allege any legal basis for a duty of the Tribal Council to disclose its “awareness” of such information even if the Council was “aware” of it. As such, these are nothing but conclusory assertions and the Court should disregard them.

The same is true for Plaintiff’s allegation that Tribal Council Chairman Melissa Darden stated that she was “advising” Mr. Vines on the prosecution. *Id.* ¶ 90. Even if true, Plaintiff does not allege that “advising” Mr. Vines is outside the scope of the Chairman’s official capacity. It is just as plausible that Chairman Melissa Darden was expressing the Tribe’s position and interests as a victim, consistent with her duties as the Chairman. Plaintiff does not allege facts sufficient to conclude that Tribal Council Chairman Melissa Darden was “advising” Mr. Vines in a manner that was outside her official capacity, or even prejudicial to Plaintiff’s interests.

**b. Communication with, and Management of, Tribal Employees are Official Acts.**

With respect to Mr. Vines’ employment by the Tribe, Plaintiff alleges nothing more than actions by the Tribe—carried out by its governing body—related to management of a Tribal government employee. Plaintiff admits that the Tribal Council is the governing body of the Tribe. And “employ[ing] legal counsel” is an enumerated power of the Tribal Council under the Tribal Constitution. Const. Art. VII, §1(b). Thus, communicating with Mr. Vines is a Tribal Council function and within the scope of Council’s authority.

The same is true for Plaintiff’s allegation that Defendants “significantly reduced Plaintiff’s salary” during his term as Chairman. Compl. ¶ 96. Plaintiff admits that he took a “voluntary leave of absence” from serving on Tribal Council. *Id.* ¶ 98. He was still paid in full for eleven months

of “voluntary leave” before his salary was reduced. *Id.* The Tribal Council is responsible for managing Tribal assets and appropriating Tribal funds. Const. Art. VII, §1(c), (f). Reducing the pay of a Tribal official who “voluntarily” decided not to perform the duties of his office is consistent with the management of Tribal funds and assets. Plaintiff’s assertion that the pay reduction was “ultra vires” is conclusory and a legal conclusion that should be disregarded.

### **3. The Tribal Council Defendants’ Role in Amendment of Tribal Constitution is an Official Act.**

Plaintiff alleges that certain amendments to the Tribal Constitution were enacted to harm his political career, but does not draw any connection between those allegations and a cause of action. The allegations are nothing more than an airing of grievances with no legal relevance (and so fail to state a claim). To the extent that Plaintiff intends these allegations to be part of his claims, those are official capacity actions. The Tribe’s Constitution can only be amended by:

a majority of the registered voters of the Chitimacha Tribe, as provided in Section 2 of Article VI, voting in an election authorized for that purpose by the tribal council, provided that at least thirty percent (30%) of those registered to vote shall cast ballots in such election.

Const. Art. X, § 1.

Thus, effectuating an amendment to the Constitution is an action of the Tribe in the purest sense. The amendment was not merely an action by the Tribal Council members on behalf of the Tribe, it was an act by the Tribe itself— “a majority of the registered voters of the Chitimacha Tribe.” As such, Plaintiff’s allegation that the Defendants amended the Constitution is not plausible because the Tribal Council has no authority to effectuate an amendment on their own. Further, any claims based on the Defendants’ role in administering the amendment process on behalf of the Tribe are barred by official sovereign immunity.

**II. Claims Based on the Tribal Council Defendants' Witness Testimony Should be Dismissed Under Fed. R. Civ. P. 12(b)(6) on the Basis of Witness Immunity.**

Plaintiff's Counts II, III, IV, V, and VII are largely based on the Tribal Council Defendants' testimony as witnesses in his criminal trial. *E.g.*, Compl. ¶¶ 208, 215, 219, 221, 233, 237, 245. But it is well established that a trial witness “has absolute immunity with respect to *any* claim based on [their] testimony,” including § 1983 claims. *Rehberg v. Paulk*, 566 U.S. 356, 367 (2012) (citing *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983)); *Marrogi v. Howard*, 805 So.2d 1118, 1125 (2002) (“witness immunity is an “absolute privilege” [under Louisiana state law] because the privilege protects the witness from civil suit regardless of malice or falsity”). Absolute immunity for trial witnesses is necessary to support the truth-seeking process at trial—without it, witnesses “might be reluctant to come forward to testify,” and even if a witness took the stand, the witness “might be inclined to shade his testimony in favor of the potential plaintiff” for “fear of subsequent liability.” *Rehberg*, 566 U.S. at 367. Plaintiff's allegations implicate these important interests; his claims present the precise threats that the witness immunity rule is meant to address.

**III. Qualified Immunity Bars All Claims Against the Tribal Council Defendants Under Fed. R. Civ. P. 12(b)(6).**

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violated clearly established statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005); *Lewis*, 137 S.Ct. at 1291 (“A [tribal] officer in an individual-capacity action . . . may be able to assert personal immunity defenses”). Determining whether the plaintiff has alleged a violation of a federal right at all, and whether that right was clearly established, are purely legal questions for the court to determine. *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998). When suing a government official, the plaintiff bears the burden of pleading specific facts to overcome qualified immunity. *Backe v. LeBlanc*, 691 F.3d 645, 648

(5th Cir. 2012). Government officials are entitled to qualified immunity if, at the time of the events underlying the litigation, “insufficient precedent existed” to provide officials with “fair warning” that their conduct violated federal rights. *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 264 (5th Cir. 2019). Regardless of whether Plaintiff alleges that the Defendants violated his rights—which he does not, as explained in Part IV—his claims cannot proceed because it was not clearly established that the conduct alleged violated federal rights. *Id.*

Plaintiff does not make any allegation—even a conclusory one—that it is “clearly established” that investigating potential misconduct, referring a matter for prosecution, and providing assistance to prosecutors—all in fulfillment of duties prescribed by the Compact and Constitution—could be deemed violation of any federal right just because the target of the investigation was ultimately acquitted. Plaintiff’s attempt to allege that qualified immunity does not apply is nothing more than a series of conclusory allegations. Plaintiff refers to “established law” that was “sufficiently clear” but never identifies what the law is or why the Court should find that it is “clear.” It is not even clear that the allegations are directed at the Tribal Council Defendants; the allegations regarding qualified immunity appear to be directed only at Defendants Vines and Duhe. Compl. ¶¶ 170-81. As such, Plaintiff fails his fundamental pleading obligation for a lawsuit against government officials. *Backe*, 691 F.3d at 648.

**IV. Plaintiff’s Allegations are Vague and Conclusory, and Therefore Cannot Support any Claim for Relief Under Fed. R. Civ. P. 12(b)(6).**

Plaintiff’s allegations are vague and conclusory, and thus fail to state any claim upon which relief can be granted. *Iqbal*, 556 U.S. at 678. Plaintiff does not even come close to adequately pleading the necessary elements of claims under § 1983, § 1985, or Art. 2315.



**A. Plaintiff's Allegations Are Not Adequate to State a Claim Under § 1983.**

The Complaint is inadequate to state any claim under § 1983, which requires allegations of fact “showing that a (1) person,<sup>8</sup> (2) acting under color of state law,” (3) deprived the plaintiff of a federal right. *Bryant v. Military Dep’t of Mississippi*, 597 F.3d 678, 686 (5<sup>th</sup> Cir. 2010) (quoting *Ellison v. De La Rosa*, 685 F.2d 959, 960 (5<sup>th</sup> Cir. 1982)). Plaintiff does not come close to adequately alleging these three elements of a § 1983 claim in any of his causes of action.

**1. Plaintiff does not allege that the Tribal Council Defendants deprived him of a federal right.**

Plaintiff does not adequately allege that any Tribal Council Defendant deprived him of a right secured by the Constitution or the laws of the United States. “[A]s the Supreme Court has emphasized, ‘[i]n order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal law.’” *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 609 (5<sup>th</sup> Cir. 2001) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002) (plaintiff must allege violation of an “unambiguously conferred right”). For the most part, Plaintiff alleges that Defendants violated his general “constitutional rights,” but in some instances he asserts violation of “constitutionally protected rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.”<sup>9</sup> But merely listing rights, no matter the level of specificity, is not sufficient to state a

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<sup>8</sup> The term “person” under § 1983 does not include government officials acting in their official capacities. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Freedom From Religion Found., Inc. v. Mack*, 4 F.4<sup>th</sup> 306, 311 (5<sup>th</sup> Cir. 2021); *Hester v. Redwood Cnty.*, 885 F. Supp. 2d 934, 948 (D. Minn. 2012) (because an Indian tribe is “not a ‘person’ under § 1983,” it necessarily follows that “a suit against a[ tribal police] officer in his official capacity for damages cannot be maintained”). As shown in Part I, above, Plaintiff’s allegations are based on official capacity actions of the Tribal Council Defendants. As such, the Tribal Council Defendants are not “persons” amendable to suit under § 1983.

<sup>9</sup> Plaintiff also lists some of the particular rights under the cited constitutional provisions: “(a) the right to be free from unreasonable searches and seizures; (b) the right not to be deprived of liberty without due process of law; (c) the right not to be deprived of due process of law, both

claim under § 1983. Plaintiff must provide adequate allegations that the rights were violated.

Plaintiff relies on three categories of alleged conduct in his unsuccessful attempt to establish that Defendants violated his federal rights: (1) referral of the bonus payment investigation to the State District Attorney; (2) allegedly “causing” or “allowing” a criminal investigation and prosecution; and (3) giving false testimony or evidence, and withholding evidence.<sup>10</sup>

Plaintiff cannot allege that the referral of the bonus payment investigation violated any of his federal rights. The referral was not a criminal charge or prosecution; it was merely an element of government deliberations regarding potential criminal prosecution. The referral transferred decision-making responsibility from the Tribal Council to the State. Compact § 4(A). Plaintiff cannot plausibly allege that mere deliberation regarding the implications of the bonus payment violated any federal right.

Allegations that the Tribal Council Defendants “caused” or “allowed” a criminal investigation and prosecution are also conclusory assertions insufficient to state a § 1983 claim. *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1407-08 (5th Cir.1995). Plaintiff can only bring claims against the “immediate perpetrator[s] of the constitutional deprivation” or individuals that had the “responsibility” and the “concomitant right to exercise control over” the immediate perpetrator. *Id.* But Plaintiff’s allegations amount to nothing but the unremarkable observation that the State’s decision to prosecute happens to align with what he alleges the Tribal Council wanted the State to do. Plaintiff alleges that the Tribal Council Defendants *could have* used Mr. Vines’ status as a Tribal employee to exert pressure on him to commence an investigation or prosecution,

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procedural and substantive; (d) the right to be free from malicious prosecution without probable cause; and (e) the right to a fair trial.” Compl. ¶¶ 232, 237; *see also* ¶ 5.

<sup>10</sup> It is not discernable whether Plaintiff means to allege that the Tribal Council Defendants’ role in amending the Tribe’s Constitution violated a federal right.

but he does not make any specific allegation that the Tribal Council actually exerted such pressure, how they did so, that doing so would be improper in any way, or that it actually caused the State to commence the criminal prosecution when the State would not have otherwise done so. The Tribal Council, like any other entity, has a right to ask State officials to prosecute crimes. And, absent specific allegations of improper influence, the State's decision to prosecute Plaintiff is consistent with an independent decision-making process.

Similarly, the allegation that the Tribal Council Defendants "allowed" the State investigation and prosecution is not sufficient to allege a violation of rights under § 1983. At most, Plaintiff alleges the mere possibility that Defendants could influence the prosecutor's decisions; he does not adequately allege that they had "control" over the prosecution.

Plaintiff fares no better with his allegations that the Tribal Council Defendants gave false testimony and evidence or withheld evidence. Even if witness immunity was not an absolute bar to those claims, the allegations would be inadequate because Plaintiff does not identify the allegedly false testimony—he alleges no details of who said what, or when. Similarly, Plaintiff describes the allegedly withheld evidence as purportedly exculpatory "statements and affidavits from industry experts/veterans." Compl. ¶ 78. Plaintiff merely asserts that the Tribal Council Defendants "were aware or should have been aware" of the statements. He does not allege circumstances suggesting that the Tribal Council Defendants were actually aware, or should have been aware, of the statements. He also does not allege that the Tribal Council Defendants actually possessed the statements, which would be a necessary precursor to withholding them.

## **2. Plaintiff does not allege that any Tribal Council Defendant Acted Under Color of State Law.**

Plaintiff does not allege that any Tribal Council Defendant is a state official, nor does he adequately allege that any Tribal Council Defendant acted under color of state law. This alone is

sufficient reason to dismiss his § 1983 claims. *See Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549-51 (5<sup>th</sup> Cir. 2005) (12(b)(6) dismissal of a § 1983 complaint alleged “no facts concerning why CSC’s role as an employer constituted state action”); *Stewart v. Coffey*, 368 Fed. Appx. 924, 925 (10<sup>th</sup> Cir. 2010) (where there were no allegations within the complaint that characterize any individual as either a state actor or federal agent, Plaintiff had not alleged a plausible claim under § 1983 against an Indian tribe); *Elmakiss v. Elmakiss*, No. 6:07-CV-136, 2007 WL 9728431, at \*5 (E.D. Tex. Aug. 17, 2007) (“None of Plaintiff’s pleadings even attempt to show that Defendants Elmakiss, Holmes, and Hughes were acting under the color of state law.”).

Plaintiff cannot allege a § 1983 action based on “deprivation of constitutional rights under color of tribal law.” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10<sup>th</sup> Cir. 2006); *Evans v. McKay*, 869 F.2d 1341, 1347 (9<sup>th</sup> Cir. 1989)

Plaintiff’s only attempt to allege any nexus—attenuated though it may be—with state law is to quote the Tribal-State Compact provision on Council’s authority to refer matters to the State district attorney. Compl. ¶ 44. The Tribal-State Compact was entered “by reason of the present requirements of the [IGRA]” to implement the federal law framework for tribal regulation of gaming on Indian land. Compact, preamble; 25 U.S.C. § 2701(2) (federal policy for tribal gaming); 25 U.S.C. § 2710(d)(3)(C) (subjects permitted in compact). A tribal-state compact does not make the Tribe or its officials state actors for purposes of § 1983. *Sandoval v. Lujan*, No. CV 03-01431 JEC/ACT, 2004 WL 7337521, at \*5 (D.N.M. Oct. 14, 2004); *see also Gomez v. Galman*, 18 F.4th 769, 775 (5<sup>th</sup> Cir. 2021) (holding that a defendant acts under color of state law only by exercising power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law”). Tribal-state gaming compacts must be approved by the federal government before they are effective, and the federal government is not even permitted to consider

state law when deciding whether to approve a compact. *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd sub nom. Langley v. Dardenne*, 77 F.3d 479 (5th Cir. 1996). Even when tribes choose, under a compact, to apply state law to reservation affairs, that does not establish that the tribes derive their authority to act from state law; rather, the tribes exercised their sovereignty in deciding what law would govern. *E.F.W. v. St. Stephens Indian School*, 264 F.3d 1297, 1306 (10th Cir. 2001). Thus, Tribal officials carrying out a compact are not acting under color of state law any more than state officials are acting under color tribal law—that is, not at all.

**B. Plaintiff's Allegations Are Not Adequate to State a Claim Under § 1985.**

Plaintiff attempts to bring a claim under 42 U.S.C. § 1985, but he does nothing more than refer to the statute. Section 1985 includes three subsections: subsection (1) addresses conspiracies “to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof”; subsection (2) addresses conspiracies to threaten, injure, or retaliate against witnesses, jurors, and others involved in the federal justice system, and to impede or obstruct state court proceedings; and subsection (3) addresses conspiracies to “go in disguise on the highway or on the premises of another” to deprive a person of the equal protection of the laws or the right to vote. Plaintiff fails to allege an adequate claim under any subsection.

Plaintiff's allegations do not relate to any public office of the United States that he held or aimed to hold, thus ruling out any § 1985(1) claim. Plaintiff's allegations have some connection to the state justice system, but he fails to state a claim under § 1985(2) because he does not allege that Defendants hindered or impeded state court proceedings. He only alleges that they referred a matter to the State District Attorney and acted as witnesses in a trial (that resulted in his acquittal). As for § 1985(3), Plaintiff makes no allegation that Defendants went “in disguise on the highway or on the premises of another” for any purpose.

Moreover, a claim under § 1985(2) or (3) requires that the alleged deprivation of rights was motivated by racial or otherwise class-based invidiously discriminatory animus; personal or political animus against an individual, which is all that Plaintiff alleges, is not sufficient. *United Broth. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 837 (1983); *Knowlton v. Shaw*, 704 F.3d 1, 11 (1st Cir. 2013). Finally, because Plaintiff’s allegations rest solely on the Defendants acting as the Tribe’s governing body, he has failed to adequately allege the conspiracy required for each of the three subsections: “[t]he Tribal Council as an entity or governmental body cannot conspire with itself.” *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *see also Chambliss v. Foote*, 562 F.2d 1015, 1015 (5th Cir. 1977), *aff’g*, 421 F.Supp. 12, 15 (E.D. La. 1976) (dismissing § 1985 action because “the university and its officials are considered as constituting a single legal entity which cannot conspire with itself”).

### **C. Plaintiff’s Allegations Are Not Adequate to State a Claim Under Art. 2315.**

The Complaint includes a claim for “malicious prosecution” under the Louisiana Civil Code Article 2315. Critically, Plaintiff does not allege that the Tribal Council Defendants are prosecutors, or that they prosecuted him. Plaintiff relies solely on the allegations that the Tribal Council Defendants gave false testimony in his criminal trial. Compl. ¶¶ 245, 248. As explained in Part II, above, trial witnesses have absolute immunity against claims arising from their testimony, and Plaintiff therefore fails to plead facts sufficient to state any claim against the Tribal Council Defendants for malicious prosecution.

### **V. The Court Should Dismiss Plaintiff’s Claims with Prejudice.**

Whether the Court dismisses this action based on official sovereign immunity, witness immunity, qualified immunity, or failure to state a claim, the dismissal should be with prejudice.

Dismissal with prejudice based on tribal sovereign immunity under Fed. R. Civ. P. 12(b)(1) is appropriate when it would “better serve the interests of justice” than dismissal without prejudice.

*Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). The Fifth Circuit and other courts have confirmed that dismissal with prejudice may be appropriate when claims are dismissed for lack of subject matter jurisdiction based on sovereign immunity. *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 290 (5th Cir. 1993) (dismissal with prejudice based on foreign sovereign immunity); *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 186 (5th Cir. 1992) (dismissing action with prejudice after finding the court had no subject matter jurisdiction over foreign defendant); *see also Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 696 (8th Cir. 2019) (“We affirm the dismissal with prejudice of claims against the Tribe and the individual defendants acting in their official capacities because those claims are barred by the Tribe’s sovereign immunity.”); *Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988) (dismissal with prejudice is appropriate “because sovereign immunity is absolute: no other court has the power to hear the case, nor can the [plaintiff] redraft their claims to avoid” immunity). In contrast, the rationale for favoring dismissal without prejudice is that, in many cases, a plaintiff “might [be] able by appropriate amendments, to cure the jurisdictional defects in their complaint and to establish a claim against [the] defendants related to the incident.” *Hitt*, at 609. That rationale does not apply here. The Court should dismiss the Complaint with prejudice because Plaintiff has alleged his “best case,” as he cannot cure the defects that are fatal to the Complaint.

Similarly, no amendment can change the fact that Plaintiff’s claims are barred by witness immunity, qualified immunity, and failure to even come close to pleading any adequate claim. *Walker v. Livingston*, 381 Fed. Appx. 477, 480 (5th Cir. 2010) (ordering dismissal with prejudice based on qualified immunity); *Crawford v. Caddo Par. Coroner's Office*, CV 17-01509, 2019 WL 943411, at \*21 (W.D. La. Feb. 25, 2019) (dismissal with prejudice based on witness immunity). The § 1983 claims do not attempt to establish basic elements, such as actions under color of state

law or particular violations of federal rights. The § 1985 and malicious prosecution claims are nothing more than references to the statutes with no attempt to allege their essential elements.

Plaintiff filed two nearly identical lawsuits, one in federal and a second in state court—not mention a third suit now pending before the Tribe’s court. Given that his Complaint cites to and relies on facts pled in the *Spivey* complaint, Compl. ¶¶ 30, 32-45, Plaintiff is (or should be) fully aware of the outcome in those *Spivey* cases, including the second action that was dismissed with prejudice based on the sovereign immunity of the Tribal Council Defendants. Nevertheless, Plaintiff’s allegations take exactly the same tack as *Spivey* did, purporting to state personal claims based on the actions of Tribal officials carrying out their duties to represent the Tribe and manage its governmental and economic affairs. Dismissal with prejudice would also ensure that the Defendants realize the practical benefits of official immunity.

### CONCLUSION

For the reasons provided herein, the Court should dismiss the Complaint with prejudice.

Respectfully submitted,

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