UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

O'NEIL J. DARDEN, JR. VERSUS ROBERT C. VINES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ASSISTANT DISTRICT ATTORNEY FOR THE 16TH JUDICIAL DISTRICT, APRIL WYATT, MELISSA DARDEN, JOHN PAUL DARDEN, JACOB DARDEN, TOBY DARDEN, JACQUELINE JUNCA, AND M. BOFILL DUHE, INDIVIDUALLY AND HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF THE 16TH JUDICIAL DISTRICT	CASE NO: 6:22-CV-00404 (LEAD) CASE NO: 6:22-CV-01398 (MEMBER) JUDGE ROBERT R. SUMMERHAYS MAGISTRATE JUDGE KATHLEEN KAY

MEMORANDUM IN OPPOSITION TO 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 Contents i

Table of Authorites ii

I. Background 1

II. Legal Standard for Rule 12(b) Motion to Dismiss 2

III. Argument 3

A. Defendants are not entitled to Tribal Sovereign Immunity 3

i. Overview of Tribal Sovereign Immunity…...……..3

ii. Plaintiff has only alleged individual capacity claims against Defendants……..…….. ……6

iii. Tribal Sovereign Immunity does not preclude the relief sought by Plaintiff…...…… 8

a. The referral to the District Attorney is an administrative act not protected by absolute immunity…….…...…… 10

b. Representation of "Tribal Interests" in the investigation and prosecution occurred outside of the (official act) legislative process……. ...…….. 12

c. Defendants want the Tribe's contract employee, Vines, to wear two different hats for immunity purposes…….…...…… 13

d. Plaintiff's temporary leave of absence. …….…...…… 14

iv. Tribal Immunity Does Not Apply in Malicious Prosecution Claims ……17

B. The inapplicability of Witness Immunity 18

C. Defendants are not entitled to Qualified Immunity……20

i. Defendant's conduct was not reasonable…… 22

D. Plaintiff's 1983 claim…… 23

E. § 1985 Conspiracy…… 24

IV. Conclusion 25

Certificate of Service 26

TABLE OF AUTHORITIES

Cases:

Acres Bonusing, Inc. v. Marston, 17 F.4th 901 (9th Cir. 2021), *writ denied*, 142 S.Ct. 2836 (2022) ……..10, 17, 18

Alden v. Maine, 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ……..… 3, 6

Ashcroft v. al-Kidd, 563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) …..……. 22, 23

Atteberry v. Nocona Gen. Hosp., 430 F.3d 245 (5th Cir. 2005) …… 22

Banks v. Dallas Hous. Auth., 271 F.3d 605 (5th Cir. 2001) ……23

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) …..…….2

Brumfield v. Hollins, 551 F.3d 322 (5th Cir. 2005) ……22

Byran v. City of Madison, 213 F.3d 267 (5th Cir 2000) ……11

Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994)……...24

Collins v. Morgan Stanley Dean Witter, 224 F.3d 496 (5th Cir. 2000) ……...2

Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008) ……. 4, 6

Dawavendewa v. Salt River Agric. Improvement & Power Dist., 276 F.3d 1150 (9th Cir. 2002), *cert. denied*, 537 U.S. 820, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002) ……. 1, 6

Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) ……...9

Evans v. McKay, 869 F.2d 1341 (9th Cr. 1989) ……. 7, 8, 24

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 452 L.Ed. 714 (1907) ……..8

Funk v. Stryker Corp., 631 F.3d 777 (5th Cir. 2011) ……..2

Goldstein v. Serio, 496 So.2d 412 (La. App. 4 Cir. 1986) …… 20

Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) ……... 9, 17

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ……21

Hall v. Thomas, 190 F.3d 693 (5th Cir. 1999) ……..1

Hillard v. Ferguson, 30 F.3d 649 (5th Cir. 1994)……25

Hoag v. State ex rel. Kennedy, 01-0176 (La. App. 1 Cir. 11/20/03), 836 So.2d 207……16

Hughes v. Tarrant County Texas, 948 F.2d 918 (5th Cir. 1991) ……..11

In re Katrina Canal Breaches Litigation, 495 F.3d 191 (5th Cir. 2007) ……..2

In re Toups, 00-0634 (La. 11/28/00), 773 So.2d 709…….14

Kalina v. Fletcher, 522 U.S. 118, 135, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) …….20

Keko v. Hingle, 318 F.3d 639 (5th Cir. 2003) ……20

King v. Hardwood, 852 F.3d 568 (6th Cir. 2017) ……19

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) ……..16, 17

Leleux-Thubron v. Iberia Parish Government,
No. 13-0852, 2014 WL 12924459 (W.D. La. Jul. 24, 2014) …….11

Lewis v. Clark, —U.S.—, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) …….. 3, 6, 8, 17, 18

Linneen v. Gila River Indian Cmty., 276 F.3d 489 (9th Cir. 2002) ……. 4, 6

Lowrance v. King County, Tex., 16 F.3d 1215, 1994 WL 57393 (5th Cir. 1994) …….11

Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)..…23, 24

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1082, 89 L.Ed.2d 271 (1986) ……20

Martin v. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464 (5th Cir. 2004) ……..2

*Maxwell v. County of San Diego,*708 F.3d 1075 (9th Cir. 2013) …….. 4, 5, 7, 18

McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984)……..24

Miller v. Wright, 705 F.3d 919 (9th Cir. 2013),
cert. denied, --- U.S. ---, 133 S.Ct. 2829, 186 L.Ed.2d 885 (2013) …… 4, 6

Minton v. St. Bernard Parish School Board, 803 F.2d 129 (5th Cir. 1985) …….11

Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) …….3

Morin v. Duhe, No. 20-00592, 2020 WL 7084951 (W.D. La. Nov. 2, 2020) …….2

Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co., 546 F.3d 1288 (10th Cir. 2008) …….. 1, 5

Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015) …….. 3, 4, 5, 18, 21

Redwine v. State, 94-0160 (La. App. 1 Cir. 12/22/94), 694 So.2d 61……..16

Regents of the University of California v. Doe,
519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1977) …… 8, 9

Rehberg v. Paulk, 566 U.S. 356, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012) ……18, 19

Sanders v. Kennedy, 794 F.2d 479 (9th Cir. 1986)…… 24

Superior MRI Servs. v. All. HeathCare Servs., 778 F.3d 502 (5th Cir. 2015) …….1

Taylor v. United States, 292 Fed.Appx. 383 (5th Cir. 2008) …….. 17

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) ……..2

Wearry v. Foster, 33 F.4th 260 (5th Cir. 2022) ……20

Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) …….9

Statutes:

Chitimacha Comprehensive Code of Justice, Title XXIV, § 4……. 9, 14, 15

Chitimacha Trial Court - Rules of Court, Title IV - Civil Procedure, Ch. 6, Sect. 601 …… 15

Constitution and Bylaws of Chitimacha Tribe of Louisiana……..11, 12, 14

Louisiana Constitution Article X, § 23…….. 16

Louisiana Civil Code Article 2985.8……...…16

Louisiana Civil Code Article 2987…….16

Louisiana Civil Code Article 2988…….……16

Other Authorities:

Allison Hester, *Maxwell, Lewis v. Clarke, And The Trail Around Tribal Sovereign Immunity*, 88 U. Colo. L. Rev. 721 (Summer, 2017) …….. 22

Cohen's Handbook of Federal Indian Law (N. Newton et al. eds., 2012) § 7.05……...8

LSBA-RPCC PUBLIC Opinion 01-RPCC-011 (02/15/17) …….. 14

Rob Roy Smith & Claire Newman, *Sovereign Immunity for Tribal Officials At Risk*, LAW 360 (Feb. 26, 2016) …….. 21

I. BACKGROUND

April Wyatt, Melissa Darden, John Paul Darden, Jacob Darden, Toby Darden, and Jacqueline Junca decided to misuse their positions on the Tribal Council for personal, political and financial reasons. They conspired to act, and did act, under the color of state law with their contract employee, Robert Vines, the Tribal Prosecutor, who took off that hat and put on his assistant district attorney hat in St. Mary Parish, Louisiana—a parish where he is not usually and customarily assigned—to investigate then prosecute Plaintiff. At the same time, Vines, decided to renegotiate his uncompleted contract with the Tribe—the alleged victim—through Defendants, in an effort to oust Plaintiff from his duly elected position as Chairman.

A February 16, 2018 written decision in *State of New Jersey, Casino Control Commission, Docket No. 17-0023-CK*[1], used as a template for the Complaint, provides an in depth and detailed recitation of the salient facts. In the interest of brevity, Plaintiff respectfully directs the Court's attention to the Statement of the Case in that decision. *See* Exhibit 1.

Defendants' Motion to Dismiss essentially ignores the facts alleged in the Complaint, which must be taken as true for present purposes, and instead argue their own facts. Defendants then offer incorrect interpretations of law that are inconsistent with basic principles of personal-capacity claims, and which would potentially confer unprecedented immunity. Accordingly, for

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[1] Defendants state: "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 (12b) motion." *Superior MRI Servs. v. All. HeathCare Servs.*, 778 F.3d 502, 504 (5th Cir. 2015). Rec. Doc. 16-4, n. 5. For the identical reason, the Court should consider the New Jersey ruling (cited and quoted Rec. Doc. 1-1, ¶¶ 82-84) to resolve the disputed jurisdictional facts.

the reasons set forth below, Plaintiff respectfully requests that this Court deny Defendants' motion to dismiss.

II. LEGAL STANDARD ON FEDERAL RULE 12(B) MOTION TO DISMISS

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must limit itself to the contents of the pleadings, including any attachments and exhibits thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496 (5th Cir. 2000); *see also Morin v. Duhe*, No. 20-00592, 2020 WL 7084951 (W.D. La. Nov. 2, 2020). The court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007) (quoting *Martin v. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464 (5th Cir. 2004).

The United States Supreme Court set forth the basic criteria necessary for a complaint to survive a Rule 12(6)(b) motion to dismiss in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. "A claim has facial plausibility when the plaintiff pleads the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 570.

Finally, "[w]hen reviewing a motion to dismiss, a district court 'must consider the complaint in its entirety, as well as other sources ordinarily examined when ruling on the 12(b)(6) motion to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

III. ARGUMENT

A. *Defendants are not entitled to Tribal Sovereign Immunity.*

i. *Overview of Tribal Sovereign Immunity*

A tribe's sovereign immunity is generally implicated when a litigant sues the tribe or an arm of the tribe directly. *Lewis v. Clarke*, ---U.S.---, 137 S.Ct. 1285, 1290-1291, 197 L.Ed.2d 631 (2017) ("an arm or instrumentality of the [sovereign] generally enjoys the same immunity as the sovereign itself"). On the other hand, a suit against a tribal official is against only the individual (a personal-capacity suit) if the plaintiff's suit would only impose personal liability on the sued employee, *Lewis*, 137 S.Ct. at 1292 ("'Personal-capacity suits … seek to impose individual liability upon a government officer for actions taken under color of state law'"). Thus, "[t]he critical inquiry is who may be legally bound by the court's adverse judgment." *Lewis*, 137 S.Ct. at 1293-1294.

An official capacity suits seek to hold the entity of which the officer is an agent liable, rather than the official himself. They "generally represent [merely] another way of pleading an action against an entity of which an officer is an agent." *Id.*, 437 U.S. at 167 (quoting *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). An officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, *qua* entity, may possess." *Id.* An officer sued in his individual capacity, however, although he may be entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," *id.*, 437 U.S. at 166-17 cannot claim sovereign immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

These same principles apply to tribal sovereign immunity. *See Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015). Although "[t]ribal soverign immunity 'extends to tribal officials when acting

in their official capacity and within the scope of their authority,'" *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *see also Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013), *cert. denied*, --- U.S. ---, 133 S.Ct. 2829, 186 L.Ed.2d 885 (2013) (same), tribal defendants sued in their individual capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. *See Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013).

In *Pistor*, the Ninth Circuit Court of Appeals noted that:

> As a general matter, individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of ... law," and that were taken in the course of his official duties. By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they " 'generally represent [merely] another way of pleading an action against an entity of which an officer is an agent.' " For this reason, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, *qua* entity, may possess." An officer sued in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," cannot claim sovereign immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally."

Id., 1112 (9th Cir. 2015) (internal citations omitted). The court concluded "[t]hese same principles fully apply to tribal sovereign immunity." *Id.* The court further stated that "[a]lthough [t]ribal sovereign immunity extends to tribal officials when acting in their *official* capacity and within the scope of their authority, tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties." *Id.* (internal quotation and citations omitted). Citing language from the Tenth Circuit Court of Appeals, the court in *Pistor* stated that:

> The general bar against official-capacity claims ... does not mean that tribal officials are immunized from individual-capacity suits *arising out* of actions they took in their official capacities .... Rather, it means that tribal officials are immunized from suits brought against them *because* of their official capacities—that is, because the

> powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Pistor, 791 F.3d at 1112; *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 546 F.3d 1288 (10th Cir. 2008) (emphasis original).

Also, in *Pistor*, the court noted in following this rule articulated by the Tenth Circuit, it held in *Maxwell v. County of San Diego* that tribe employees are not entitled to tribal sovereign immunity from a state tort action brought against them in their individual capacities. *Pistor*, 791 F.3d at 1113 (citing *Maxwell*, 708 F.3d 1075 (9th Cir. 2013)). Conducting a "remedy-focused analysis," the court in *Maxwell* explained:

> Tribal sovereign immunity derives from the same common law principles that shape state and federal sovereign immunity. Normally, a suit like this one—brought against individual officers in their individual capacities—does not implicate sovereign immunity. The plaintiff seeks money damages not from the state treasury but from the officer[s] personally. Due to the essential nature and effect of the relief sought, the sovereign is not the real, substantial party in interest.

Id. (citing *Maxwell*, 708 F.3d at 1087-88).

The *Pistor* court further stated that:

> *Maxwell's* caution about masked official capacity suits aside, it remains "the general rule that individual officers are liable when sued in their individual capacities." So long as any remedy will operate against the officers individually, and not against the sovereign, there is "no reason to give tribal officers broader sovereign immunity protections than state or federal officers."

Id.

These principles foreclose Defendants' claim to sovereign immunity in this case. Plaintiff "seeks money damages 'not from the [tribal] treasury but from the [tribal defendants] personally.'" *Maxwell,* 708 F.3d at 1088. On that point, Defendants have not shown that "the judgment sought would expend itself on the [tribal] treasury or domain, or interfere with [tribal] administration, ... [or] restrain the [Tribe] from acting." *Id.* Even if the Chitimacha Tribe agrees to pay for Defendants' liability, that does not entitle them to sovereign immunity: "The unilateral

decision to insure a government officer against liability does not make the officer immune from that liability." *Id.* at 1090.

Here, Plaintiff seeks to recover damages from Defendants in their personal capacities. He alleges each of them committed one or more torts against him for which he seeks monetary relief from them directly. Whether he is ultimately successful on the merits, his claims are not barred by sovereign immunity. As further explained by the Supreme Court in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) in discussing state sovereign immunity, "a suit for money damages may be prosecuted against a state officer in his official capacity for unconstitutional or wrong conduct fairly attributable to the officer himself, so long as the relief is not sought from the state treasury but from the officer personally." *Alden*, 527 U.S. at 757. In the tribal sovereign immunity context, the Supreme Court has said it is "no broader than the protection offered by state or federal sovereign immunity (and) 'does not erect a barrier against suits to impose individual or personal liability.'" *Lewis*, 137 S.Ct. at 1292-1293.

ii. *Plaintiff has only alleged individual capacity claims against Defendants.*

Although "[t]ribal sovereign immunity 'extends to tribal officials when acting in their *official* capacity and within the scope of their authority,'" *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) (emphasis added) (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489 (9th Cir. 2002)); *see also Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013), *cert. denied*, --- U.S. ---, 133 S.Ct. 2829, 186 L.Ed.2d 885 (2013) (same), tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even if they are sued for actions in the course of their official duties. *Dawavendewa v. Salt River Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), *cert. denied*, 537 U.S. 820, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002) (tribal sovereign immunity does not bar suit against tribal officers allegedly acting in violation of federal law).

Moreover, *Evans v. McKay*, 869 F.2d 1341 (9th Cr. 1989) offers additional guidance about the denial of sovereign immunity for individual tribal defendants sued under § 1983 and alleged to have acted in concert with state officers accused of constitutional violations. *Id.* at 1348. More particularly, an officer was acting in a dual capacity—as an officer of a tribe and of a government agency.[2] The alleged unconstitutional acts were made pursuant to a city ordinance. While these officers may have been said to be acting pursuant to Tribal orders during the incidents in question, they were also acting in their capacity as local government officers. The plaintiff therein expressly alleged that the officers "acted under the color of state law.…Given this explicit allegation of official state authority, coupled with the 'peculiar' law enforcement situation as it exists on the reservation, we conclude that the appellants have sufficiently pleaded action under color of state law to withstand a Rule 12(b)(6) motion." *Id.* at 1349.

Plaintiff has also alleged that Defendants acted in concert with Vines "under color of state law." Accordingly, their actions cannot be said to have been authorized by tribal law. *Id.* at FN9; *see also Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1907) (enforcement of unconstitutional act by state official is a proceeding without authority of and one which does not affect the State in its sovereign or governmental capacity).

In short, Plaintiff has put forth allegations that Defendants' actions were taken under the color of state law to further personal and political interests distinct from the Chitimacha Tribe. Additionally, Plaintiff alleges that Defendants actions were *ultra vires.* Defendants

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[2] Defendants contend that their efforts to investigate and deliberations with Plaintiff was "in coordination with the Tribe's Prosecutor," Vines. *See* Rec. Doc 16-4 at 12-13. But then Defendants acknowledge that they cooperated with and assisted Vines "in his capacity as an Assistant District Attorney." *Id.* at 13. Similar to the defendants in *Evans*, while Vines could arguably be said to have been acting pursuant to Defendant orders as Tribal Prosecutor, he was also acting a state government officer under the color of state law.

have not shown that the Chitimacha Tribe is the "real, substantial party in interest." *Id.* at 1088. Accordingly, they are not entitled to invoke sovereign immunity.

iii. *Tribal Sovereign Immunity does not preclude the relief sought by Plaintiff.*

This is *not* the Monte Spivey case that Defendants heavily rely upon for purposes of sovereign immunity.[3] In the *Spivey* case, this Court noted "it is unclear from the Complaint whether plaintiff intends to assert personal capacity or official capacity claims against the Tribal Council members, or both." *See Spivey v. Chitimacha Tribe of Louisiana, et al*, No. 21 -02257 (W.D. La. Feb. 3, 2022).[4] There is no such confusion about Plaintiff's Complaint.

Indeed, sovereign immunity does not call for this Court to dismiss Plaintiff's 1983 lawsuit. This so is because the Supreme Court has extended the doctrines governing state and federal employee liability to the context of tribal sovereign immunity including tribe officers. *See Lewis*, *supra* ("in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated"); *see also* Cohen's Handbook of Federal Indian Law (N. Newton et al. eds., 2012) § 7.05 [1][a], p. 638, n. 18 citing *Regents of the University of California v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1977). In reaching this decision, the Supreme Court explained "[t]here is no reason to depart from the[ ] general rules (for individual and official capacity suits) in the context of tribal

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[3] The defendants in *Spivey v. Chitimacha Tribe, et al.*, No. 21-02257 (W.D. La. Feb. 23, 2022) were the Chitimacha Tribe of Louisiana, Cypress Bayou Casino and Tribal Council members. The plaintiff therein alleged that all three defendants waived their immunity pursuant to a Tribal Compact agreement. Mr. Darden does not name the Chitimacha Tribe of Louisiana nor Cypress Bayou Casino as defendants, nor does he assert that the Tribal Compact constitutes a waiver of immunity.

[4] The Magistrate Judge who decided the *Spivey* case was assigned this case but has recused herself in this lawsuit.

sovereign immunity." *Id.* at 1291. Therefore, it is paramount to review the distinction between individual- and official-capacity suits.

As previously noted, an official-capacity claim seeks relief against the official and is against the official's office and thus the sovereign itself. *Id.*; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). In other words, "[t]he real party in interest is the government entity, not the named official." *Id.* "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Id.* (quoting *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)). "[O]fficers sued in their personal capacity come to court as individuals," *Hafer*, 502 U.S. at 27, and the real party in interest is the individual, not the sovereign. Plaintiff has not sued the Chitimacha Tribe or any arm of the Tribe. Instead, he seeks to hold Defendants each personally liable in their individual capacities rather than in their official capacities. Such is a meritorious individual capacity 1983 claim. As a result, this Court should deny Defendants' motion to dismiss.

Of further significance is the Chitimacha Comprehensive Code of Justice, Title XXIV, § 4(a)[5], which provides:

> Liability shall not be imposed on an officer or employee of a Public Entity exercising due care in the execution of a statute, ordinance, rule, or regulation or for the performance or failure to performance or failure to perform a policymaking or discretionary act when such acts or omissions are within the course and scope of their lawful powers and duties, *except that the provisions of Section 4(a) are not applicable to acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct*.[6]

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[5] Chitimacha Comprehensive Code of Justice, Title XXIV, § 4(a) was adopted December 5, 1989 and became effective August 14, 1990.

[6] Emphasis added.

Under this premise, Plaintiff has alleged numerous fraudulent, malicious, intentional, willful, outrageous, reckless, flagrant and/or *ultra vires* acts by the defendants.[7] Accordingly, again, Plaintiff has pled a meritorious 1983 claim against the defendants in their individual capacities. And the tribal sovereign immunity inquiry does not revolve around whether issues pertaining to tribal government would be touched on in the litigation. "The question is whether any remedy will operate against the sovereign. Or as the Supreme Court put it, the critical inquiry is who may be legally bound by the court's adverse judgment." *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 911 (9th Cir. 2021). (citations, alterations, and internal quotes omitted).

a. *The referral to the District Attorney is an administrative act not protected by absolute immunity.*

Defendants assert that the referral of the bonus payment investigation regarding Plaintiff to the District Attorney is an "official act." In support of their position, they cite the Report and Recommendation of *Spivey v. Chitimacha Tribe of Louisiana, et al*, No. 21 -02257 (W.D. La. Feb. 3, 2022). Apparently, Defendants would prefer a broad interpretation of "official acts" and that this Court not consider the nature or function of the act. Materially, the Report and Recommendation in *Spivey* did not include consideration of the nature or function of Defendants' acts, nor was it raised by Mr. Spivey.

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[7] *See e.g.* Rec. Doc. 1-1, ¶¶ 44, 49, 50-54, 66, 73, 79, 82, 84, 86, 90, 93, 95-98, 122, 123, 130, 140, 147-149, 151, 152, 155, 165, 166, 182, 190, 191, 195, 197, 199, 222, 223, 225, 232, 234, 237, 245, 248, 250. The Petition for Damages that was removed from state court (16th Judicial District of Louisiana, St. Mary Parish) in *O'Neil J. Darden, Jr. v. Robert C. Vines, et al, No. 6:22-cv-01398, Western District of Louisiana* is virtually identical to the Complaint filed herein. It is forty-three (43) pages (253 enumerated paragraphs). Since the response to Defendants' motion to dismiss in both cases is identical, the petition that was removed will be used for all references.

The governing body of the Chitimacha Tribe is the Tribal Council. *See* Constitution of the Chitimacha Tribe of Louisiana Art. V, § 1; Exhibit 2. All executive and legislative functions are vested with the Tribal Council. *Id.*, Art. VII; Bylaws of the Chitimacha Tribe of Louisiana Arts. I and II.

At first blush, Defendants conduct at issue, the referral, is arguably legislative. "Absolute immunity protects those duties that are functionally legislative, not all activities engaged in by a legislator." *Leleux-Thubron v. Iberia Parish Government*, No. 13-0852, 2014 WL 12924459 (W.D. La. May, 12, 2014) (citing *Byran v. City of Madison*, 213 F.3d 267 (5th Cir 2000) *citing Hughes v. Tarrant County Texas*, 948 F.2d 918 (5th Cir. 1991). Court have made a distinction between establishing a policy, act, or law and enforcing and administering it. *Hughes*, 948 F.2d at 920. To determine if an act is legislative, the Fifth Circuit looks at the "nature of the facts used to reach the given decision" and then "focuses on the particularity of the impact of the state action." *Hughes*, 948 F.2d at 921. "If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative." *Id.* Also, "if the action single[s] out specific individuals and affect[s] them differently than others, it is administrative." *Id.*

Under both tests, Defendants' decision to refer the matter to the District Attorney (and their contract employee, Vines) was administrative. The facts which the Defendants based their decision was specific as to Plaintiff, and the ultimate impact of that determination was felt only by Plaintiff. Consequently, Defendants official acts are administrative in nature and not entitled to absolute immunity. *See Lowrance v. King County, Tex.*, 16 F.3d 1215, 1994 WL 57393 (5th Cir. 1994); *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1985).

b. *Representation of "Tribal Interests" in the investigation and prosecution, occurred outside of the (official act) legislative process.*

Defendants contend that their providing of assistance to Vines during the investigation and prosecution of the criminal case against Plaintiff is likewise official action. Encompassed within their argument is Defendant Melissa Darden "advising" Vines on the prosecution (Rec. Doc. 1-1, at ¶ 90), and "[e]ven 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 Chairman." Rec. Doc. 16-4 at 14.

The Chairman's duties are delineated in Article I, § 1 of the Bylaws of the Chitimacha Tribe of Louisiana, specifically, "[t]he chairman shall preside over all meetings of the Council. He shall perform the usual duties of a chairman and exercise any authority delegated to him by the council." Defendants have made no offering, *e.g.* reference to resolutions, minutes, etc., that Defendant Melissa Darden was acting within her official capacity, or under any authority delegated by the council, when "advising" Vines. Rather, they offer speculation about what she may have been doing. But other members of the current Tribal Council disagree with Defendants and believe such conduct is not an official act.

On that point, current Tribal council member, Johnny Burgess has attested that such interactions "were without tribal council approval. At no time did the Tribal Council discuss (collectively or transparently) or consent to Melissa Darden giving instructions to Mr. Vines about how he should handle the case."[8] *See* Exhibit 3. Therefore, this argument by Defendants cannot

[8] *See* Rec. Doc. 1-1 at 17, ¶ 92. The information forming the basis of this allegation was gleaned from the June 17, 2021 affidavit of Johnny Burgess.

carry the day. Regardless of how Defendants choose to characterize their actions, it is alleged, and there is evidence to support these were *not* official acts.

c. *Defendants want the Tribe's contract employee, Vines, to wear two different hats for immunity purposes.*

Defendants note the "Tribal Council's official conduct embraces providing 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." Rec. Doc. 16-4 at 12. Defendants further note "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." Rec. Doc. 16-4 at 13. At that same time, Defendants contend communicating with Vines is a Tribal Council function and within the scope of the Council's authority because he is a Tribal government (albeit contract) employee. Rec. Doc. 16-4 at 14. Clearly, Defendants recognize that Vines was simultaneously serving in dual roles; and they seek immunity for their interactions with him under both.

While Defendants communications with Vines concerning the investigation and prosecution has been addressed in the preceding section, Plaintiff's inclusion in the Complaint about Defendants' discussions with Vines, specifically, renegotiating his contract as Tribal Prosecutor is to demonstrate the nefarious pay-to-play arrangement between Defendants and Vines.[9] Stated differently, it illustrates "fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct" that is encompassed by the Chitimacha Comprehensive Code of Justice, Title XXIV, § 4(a) and allows liability to be imposed upon tribal officials.

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[9] In addition, Vines appeared before Defendants and Plaintiff not only to renegotiate his contract but to discuss criminal court proceedings, including why criminal defendants hire lawyers, in an effort to intimidate Plaintiff.

Parenthetically, the Louisiana Supreme Court has squarely addressed similar conflicts of interest between an assistant district attorney's prosecutorial role on behalf of the state and the interest of a client. In that regard, the Louisiana Supreme Court found that "in order to comply with the Rules of Professional Conduct, a district attorney must immediately withdraw from the civil representation of a client where there is substantial reason to believe the charges of criminal conduct have been or will be filed by or against the civil client." *In re Toups*, 00-0634 (La. 11/28/00), 773 So.2d 709; *see also* LSBA-RPCC PUBLIC Opinion 01-RPCC-011 (02/15/17). Not only did Vines not withdraw, he continued to carry out Defendants' plan and wanted to be paid more to do it.

d. *Plaintiff's temporary leave of absence.*

Defendants further contend the reduction of Plaintiff's salary comports with Chitimacha Constitution Article VII, § 1(c), (f). Rec. Doc. 16-4 at 15. To that end, the allege "[r]educing 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." Rec. Doc. 16-4 at 1. Importantly, the Chitimacha Constitution attached as Exhibit A/1 (Rec. Doc. 16-4) to Defendants motion is *not* the Constitution in effect when Defendants reduced Plaintiff assumed office.

Furthermore, Defendants only paint half of the picture of what transpired. The other half is that "[a]s of February 16, 2016 (Defendants April Wyatt, Jacqueline Junca, Jacob Darden and Toby Darden) met with the Chairman and asked that he take a temporary leave of absence until completion of this investigation." Plaintiff complied with Defendants' request. But the leave was unreasonably drawn out longer than necessary and by letter dated April 25, 2016, Plaintiff

informed the Chitimacha Tribe including Defendants that he was terminating his voluntary, temporary leave of absence and resuming his duties as Chairman.[10]

Remarkably, there is no basis contained in the Chitimacha Constitution that was in effect at that time for the Tribal Council to ask the Chairman to take a leave of absence. *See* Exhibit 3. The prior Constitution did not provide for a suspension of any member of the Tribal Council except if the Tribal Council member was appealing a final conviction of any crime or offense under: (a) the Major Crimes Act (18 USCA 1153, et seq); or (b) the General Crimes Act (18 USCA 1152, et seq); or (c) the Assimilative Crimes Act (18 USCA 13). *See* Exhibit 3 (Chitimacha Constitution Art. V, § 3B); *see also* Rec. Doc. 1-1 at 18-19, ¶ 96. None of these three (3) enumerated causes for suspension were applicable to Plaintiff.

Of further importance, the Chitimacha Tribal Court – Rules of Court, Title IV – Civil Procedure, Ch. 6, Sec. 601 provides:

> (a) In determining any case over which it has jurisdiction the Court shall give binding effect to:
>
> (1) any applicable constitutional provision, treat, law, or valid regulation of the United States;
>
> (2) any applicable provision of the Tribal Constitution or law of the Tribe not in conflict with federal law;
>
> (3) any applicable custom or usage of the Tribe not in conflict with any law of the Tribe or of the United States. Where doubt arises as to such custom or usage, the Court may request the testimony, as witnesses of the Court, of persons familiar with such custom and usage.

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[10] Although Plaintiff's April 25, 2016 letter and Defendants' responsive May 4, 2016 letter are not specifically alleged in the Complaint, he does allege that he had taken a voluntarily leave of absence and that Defendants, including Defendant John Paul Darden, initiated an *ultra vires* resolution to reduce his salary. Rec. Doc. 1-1, ¶¶ 98-100. An amending complaint to include the events with more specificity would conclusively dispel Defendants' "official act" argument.

> (b) Where appropriate, the Court may, in its discretion, be guided by statutes, common law, or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place.[11]

According to the effective Constitution when Plaintiff assumed office, he "shall hold office for a term of two (2) years and until their successors are duly elected and installed." *See* Exhibit 3; Chitimacha Constitution Article VI, § 5. Since the Chitimacha Constitution does not provide for the reduction of salary of a Tribal Council member, this Court, by applying Chitimacha Tribal Court Rules, Section 601, should look for guidance to the Louisiana Constitution, specifically, Article X, § 23, which states: "The compensation of an elected official shall not be reduced during the term for which he is elected."

Louisiana statutory and jurisprudential authority also provides guidance, that is, the Chitimacha Tribe had a mandatory, contractual obligation to pay Plaintiff until the money is paid, or for the term for which he was elected expires, whichever occurs later. *See Hoag v. State ex rel. Kennedy*, 01-0176 (La. App. 1 Cir. 11/20/03), 836 So.2d 207; *Redwine v. State*, 94-0160 (La. App. 1 Cir. 12/22/94), 694 So.2d 61; *see also* La. C.C. arts. 2985.8, 2987 and 2988. By the Defendants seeking to reduce Plaintiff's salary, they failed to fulfill their duties to maintain Plaintiff's salary and improperly reduced the required salary of Plaintiff without any basis under Chitimacha (or Louisiana) law. Accordingly, Defendants reduction of Plaintiff's salary was *ultra vires.*

The *ultra vires* exception was recognized by the Supreme Court as an exception to sovereign immunity which allows suit against officials in circumstances. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The Supreme

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[11] *See* http://www.chitimacha.gov/sites/default/files/CCCJ%20Title%20IV%20-%20Civil%20Procedure%20with%20Amendments.pdf (Revised by Ordinance #3-01; Adopted: December 18, 2001; Effective: November 8, 2002)

Court explained in *Larson* that the *ultra vires* exception applies in two situations: (1) where an officer's powers are limited by statute, but his actions go beyond those limitations, or (2) if his actions are unconstitutional. *Larson*, 337 U.S. at 689-90. Under these circumstances, the officials' actions are considered individual and not the sovereign. *Id.* at 689. The Fifth Circuit, in an unpublished opinion, has implicitly recognized the continuing vitality of the *ultra vires* exception. *See Taylor v. United States*, 292 Fed.Appx. 383 (5th Cir. 2008) (unpublished).

Defendants contend Plaintiff's assertion that his pay reduction was *ultra vires* is conclusory and a legal conclusion that should be disregarded. Rec. Doc. 16-4 at 15. However, clearly, Defendants went beyond the limitations of the Chitimacha Constitution by reducing Plaintiff's salary without any legal authority to do so, and their actions were unconstitutional. By definition, their actions (*i.e.* the resolution) to reduce Plaintiff's salary was *ultra vires*.

iv. *Tribal Immunity Does Not Apply in Malicious Prosecution Claims*

In *Acres Bonusing*, the Ninth Circuit recently addressed tribal immunity of individual tribal members in a malicious prosecution claim. Following the framework in *Lewis*, tribal sovereign immunity did not bar the action for damages against the individual tribal employees and agents in their personal capacities. As the Supreme Court in *Lewis* explained about suits against individuals in their personal capacities, the plaintiff "seek[s] to impose *individual* liability upon a government officer for actions taken under color of … law." *Id.* (quoting *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)).

Under *Lewis*, the result is the same even if the sovereign agrees to indemnify the official for any liability. "[A]n indemnification provision cannot, as a matter of law, extent sovereign immunity to individual employees who would otherwise not fall under its protective cloak." *Id.* at 1292. The immunity "analysis turn[s] on whether the potential *legal* liability l[ies], not from whence the money to pay the damages award ultimately" comes. *Id.* Thus, "[t]he critical inquiry

is who may be *legally bound* by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 1292-93 (emphasis added).

"Significantly, *Lewis* then held that the general rules governing sovereign immunity applied equally to tribal sovereign immunity." *Acres Bonusing, Inc.*, 17 F.4th at 909; *Lewis* at 1291. Other precedent in the Ninth Circuit, namely, *Pistor* forecast the Supreme Court's analysis in *Lewis* and contained the most substantial treatment of the sovereign immunity issue, which was instructive in *Acres Bonusing, Inc.*

'*Pistor* emphasized that the same principles that 'shape state and federal sovereign immunity' apply to tribal sovereign immunity." *Acres Bonusing, Inc.*, 17 F.4th at 910; *Pistor*, 791 F.3d 1113 (quoting *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). The Ninth Circuit's earlier decision in *Maxwell* tracks *Lewis* and *Pistor*. *Id.*

Applying *Lewis*, *Pistor* and *Acres Bonusing, Inc.*, tribal sovereign immunity does not bar this suit. Again, Plaintiff seeks money damages against Defendants in their individual capacities. Any relief against them will not require the Chitimacha Tribe to do or pay anything, because any "judgment will not operate against the Tribe," *Lewis*, 137 S.Ct. at 1291. The Chitimacha Tribe is not the real party in interest here.

B. *The inapplicability of Witness Immunity.*

Defendants assert "Counts II, III, IV, V, and VII are largely based on the Tribal Council Defendants' testimony as witnesses in his criminal trial," and seek to invoke Witness Immunity for their misconduct. Rec. Doc. 16-4 at 21. That is incorrect.

For example, Plaintiff alleges in Count II that Defendants acted in concert with Vines in fabricating false evidence in the process of *investigating* the bonus payment to implicate him. Defendants' assertions notwithstanding, their reliance on *Rehberg v. Paulk*, 566 U.S. 356, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012) to support their conclusion is misplaced.

Crucially, there is distinction between a person who provides trial testimony and one who sets the wheels of government in motion by instigating legal action or fabricating evidence concerning an unsolved crime. At best, only qualified immunity extends to such acts. *King v. Hardwood*, 852 F.3d 568 (6th Cir. 2017). "[I]ndividuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has 'made, influenced, or participated in the decision to prosecute the plaintiff' by, for example, 'knowingly or recklessly' making false statements in either reports or affidavits to secure warrants.'" *Id.*, 852 F.3d at 582-83.

Plaintiff alleges that Defendants singled him out to oust him out of office, made false statements in suggesting he did something improper and personally sought to have him investigated then prosecuted. Perhaps *Rehberg* affords Defendants absolute immunity to the extent Plaintiff's claims are based on their trial testimony alone, but *Rehberg* does not afford Defendants absolute immunity for their actions that are prior to, and independent of, their trial testimony. Because Plaintiff has alleged that Defendants set his prosecution in motion—and there was an absence of probable cause and they made knowing or reckless false statements and provided false information implicating Plaintiff[12]—Plaintiff may properly basis his malicious-prosecution claim on those actions without triggering absolute immunity established by *Rehberg*.

Also, in maintaining the viability of Plaintiff's claims against Defendants who wrongly set his prosecution in motion is rooted in the common-law distinction of "complaining witnesses," who—unlike testifying witnesses—are not afforded absolute immunity. *Rehberg*, 566 U.S. at 370-

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[12] *See* Rec. Doc. 1-1, ¶¶ 25, 26, 50, 52, 73, 88, 89, 120, 121, 122, 123, 124, 125, 155, 197

73; *see also Kalina v. Fletcher*, 522 U.S. 118, 135, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (Scalia, J. concurring) ("a 'complaining witness' could be sued for malicious prosecution whether or not he ever provided factual testimony, so long has he had a role in initiating or procuring prosecution"); *Malley v. Briggs*, 475 U.S. 335, 340-41 106 S.Ct. 1082, 89 L.Ed.2d 271 (1986) ("[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause."); *Keko v. Hingle*, 318 F.3d 639 (5th Cir. 2003) (witness was not protected by absolute immunity from liability under § 1983 for pre-testimonial activities); *Wearry v. Foster*, 33 F.4th 260 (5th Cir. 2022) (officer only entitled to immunity when testifying as a witness at trial).

Clearly, Plaintiff has a colorable claim against Defendants for initiating an investigation on a bonus payment that was transparent and discussed, initiating an investigation based on a non-existent policy, and fabrication of evidence during the investigation that includes changing their stories from what they initially told Louisiana State Police to what they told Vines when he re-interviewed them—all for purposes of feigning probable cause. *See Goldsetin v. Serio*, 496 So.2d 412 (La. App. 4 Cir. 1986) (malicious prosecution is not concerned with the statements made during a proceeding but rather with the intent of the parties in instituting the original proceeding, thus absolute privilege is no an affirmative defense). This is especially so when considering there was no proceeding pending, scheduled or perhaps contemplated.

C. *Defendants are not entitled to Qualified Immunity.*

In certain circumstances where government officials are sued in their individual capacities for alleged constitutional violations, they may be able to avail themselves to qualified immunity. It is a judicial created doctrine that acts to shield government employees from liability where they were performing discretionary functions if their actions did not violate "clearly established law."

Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Importantly, the actions must also have been taken in good faith.[13] *Id.*, 457 U.S. at 816.

Defendants theorize that the doctrine of qualified immunity applies to them as tribal officials just as it does to their state and federal counterparts. To do so, they rely on several cases. But each case cited concerns qualified immunity for *state* actors, not tribal officials.[14] Practically, however, qualified immunity has not been proven as useful in the tribal context as it has in the state context. *See* Rob Roy Smith & Claire Newman, *Sovereign Immunity for Tribal Officials At Risk*, LAW 360 (Feb. 26, 2016).[15] Whether that is because the United States Constitution does not apply to tribes as it does to states, or perhaps because tribal sovereign immunity has served as a complete bar to suit against tribal officials, cases applying qualified immunity in a tribal context are rare. *Id.*

Of course, suing under section 1983 is more complicated in a tribal context since the Constitution does not apply to tribes. As the Ninth Circuit noted, section 1983 suits cannot be maintained against tribal officials acting under tribal law. *Pistor*, 791 F.3d at 1114-15. However, the Ninth Circuit has also indicated that such a suit may lie if the tribal official had been acting under color of state law, for example by action in conjunction with a state actor. *Id.* "The general rule of [section 1983's] inapplicability to tribal officers acting pursuant to tribal law is a key difference in how tribal and state sovereign immunity may operate because it leaves tribal official

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[13] The question of whether a state official acted in good faith is a question of fact. *Harlow*, 457 U.S. at 816. Plaintiff has specifically pled that Defendants actions were *not* in good faith.

[14] Defendants cite *Lewis v. Clarke*, ---U.S.---, 137 U.S. 1285, 197 L.Ed.2d 631 (2017) to suggest "[a] [tribal] officer in an individual-capacity action … may be able to assert personal immunity defenses." Rec. Doc. 16-4 at 16. The example given in *Lewis* was "absolute prosecutorial immunity in certain circumstances," not qualified immunity. *Lewis*, 137 S.Ct. at 1291.

[15] https://www.law360.com/articles/763181/sovereign-immunity-for-tribal-officials-at-risk

completely unshielded by immunity where their state counterparts may be protected by qualified immunity." *See* Allison Hester, *Maxwell, Lewis v. Clarke, And The Trail Around Tribal Sovereign Immunity*, 88 U. Colo. L. Rev. 721 (Summer, 2017). Consequently, "whether or how the broader doctrine of qualified immunity applies to trial officials … is somewhat fraught in the tribal setting." *Id.* at 755.

While it does not appear that the Fifth Circuit, nor any Louisiana federal court, has applied qualified immunity in the tribal context, Defendants seemingly desire for this Court to be the first to do so.

i. *Defendants' conduct was not objectively reasonable.*

Qualified immunity shields from suit but not the "plainly incompetent or those who knowingly violate the law." *Brumfield v. Hollins*, 551 F.3d 322 (5th Cir. 2005). If a plaintiff makes a showing that the official violated a statutory or constitutional right, then the second step is to determine whether "the defendants' actions were objectively reasonable in light of the law that was clearly established at the time of the actions complained of." *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245 (5th Cir. 2005).

Plaintiff has borne his burden on the first step of the qualified immunity analysis. He has sufficiently pleaded that Defendants violated his constitutional rights concerning their frivolous investigation, fabrication of evidence, violation of due process, etc. under the color of state law, as well as depriving him of his property interest (*e.g.* salary as Chairman). The Court must take these well-pleaded facts as true.

The courses of conduct taken by Defendants were objectively unreasonable in light of the clearly established law. Such conduct is objectively unreasonable when, at the time of their conduct, the contours of Plaintiff's violated rights were "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563

U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Here, Defendants do not argue that the law was not clearly established at the time of their offenses; rather there merely offer a conclusory opinion that they were "performing discretionary functions." *See* Rec. Doc. 16-4 at 16. But the contours of Plaintiff's constitutional rights were sufficiently clear—as Plaintiff pleaded in his Complaint—that a reasonable official would have understood those rights were being violated.

D. *Plaintiff's 1983 claim.*

Plaintiff has alleged the fundamental elements of a section 1983 claim, that is, the Defendants deprived him of a right secured by the Constitution or the laws of the United States. *See Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 609 (5th Cir. 2001).

"It is well established that private parties acting in concert with officers of the state are acting under the color of law within the meaning of section 1983." *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). In the complaint, Plaintiff alleges that Defendants acted jointly with Vines in instigating the investigation at issue, including manufacturing probable cause for a prosecution when none existed.[16] The Court *must* assume the veracity of these allegations since the conduct, if proven, would support a claim under section 1983.

Furthermore, the Complaint avers that the conduct complained of was committed by Defendants acting under the color of *state* law; and that this conduct deprived Plaintiff of rights, privileges, or immunities secured by the Constitution or law of the United States. The Supreme

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[16] The individual defendants contend that their "effort to investigate" and "deliberations" were in "coordination with the Tribe's Prosecutor." But defendant Robert Vines was not acting as the Tribe's Prosecutor; rather he took on the case as an assistant district attorney for the 16th Judicial District Court

Court has established that a section 1983 claim is satisfied when a party charged with an alleged constitutional deprivation "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937.

Plaintiff's 1983 claim against Defendants also arises, in part, out of an *ultra vires* resolution to have the Tribe's contract employee, Vines, to "oust" Plaintiff by conducting an improper or illegal investigation then shoehorning it into a false theory to prosecute plaintiff. The alleged unconstitutional acts were done under Louisiana Revised Statutes, specifically, La. R.S. 14:35 and 14:73.5. While Vines arguably may be said to have been acting pursuant to the Defendants' orders, he was also acting in his capacity as an assistant district attorney. Given this explicit averment of official state authority, Plaintiff has sufficiently pleaded action under the color of state law to withstand a Rule 12(b)(6) motion. *See Evans v. McKay*, 869 F.2d at 1348.

As to the second element of Plaintiff's 1983 action, he alleges the Defendants' conduct, including Vines, was without probable case. The Court must accept these allegations at true, thus it is sufficient to state a claim of a federally protected right entitling him to relief under section 1983. *Id*; *see also Sanders v. Kennedy*, 794 F.2d 479 (9th Cir. 1986) (individual's allegations of unlawful arrest without probable cause stated a claim for relief under section 1983); *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984) (same).

E. *§ 1985 Conspiracy.*

Plaintiff alleges that he may have a claim under § 1985. He has alleged sufficiently that Defendants conspired to deprive him of his constitutional rights. To that end, Plaintiff has alleged the existence of an agreement to do an illegal act and an actual constitutional deprivation. *See Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994). Indeed, the factual allegations are specific about an agreement, plan or meeting of the minds by Defendants and Vines to "oust" Mr. Darden from his position as chairman.

"To state a claim under 42 U.S.C. § 1985(3), a plaintiff must alleged: (1) a conspiracy involving two or more persons; (2) for the purposes of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which cases injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States." *Hillard v. Ferguson*, 30 F.3d 649 (5th Cir. 1994).

For his Section 1985 claim, Plaintiff alleges that Defendants and Vines participated in an extensive conspiracy to cause Plaintiff's false arrest, the institution of unfounded prosecution and the concealment of truth from the public. Both Defendants and Vines took certain action designed to conceal the fact that there was no basis for the arrest or prosecution of Plaintiff. And Vines attempted to edit Defendants answers to questions previously provided by them for purposes of giving false testimony. Defendants then gave testimony they knew to be false, or contradictory to their initial statements. They then falsely alleged that Plaintiff violated an unwritten policy, despite the bonus payment that he did not accept being transparent and known. As such, there was no legal basis for the investigation, arrest or the charges. Clearly, serious allegations of conspiracy have been made, and matters such as the extent of the injury and casual connection raise questions for the trier of fact. It cannot be said with certainty that there is no possibility that any set of facts which might be provide in support of the allegations would entitle Plaintiff to some relief.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss. Plaintiff has sufficiently pleaded individual-capacity claims. At a minimum, this Court should grant Plaintiff leave to amend his Complaint with respect to any claims that are arguably deficient.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify by signing above that I served this document by ECF/CMF on all counsel of record in the above-captioned matter on September 16, 2022.