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	CIVIL ACTION NO: 6:22-cv-0404 LEAD 6:22-cv-1398 MEMBER JUDGE ROBERT M. SUMMERHAYS MAGISTRATE JUDGE KAY

PLAINTIFF O'NEAL J. DARDEN, JR.'S
OBJECTIONS TO REPORT AND RECOMMENDATIONS

Respectfully submitted,

s/ Shane E. A. Romero, Jr.
SHANE E. A. ROMERO, JR. (26108)
110 East Pershing Street
New Iberia, LA 70560
Telephone: (337) 321-6945
Facsimile: (337) 321-6947
Email: seromero@cox-internet.com

Counsel for O'Neil J. Darden, Jr.

TABLE OF AUTHORITIES

Cases:

Avoyelles Parish Justice of the Peace v. Avoyelles Parish Police Jury, 98-8583 (La. App. 3 Cir. 6/23/99), 758 So.2d 161, *writ denied*, 99-2210 (La. 12/17/99) 8

Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989) 2, 3

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) 8

Lewis v. Clarke, 581 U.S. 155, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) 1

Lugar v. Edmonson Oil Co., Inc. 457 U.S. 922, 102 S.Ct. 2744 (1982) 3

Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015) 1

Rivera-Colon v. Parish of St. Bernard, 516 F.Supp.3d 583 (E.D. La. 2021) 6

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

Taylor v. United States, 292 Fed.Appx. 383 (5th Cir. 2008) 9

Statutes:

U.S. Const. amend. XXVII 7

28 U.S.C. § 636(b)(1)(C) 1

Fed. R.Civ.Proc. 72(b) 1

La. Const. art. V, § 21..... 7

La. Const. art. V, § 31 7

La. Const. art. X, § 23 7

Chitimacha Comprehensive Code of Justice, Title XXIV § 4(a) 5

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R.Civ.Proc. 72(b), Plaintiff respectfully objects to the Report and Recommendation rendered on March 1, 2023 for the reasons discussed *infra.*

The Magistrate recommended that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction should be granted, and all claims against Defendants should be dismissed without prejudice. Rec. Doc. 42, p. 10. The Report and Recommendation fails to address several pertinent facts that should preclude dismissal including: (1) Defendants acting in concert with a state actor under the color of state law; (2) the February 16, 2018 decision in *State of New Jersey, Casino Control Commission, Docket No. 17-0023-CK*[1], (3) Defendants defunding Plaintiff's constitutionally protected compensation was *ultra vires* and, perhaps most importantly, (4) Defendants utilized their private contract employee to prosecute the matter in his capacity as assistant district attorney.

I. DEFENDANTS WERE ACTING IN CONCERT WITH A STATE ACTOR UNDER THE COLOR OF STATE LAW.

The Report and Recommendations incorrectly infers that Plaintiff relies solely on *Lewis v. Clarke*, 581 U.S. 155, 137 S.Ct. 1285, 197 L.Ed.2d 631 (2017) to support his claims that Defendants are the real parties in interest for purposes of sovereign immunity. But the Magistrate does not address any of Plaintiff's other cited jurisprudential authority such as *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) ("[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

[1] By citing and quoting the New Jersey ruling (Rec. Doc. 1-1, ¶¶ 82-84), the Court may consider this document in deciding the 12b motion to dismiss. *Superior MRI Servs. v. All. HealthCare Servs.*, 778 F.3d 502, 504 (5th Cir. 2015).

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.").

Plaintiff has alleged additional sufficient facts to withstand a motion to dismiss. More particularly, Plaintiff alleges Defendants acted in concert with officers of the state, namely, the Tribe's contract employee and Sixteenth Judicial District Assistant District Attorney, Robert Vines, under the color of state law within the meaning of Section 1983. The Ninth Circuit, in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), provides guidance to demonstrate that Plaintiff's complaint is sufficient to state a claim under Section 1983 against Defendants and preclude immunity.

In *Evans*, suit was brought against individual police officers arising out of the execution of orders of the Tribal Court. The order was sought and obtained by the tribal tax commission to enforce tribal laws, and the orders were executed by policies officers of a municipality who also happened to be agents of the Bureau of Indian Affairs. The contract between the municipality and the Bureau of Indian Affairs empowered the police offices to provide law enforcement protection the residents of the City and to enforce the ordinances. While the law enforcement officers may have been said to have been acting to Tribal Court orders, they were also allegedly and arguably acting in their capacity as municipal police officers. *Evans*, 869 F.2d at 1347-1348. In the *Evans* complaint, it was "expressly alleged that '[t]he city police acted under color of state law in arresting white Plaintiffs without a warrant.' Given this explicit allegation of official state authority, coupled with the 'peculiar' law enforcement situation as it exists on the reservation, we conclude that appellants have sufficiently pleaded action under color of state law to withstand a Rule 12(b)(6) motion." *Id.*

Moreover, regarding individual tribal defendants, the Ninth Circuit held "[i]t is well established that private parties who act in concert with officers of the state are acting under the color of state law within the meaning of Section 1983." *Id; Lugar v. Edmonson Oil Co., Inc.* 457 U.S. 922, 102 S.Ct. 2744 (1982). The *Evans* complainant alleged that the individual tribal defendants acted jointly with the city police in instigating the arrest at issue, and the court "must assume the veracity of the allegations" since the alleged conduct, if proven, would support a claim under Section 1983. *Id.*

The allegations in Plaintiff's complaint are nearly identical. Defendants sought to investigate then initiate prosecution against Plaintiff. In doing so, they used their contract employee, Vines, in his capacity as assistant district attorney. While Vines may have been said to be acting according to Tribal Council orders, he was undoubtedly acting in his capacity of an assistant district attorney for the Sixteenth Judicial District of Louisiana. Furthermore, Plaintiff alleges Defendants acted jointly with their hired gun, Vines, in instigating the arrest and prosecution at issue. This Court must accept the veracity of these allegations.

If this Court draws all reasonable inferences in Plaintiff's favor, as is required when evaluating a motion to dismiss, it is clear that Plaintiff sufficiently alleges that Defendants acted in concert with a state actor, Vines, to violate his civil rights. Simply, Vines kept a criminal investigation open for years for purposes of ousting Plaintiff from his elected position, while Defendants met with law enforcement and then Vines—in his investigatory capacity—for purposes of bringing unfounded criminal charges. In doing so, there was a meeting of the minds, that is, Defendants get serve their own personal and political motives in exchange for Vines receiving a financial benefit via a baseless investigation and charges.

II. THE NEW JERSEY RULING.

The Report and Recommendations suggests that Defendants actions were within the scope of the Tribal Council's authority. Rec. Doc. 42, p. 8. But Plaintiff had not committed any crime. That no probable cause for investigating or arresting Plaintiff was obvious.

In a 47-page decision, written after a thorough hearing concerning the underlying facts of this lawsuit, the clear and convincing evidence demonstrated that Plaintiff's actions were transparent and discussed by Defendants. Rec. Doc. 33-1. Importantly, "[t]here was not one scintilla of evidence or testimony proffered that anyone with concerns about Chairman Darden receiving a prorated bonus ever hinted to Applicant or Mr. Spivey that they had such concerns…" Rec. Doc. 33-1, p. 11.

Further, "[t]he LSP spent a significant amount of time and energy in various interviews for which transcripts were provided claiming that 'laws' were broken when the idea of giving Chairman Darden a prorated bonus was broached, but my review of the evidence reveals that could not be further from the truth. The bonus policy was just that, a policy." Rec. Doc. 33-1, p. 16. "The evidence reveals that the prorated bonus to Chairman Darden was not illegal. There was never any motive or proffered intent provided by the LSP…" Rec. Doc. 33-1, p. 18. "How anyone could find this (the bonus payment to Plaintiff) to be anything but transparent is puzzling." Rec. Doc. 33-1, p. 19. "There was no law that precluded Chairman Darden from receiving a bonus he earned prior to assuming his role as Chairman." Rec. Doc. 33-1, p. 21.

Of further interest, the New Jersey decision states that it "would be curious to know whether Chairman Darden's last paycheck was processed and/or deposited into his account after

June 29, 2015, his last day of work before he assumed the role as Chairman.[2] If it was, then using the logic of the LSP, such a payment violates § 525 of the Tribal Ordinance and is subject to at least a charge of Felony Theft, since the acceptance by the Chairman of money from Cypress while he was in the role of Chairman is really the crime, as it allegedly represents employment by Cypress and compensation to the Chairman. A reasonable fact-finder can clearly see the irrational result from taking this insular approach and reach the logical conclusion that the designation of Chairman Darden in Cypress' payroll system for the sole purpose of giving him a prorated bonus based on his work prior to assuming his role as Chairman is not illegal nor an attempt to subvert the prohibition against the Chairman being employed and receiving compensation from Cypress while concurrently serving as Chairman." Rec. Doc. 33-1, p. 21-22. Accordingly, the decision of the Magistrate that Defendants' conduct was within their authority is inexplicable, especially when you consider a second tribunal (the Sixteenth Judicial District Court) reached the same conclusion that no crime was committed. The bonus payment to Plaintiff was obviously proper.

Defendants conduct is contemplated by the Chitimacha Comprehensive Code of Justice, Title XXIV § 4(a), 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 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.*[3]

---

[2] Indeed, Plaintiff's last paycheck from his employment with Cypress was deposited after he assumed his elected position as Chairman.

[3] Emphasis added.

Here, Plaintiff alleges Defendants set into motion events that led to the investigation, arrest and prosecution of Plaintiff. There is no evidence that Plaintiff's bonus was anything other than transparent, because it was known and discussed extensively by Defendants. Moreover, Defendants knew that Plaintiff had earned the bonus prior to his election, yet they still encouraged an investigation and prosecution by their henchman, Vines. Their acts were under the guise of "official action" was done with malice, which "may be inferred from the law of probable cause." *Rivera-Colon v. Parish of St. Bernard,* 516 F.Supp.3d 583 (E.D. La. 2021). Defendants cannot explain how Plaintiff's acceptance of a known and identified bonus payment, which was discussed by them, supports probable cause for any criminal offense does not exist under the facts as pleaded by Plaintiff. Therefore, how the Report and Recommendation could cast Defendants' acts as anything other than fraudulent, malicious, intentional, willful, outrageous, reckless or flagrant misconduct is perplexing.

III. THE DEFENDANTS' DEFUNDING OF PLAINTIFF'S SALARY WAS *ULTRA VIRES*.

The Report and Recommendation states that "Article VIII, § 1(f) of the Constitution and Bylaws gives the Tribal Council the power to 'appropriate any available tribal funds for the benefit of the tribe.' Doc. 18, att. 1, p. 8, art. VII, § 1(f). This provision is at least a colorable basis for the Tribal Council Defendants' decision to reduce plaintiff's salary after plaintiff took an eleventh-month voluntary leave of absence."[4] Doc. 42, p. 9. Such analysis omits the fact that Plaintiff had a constitutional right to serve unfettered in his duly elected position for the full term. Rec. Doc. 33-2, Art. VI, § 5.

---

[4] Plaintiff's leave of absence was not purely voluntary as stated by the Magistrate. Rec. Doc. 42, p. 8. On May 4, 2016, Defendants authored a letter stating, in pertinent part, "Chairman Darden's description of his removal as voluntary is incorrect." More importantly, Defendants "determined that Chairman Darden would take a leave of absence, while continuing to receive his full salary." *See* Ex. 1.

According to the effective Chitimacha 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."[5] Rec. Doc. 33-2, Art. VI, § 5. By using the word "shall" in Art. VI, § 5, it is only logical that the full amount of the salary be funded during the term. Further, it is elementary that the Tribal Council has control over the finances of the Tribe except as limited by constitutional provisions.

The important relationship of elected officials' compensation to their independence in office is not a novel idea. For example, the Compensation Clause and the Twenty-Seventh Amendment of the United States Constitution embodies the idea of protecting the salary of federal judges, senators, and representatives during their terms in office. *See also, e.g.*, La. Const. art. V, §§ 21 and 31 and art. X, § 23 (prohibiting the reduction of salary of officials during their term in office). To that end, the framers of the United States Constitution knew well to guard against the "evils of democracy" by including a prohibition in Art. III, § 1 barring any dimunition of judges' compensation "during their Continuance in Office;" and likewise, the Twenty-Seventh amendment declares "[n]o law, varying the compensation for services of Senators and Representative, shall take effect, until an election for Representatives shall have intervened." U.S. Const. amend. XXVII.

Regardless of how any temporary leave of absence by Plaintiff is characterized – voluntary or involuntary – Defendants had no authority to reduce Plaintiff's salary. They had a mandatory obligation to pay Plaintiff's compensation. In other words, the Magistrate's interpretation of the Chitimacha Constitution would render the mandatory provisions of Plaintiff being allowed to serve

---

[5] Emphasis added.

his term at the salary for his elected position meaningless. It would create a discretionary obligation for Plaintiff's salary to be funded at the pleasure of the Tribal Council. Without question, the protection of Plaintiff's salary attaches at the time Plaintiff was elected or takes office.

Materially, the folly of allowing diminution of salary for elected officials spawned the adoption of the federal compensation guarantees found in the United States Constitution. Of course, there is no shortage of excuses, some vindictive and some perhaps prompted by legitimate fiscal concerns, which might motivate those controlling the public purse to reduce the salaries of elected officials. But the legitimacy of a popular election demands that the public and the officials they elect know on the day of the election that at least during the term for which the official is elected neither the compensation nor the term then fixed for the office will be decreased for any reason. *See, Avoyelles Parish Justice of the Peace v. Avoyelles Parish Police Jury*, 98-8583 (La. App. 3 Cir. 6/23/99), 758 So.2d 161, *writ denied*, 99-2210 (La. 12/17/99). That being considered, Defendants had a mandatory obligation to pay Plaintiff's full compensation until the Chitimacha Constitution was modified, the money was paid, or the term for which Plaintiff was elected expire, whichever comes later. Defendants obviously breach of this obligation by an *ultra vires* resolution.

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 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). Here, 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*.

Parenthetically, there was no basis contained in the Chitimacha Constitution in effect at that time for the Tribal Council to ask the Chairman to take a leave of absence.[6] *See* Rec. Doc. 33-2. This 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). Rec. Doc. 33-2, Art. V, § 3B; None of these three (3) enumerated causes for were applicable to Plaintiff.

IV. ROBERT VINES: A CONTRACT EMPLOYEE OF THE TRIBE, THE ALLEGED VICTIM, IS PAID BY DEFENDANTS; AND ALSO AN ASSISTANT DISTRICT ATTORNEY PROSECUTING PLAINTIFF ON BEHALF OF DEFENDANTS.

The Report and Recommendation recognizes that "during the criminal investigation and trial, the Tribe was the alleged victim," Rec. Doc. 42, p. 8. and concludes that when "Defendants referred the matter to the local District Attorney's Office for prosecution, they were acting within their authority to represent the Tribe's interests to the state and within the Tribe's authority to refer the matter for prosecution." Rec. Doc. 42, p. 6. But the Magistrate completely ignored the elephant in the room. Robert Vines could never be an objective prosecutor. He is a contract

---

[6] The Constitution and Bylaws of the Chitimacha Tribe of Louisiana provided by Defendants (Rec. Doc. 18-1) was not in effect at the time of Plaintiff's suspension/leave of absence. Instead, Rec. Doc. 33-2 was in effect on the date of the events giving rise to this lawsuit.

employee of the Tribe—the alleged victim—whose compensation is funded by Defendants. Clearly, he had a motive to protect his pocketbook by carrying out Defendants' untoward political desires.

Defendants note that their conduct "embraces providing assistance to the State's prosecution." 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 the 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 employee." Rec. Doc. 16-4. Clearly, Defendants recognize Vines was simultaneously serving in dual roles; and they seek immunity for their interactions with him in both roles. In other words, Defendants want Vines to serve as a sword and a shield.

Oddly, the Report and Recommendations is devoid of any discussing of Plaintiff's specific averments about Vines renegotiating his contract as Tribal Prosecutor with Defendants, which demonstrates the nefarious pay-to-play arrangement. Again, it illustrates "fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct" embodied by Chitimacha Comprehensive Code of Justice, Title XXIV § 4(a) that precludes sovereign immunity and allows liability to be imposed upon Defendants.

V. CONCLUSION

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

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 March 13, 2023.