Luke Busby, Esq.
Nevada State Bar #10319
316 California Avenue
Reno, Nevada 89509
Phone (775) 453-0112
luke@lukeandrewbusbyltd.com
Attorney for Plaintiff Michael Erwine

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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MICHAEL ERWINE, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	3:24-cv-00045-MMD-CSD **RESPONSE IN OPPOSITION TO MOTION TO DISMISS [ECF # 111] AND JOINDER [ECF # 114]**

COMES NOW, Plaintiff, MICHAEL ERWINE, by and through the undersigned counsel, and hereby files the following Response to the November 22, 2024 Notice of Renewed Motion and Renewed Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), (6), & (7) filed by Defendants ZACHARY WESTBROOK, JOHN LEONARD AND MICHEL HALL ("Officer Defendants") at ECF No. 111. On November 30, 2024, Defendant GENE M. BURKE filed a Joinder to the Officer Defendants' Motion at ECF #114.

MEMORANDUM OF POINTS AND AUTHORITIES

This case has seen multiple attempts by the Officer Defendants to dismiss Plaintiff's claims. Initially, the Officer Defendants filed a motion to dismiss [ECF No. 62] asserting sovereign

immunity, improper venue, and failure to exhaust tribal remedies, which Plaintiff opposed [ECF No. 73]. After Magistrate Judge Denney issued an order on September 3, 2024 [ECF No. 99] finding the sovereign immunity defense unlikely to succeed but noting potential personal immunity defenses, the Officer Defendants sought to supplement their motion [ECF No. 105] with absolute and qualified immunity arguments. On November 7, 2024, this Court denied both the motion to dismiss and motion to supplement without prejudice [ECF No. 108] and permitted filing of a comprehensive motion incorporating all grounds for dismissal within the page limits prescribed by LR 7-3(b). The instant motion [ECF No. 111] now raises three main arguments: (1) official immunity, (2) derivative sovereign immunity, and (3) failure to join an indispensable party.

STANDARD OF REVIEW

Under FRCP 12(b)(1), a defendant can seek dismissal of a claim due to lack of subject matter jurisdiction. This type of dismissal is justified when the complaint, on its face, does not sufficiently allege facts that establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984-85 (9th Cir. 2008). The plaintiff must demonstrate the court's jurisdiction over the case. *McCauley v. Ford Motor Co*., 264 F.3d 952, 957 (9th Cir. 2001).

When considering a motion to dismiss under FRCP 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc*., 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys*., 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A facial plausibility standard is not a "probability requirement" but mandates "more

than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. *Jablon v. Dean Witter & Co*., 614 F.2d 677, 682 (9th Cir. 1980).

FRCP 12(b)(7) allows a party to assert a ground for dismissal based on failing to join a party as required under Rule 19. *Fed. Deposit Ins. Corp. v. Jones, No*. 2:13-cv-168-JAD—GWF, 2014 U.S. Dist. LEXIS 131738, 2014 WL 4699511, at *11 (D. Nev. Sept. 19, 2014). FRCP 19(a) is designed to ensure that a party with a stake in the proceedings is able to participate, thereby protecting their interests. *In re Republic of the Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002). A "required" party under Rule 19(a) must be joined if feasible when their absence would prevent the court from providing complete relief among the existing parties, or when their interests are so connected to the matter that proceeding without them could impair their ability to protect their interest or expose existing parties to the risk of multiple or inconsistent obligations. Courts may consider evidence beyond the pleadings in deciding a 12(b)(7) motion. *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994).

ARGUMENT

I. IMMUNITY

Defendants argue they possess absolute immunity because the Washoe Tribal Code extends sovereign immunity to tribal officers and employees, and because federal law principles confirm tribal officials should receive absolute immunity for personnel decisions. This argument fails for multiple reasons. See pages 7-11 of the Motion.

A. Absolute Immunity

The Supreme Court's immunity jurisprudence distinguishes between sovereign immunity, which protects governmental entities from suit, and absolute immunity, which protects individual officials performing specific functions. While qualified immunity is the norm for executive officials under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), the Court has carved out absolute

immunity in five distinct circumstances: prosecutors performing prosecutorial tasks, *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976); judges performing judicial tasks, *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978); legislators performing legislative tasks, *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998); police officers when testifying as witnesses, *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108 (1983); and the President for actions within the outer perimeter of official duties, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S. Ct. 2690 (1982). Clearly, none of these apply here.

The Tribal Code provisions cited by the Officer Defendants do not actually confer absolute personal immunity. While the Officer Defendants point to code sections referring to "sovereign immunity" for tribal officers and employees, these provisions appear in the context of protecting the tribe's sovereign interests, not granting absolute personal immunity for individual wrongdoing. Although the Officer Defendants cite code sections that reference 'sovereign immunity' for tribal officers and employees, these provisions appear in the context of protecting the tribe's sovereign interests, rather than granting absolute personal immunity for individual wrongdoing. The Code's reference to immunity for "officers or employees" reads in context as extending the tribe's sovereign immunity in appropriate cases, not as conferring blanket absolute personal immunity for any action taken under color of tribal authority.

The Defendants' reliance on *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), is misplaced. The 9th Circuit's decision in *Davis* was based upon the fact that the appellee held the position of general counsel with the Tribe and allegedly made defamatory statements in the course of his duties in evaluating a subordinate employee, which is not the case here for the defendants Westbrook, Leonard, and Hall. "The question presented by this appeal is whether appellee, by virtue of his position as general counsel for the Navajo Tribe, was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties." *Davis v. Littell*, 398 F.2d 83, 83 (9th Cir. 1968)

Even if the Officer Defendants were in the same position of co-defendant Burke as general counsel for the Tribe, *Davis* would still be inapplicable because the Officer Defendants' conduct exhibited a pattern of retaliatory and discriminatory conduct that is actionable under federal law against the Officer Defendants in their individual capacities. Notably Erwine has dismissed his defamation claims against Westbrook, Leonard, and Hall [ECF 89] due to immunity under the *Westfall Act* [See ECF #88] 28 U.S.C.A § 2679 and Erwine did not bring a claim for defamation against defendant Burke.

In *Davis*, the tribal official was acting within the scope of his duties in evaluating a subordinate's competence and reporting his findings to the Tribal council. *Davis v. Littell*, 398 F.2d at 85. While Erwine's First Amended Complaint makes similar allegations, it also alleges conduct that goes far beyond defamation and routine personnel management. The FAC details a pattern of retaliatory and discriminatory conduct beginning when Chief Westbrook made hostile personal comments to Erwine, stating "I hired you after nobody else would" and "You owe me." FAC ¶130. Deputy Chief Leonard directly threatened Erwine's employment, declaring "If we don't want you here you won't be" and "We will find a way to fire you." FAC ¶131. This threatening conduct escalated to physical intimidation when Chief Westbrook threw Erwine's equipment across a hallway while yelling "Get your shit off my table." FAC ¶144.

The retaliatory nature of Defendants' conduct became unmistakable when Erwine requested time off to testify in his lawsuit against Churchill County. Rather than process this routine request through normal channels, Westbrook denied Erwine telling him "That's personal" and work takes priority. FAC ¶176. When Erwine explained he could not change the trial date, the Defendants responded by reinvestigating incidents for which Erwine had already been cleared of any wrongdoing. FAC ¶¶175-180. They then, when reinvestigating, manufactured false charges of dishonesty and terminated him without following proper procedures, specifically intending to destroy his law enforcement career. FAC ¶¶184-187. The Defendants placed statements in his personnel file falsely claiming he was "deceitful and dishonest" and had "failed to be truthful" -

charges that would prevent him from ever working in law enforcement again under NRS 289.110(4)(d). FAC ¶187. When Erwine sought to dispute these charges under the Tribe's grievance procedures, he was denied any process, much less the due process required by law. *Id.*

Burke argues that his position as General Counsel "lies at the heart of the Tribe's sovereignty" (Joinder p.8). The FAC alleges that Burke engaged in a systematic effort to prevent Erwine from accessing the Tribe's grievance procedures and to conceal Erwine's attempts to communicate with Tribal leadership. First, Burke attempted to control and restrict all communications by demanding that Erwine's communications with the Tribe be channeled exclusively through him. FAC ¶185. When Erwine sought to file a grievance in accordance with Tribal policy, Burke wrongfully denied him this right, despite it being expressly permitted under Tribal procedures. FAC ¶191. Burke's pattern of interference continued when he intercepted Erwine's attempts to contact the Tribal chairman directly, again insisting that all communications must go through him. FAC ¶195. The extent of Burke's concealment became evident when Erwine eventually succeeded in meeting with the Tribal chairman, who revealed he had no knowledge of Erwine's termination and expressed that Burke's involvement in the matter was unusual. FAC ¶197. This series of actions demonstrates Burke's deliberate efforts to prevent the Tribe from learning about Erwine's attempts to utilize the established grievance procedures and to shield his own conduct from Tribal oversight. The fact that Burke served as General Counsel does not automatically place all his actions within the scope of tribal sovereignty. Burke's conduct went beyond providing legal advice and into active interference with established tribal procedures, as evidenced by the tribal chairman's statement that Burke's involvement in personnel matters was unusual. FAC ¶197. Burke's deliberate concealment of information from tribal leadership and interference with grievance procedures served no legitimate sovereign interest.

Although Burke, as general counsel for the tribe, could theoretically claim prosecutorial absolute immunity in certain circumstances, his actions regarding Erwine fall entirely outside any prosecutorial or litigation functions that would warrant such immunity for a general counsel.

Instead, Burke's actions align more closely with those typically performed by Human Resources personnel or the tribal chairman himself—who notably observed that Burke's involvement in such matters was unusual. *See Supra*. As to the Officer Defendants Westbrook, Leonard, and Hall, the Ninth Circuit has consistently followed Supreme Court precedent in holding that police officer absolute immunity has defined limits and does not extend to non-testimonial conduct. *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) (citing *Cunningham v. Gates*, 229 F.3d 1271 (9th Cir. 2000)).

This conduct falls far outside the scope of official decision-making that absolute immunity is meant to protect. The doctrine exists to allow officials to make legitimate governance decisions "untroubled by the fear that some jury might find performance to have been maliciously inspired." *Davis*, 398 F.2d at 85. It does not exist to shield officials who abuse their positions to carry out personal vendettas.

Burke also claims that allowing suit against him as General Counsel would be "a devastating blow to Tribal sovereignty" (Joinder p.8). Burke's policy argument about tribal sovereignty misses the mark because holding individual officials accountable for personal misconduct that violates federal law does not impair legitimate tribal governance - it strengthens it by ensuring officials act within proper bounds. See *Lewis v. Clark*, 581 U.S. 155, 163 (2017) (tribal sovereignty is not implicated by suit against tribal employees in their individual capacities). The FAC alleges Burke acted contrary to tribal policy and interests, not in furtherance of them. Burke, as well as the Officer Defendants, are sued in their individual capacity.[1]

[1] Burke's Joinder also argues that Erwine failed to exhaust administrative remedies (Joinder p.9): Burke's argument about failure to exhaust administrative remedies ignores that he himself actively prevented Erwine from accessing those very remedies. The FAC details how Burke wrongfully denied Erwine access to the tribal grievance procedures (FAC ¶191), intercepted communications to tribal leadership (FAC ¶195), and concealed information from the tribal chairman (FAC ¶197). A Defendant cannot create the conditions that make exhaustion impossible and then claim the case should be dismissed for failure to exhaust. It is well established that exhaustion is not required when circumstances render administrative remedies effectively unavailable. *Nunez v. Duncan*, 591 F.3d 1217, 1223 (9th Cir. Or. 2010).

The 1968 decision in *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), was grounded in an outdated understanding of tribal sovereign immunity and its extension to tribal employees. The *Davis* court's analysis focused heavily on the broad scope of tribal sovereign immunity, using this as the foundation to extend immunity protections to tribal employees. However, this analytical framework was fundamentally overruled nearly five decades later by the Supreme Court's landmark decision in *Lewis v. Clark*, 581 U.S. 155, 163 (2017). In *Lewis*, the Supreme Court explicitly held that tribal employees can be held liable for their actions taken during the course of employment when sued in their individual capacity - a critical distinction that was never contemplated or analyzed in the *Davis* decision. This shift in Supreme Court jurisprudence undermines the continued validity of *Davis*' extension of tribal immunity to individual employees.

B. Qualified Immunity

Defendants' alternative argument for qualified immunity fails equally. "In § 1983 actions, qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022) citng *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1018 (9th Cir. 2020), quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quotation marks omitted). “Qualified immunity protects government officials from civil damages ‘insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir. 2013) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The qualified immunity analysis consists of determining: “(1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific case.” *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009). Courts “consider whether a reasonable officer would have had fair notice that the action was unlawful.” *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) (internal quotation marks

omitted). A case directly on point is not required in order for a right to be clearly established, but "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 739 (2011). In deciding whether to grant qualified immunity, if genuine issue of material fact exists, the court must accept the facts as asserted by the non-moving party. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013); *Coles v. Eagle*, 704 F.3d 624, 629 (9th Cir. 2012). Summary judgment must be denied if any genuine issue of material fact prevents a finding of qualified immunity. *Sandoval v. Las Vegas Metropolitan Police Dept*., 756 F.3d 1154, 1160 (9th Cir. 2014).

42 U.S.C § 1981 Claim

Qualified immunity is not available as a defense for government actors facing claims of intentional racial discrimination under 42 U.S.C. §1981 based on the clearly established constitutional prohibition against invidious racial discrimination. *Yoshikawa v. Seguirant*, 41 F.4th 1109, *Williams v. Alhambra Sch. Dist. No. 68*, 234 F. Supp. 3d 971, *Garcia v. Williams*, 704 F. Supp. 984.

Defendants also make the novel argument that 42 U.S.C. §1981 cannot apply in the tribal context due to Title VII's tribal exemption. This argument fundamentally misunderstands the distinction between tribal sovereign immunity and individual liability for intentional discrimination under the Civil Rights Act and the anti-workplace discrimination provisions of Title VII – and is unsupported by any existing law. While tribes themselves may be exempt from Title VII, individual officials have no immunity for intentional racial discrimination against employees. The FAC details a clear pattern where Erwine, who is white, was disciplined by the Officer Defendants while Native American Officer Christensen faced no consequences for identical conduct. On February 5, 2021, both Erwine and his fellow officer, who is Native American, determined there was insufficient probable cause to arrest a driver for DUI after successful completion of field sobriety tests, yet only Erwine received disciplinary action and was forced to repeat an entire three month long training program. FAC ¶¶135-137. This discriminatory pattern continued throughout

Erwine's employment, with joint decisions consistently resulting in discipline only for the white officer. FAC ¶¶247-250. The Ninth Circuit has explicitly recognized that employees of Indian Tribes can be held accountable for racial discrimination under 42 U.S.C. § 1981. See *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), where the court held that tribal members sued in their individual capacity could be held liable under 42 U.S.C. § 1981 for claims of intentional racial discrimination.

42 U.S.C. § 1985 Claims

In the FAC, Erwine brought two distinct claims under 42 U.S.C. § 1985. The Fourth Claim for Relief, found on pages 38-39 of the FAC, alleges a violation of 42 U.S.C. § 1985(2) against Westbrook, Leonard, Hall, and Burke for conspiracy to interfere with civil rights through obstruction of justice. Specifically, paragraphs 293-299 allege that these defendants conspired to deter Erwine from attending court and testifying truthfully in his lawsuit against Churchill County. Therein, Erwine claims that after becoming aware of Erwine's need to attend trial, the defendants ordered him to be reinvestigated for incidents that he had already been cleared of by another supervisor. The complaint alleges that these actions as intentional and malicious interference with Erwine's right to testify.

Erwine's Fifth Claim for Relief, detailed on pages 39-40 of the FAC in paragraphs 300-317, alleges a violation of 42 U.S.C. § 1985(3) against the defendants Westbrook, Leonard, Hall, and Burke for conspiracy to deprive Erwine of his rights and privileges. This claim centers on allegations of discriminatory treatment, with paragraph 302 specifically noting that "Erwine as a white male was treated vastly different than that of Native American female police officer, Officer Christensen." The FAC alleges that defendants conspired to deprive Erwine of both procedural and substantive due process rights regarding his continued employment and reputation. Paragraphs 309-313 detail how the defendants allegedly engaged in conduct motivated by racial or class-based discriminatory animus, resulting in injury and deprivation of Erwine's federally protected rights. Erwine alleges violations of clearly established rights that any reasonable official would have

recognized. The FAC details how Westbrook, Leonard, Hall and Burk conspired to retaliate against Erwine after learning of his whistleblower lawsuit against Churchill County. Specifically, upon discovering his pending litigation, they manufactured pretextual reasons to discipline him by reinvestigating incidents for which another supervisor had already cleared him. See FAC ¶¶ 175-179. The defendants then denied him the grievance procedures guaranteed under tribal policy, with Burk improperly preventing Erwine from filing a grievance or responding to allegations. See FAC ¶¶ 190-192. This culminated in Erwine's termination based on false allegations of dishonesty and insubordination, conducted without following the Tribe's required procedures and relying on previously unfounded disciplinary actions that had been removed from his file. See FAC ¶¶ 184-185, 337-345.

Contrary to the claim in the Motion, and counterintuitively, the Officer Defendants and Burke were not all agents of the same entity, which is a prerequisite for applying the intercorporate conspiracy doctrine. This distinction is clearly evidenced in the United States' Notice of Substitution of Parties [ECF 77], which certified that "at the time of the incidents alleged in the First Amended Complaint, Westbrook, Hall, and Leonard were acting in the scope of federal employment or office for purposes of allegations or claims in Erwine's First Amended Complaint that give rise to the applicability of the Federal Tort Claims Act provisions." [ECF 77 3:6]. Notably, this certification conspicuously omits Burke, who was employed exclusively by the Indian Tribe, while Westbrook, Hall, and Leonard were acting as agents of the federal government in enforcing the federal employment contract that governed both their and Erwine's employment.

Even if the Court were to find that the Officer Defendants and Burke were all agents of the same corporation, the intercorporate conspiracy doctrine defense would still fail. The Ninth Circuit follows the Nevada Supreme Court's standard on civil conspiracies for cases arising in that district. In *Armstrong v. Reynolds*, 22 F.4th 1058, 1085 (9th Cir. 2022), the Ninth Circuit held: "Under that doctrine, '[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as

individuals for their individual advantage,'" citing *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610 (1983).

This precedent is significant because Erwine has alleged substantial facts in the FAC demonstrating that the Defendants acted for personal motives rather than on behalf of the tribe. The personal animus of both Westbrook and Leonard was evident through their direct statements to Erwine. During a department meeting, Westbrook singled out Erwine, stating "I hired you after nobody else would" and "You owe me." FAC ¶130. At the conclusion of this meeting, Leonard told Erwine "If we don't want you here you won't be," "We will find a way to fire you," and "It's really not that hard." FAC ¶131. Westbrook's personal hostility toward Erwine was further demonstrated when he openly expressed his disdain to other department members about Erwine "dragging" him through the grievance procedure process. FAC ¶143.

In other words, even if the Defendants were all tribal agents, the intercorporate conspiracy doctrine does not bar Erwine's claims because under Ninth Circuit and Nevada law, this doctrine doesn't apply when agents act for personal advantage rather than on behalf of their employer. *Armstrong v. Reynolds*, 22 F.4th 1058, 1085 (9th Cir. 2022). The FAC alleges multiple instances showing Westbrook and Leonard acted from personal motives rather than tribal interests - including Westbrook's "You owe me" statement, Leonard's threats to find a way to fire Erwine, and Westbrook's complaints about Erwine's use of grievance procedures. FAC ¶¶ 130-31, 143.

The pattern of personal animus against Erwine is further demonstrated when Westbrook took extraordinary measures to ensure the ultimate demise of Erwine. Paragraphs 173-174 on page 23 of the FAC, alleges the following:

> Sergeant Ryan told Erwine that there were some complaints of misconduct and policy violations made against him regarding the February 20 and 21, 2022 incidents. Sergeant Ryan went over the police report and body camera footage of the incidents with Erwine and asked him questions about the body camera footage and his report. At the conclusion of the meeting Sergeant Ryan told Erwine that he did not find any grounds to substantiate the allegations of misconduct or policy violations.

However, Westbrook was unsatisfied with this finding and ordered a different supervisor, Sergeant Hall, to reinvestigate Erwine and arrive at a much different conclusion resulting in Erwine's ultimate termination. FAC ¶179. This overruling of Erwine's direct supervisor and order to reinvestigate him was in response to Erwine requesting leave to testify in an upcoming jury trial against fellow law enforcement officers.

These series of events and circumstances clearly show that the Defendants' actions were not made in accordance with the Tribes rules or to advance tribal interests. Rather, they contravened tribal policy and were deliberately concealed from tribal leaders and the tribal chairman. FAC ¶197.

Clearly, if the intercorporate conspiracy doctrine does not apply, then the Officer Defendants' grounds for seeking dismissal based on qualified immunity fails. Additionally the defendants failed to show they are entitled to qualified immunity due to the constitutional right violations being clearly established. Erwine's claims under both provisions of 42 U.S.C. § 1985 rest on clearly established and longstanding law.

The Ninth Circuit in *Head v. Wilkie*, 936 F.3d 1007 (9th Cir. 2019) affirmed a cause of action under 42 U.S.C. § 1985(2) for conspiracy to deter or harm an individual required to testify in federal court proceedings. Erwine's case directly parallels *Head v. Wilkie*, where the Ninth Circuit held that § 1985(2) protects witnesses from employment retaliation regardless of impact on underlying proceedings. *Head* definitively confirmed that intimidation or retaliation against witnesses in federal court proceedings constitutes the gist of the wrong at which the statute is directed, and interference with employment constitutes cognizable injury. 936 F.3d at 1013. Given this clear precedent, no reasonable official could have believed that conspiring to retaliate against Erwine for documenting misconduct and participating in internal investigations was constitutionally permissible. The clear parallels between the employment retaliation in *Head* and the alleged retaliation against Erwine placed the constitutional question beyond debate at the time of the challenged conduct.

Additionally, in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790 (1971), the Supreme Court recognized a cause of action under 42 U.S.C. § 1985(3) against persons who conspire to deprive another of their civil rights, as occurred with Mr. Erwine. The *Griffin* Court unequivocally held that § 1985(3) reaches private conspiracies aimed at invidiously discriminatory deprivation of the equal enjoyment of rights secured to all by law. 403 U.S. at 102. "all indicators -- text, companion provisions, and legislative history -- point unwaveringly to § 1985 (3)'s coverage of private conspiracies." *Id.* at 101. Under Griffin's clear framework, such allegations state a viable § 1985(3) claim that any reasonable official would have understood violated clearly established law.

In *Ziglar v. Abbasi*, 582 U.S. 120, 153-55 (2017) the Supreme Court applied qualified immunity to the Section 1985(3) claims because reasonable officials would not have known that internal policy discussions and consultations among officials in the same department could violate the law. Specifically, the Court found there was no clearly established law on whether agreements between officers within a single federal department could constitute a conspiracy, making it sufficiently uncertain whether Section 1985(3) applied to such discussions and actions. As the Court explained, qualified immunity protects officials unless the unlawfulness of their conduct was clearly established at the time. *Id.* Given both the context of internal departmental discussions and the legal uncertainty around Section 1985(3)'s application, the *Ziglar* Court concluded reasonable officers could not have known with certainty that such policy-related agreements were forbidden by the statute.

The claims in Erwine's complaint are fundamentally distinct from those in Ziglar, as they allege specific acts of retaliation and discrimination that served individual interests rather than corporate objectives. Unlike *Ziglar*, which involved broad policy decisions, Erwine's complaint details concrete instances where the Officer Defendants and Burke acted contrary to tribal interests and policy, demonstrating clear personal motives. Westbrook and Leonard's documented statements and actions, such as threatening Erwine's employment and interfering with his ability to testify in court proceedings, exemplify conduct driven by individual animus rather than official corporate purposes. The defendants' deliberate concealment of their actions from tribal leadership further demonstrates that they were acting for personal advantage rather than in their official capacities on behalf of the tribe. Unlike *Ziglar*,

which involved high-level departmental policy decisions made in response to a national emergency, Erwine alleges targeted conspiracies to obstruct his court testimony under § 1985(2) and discriminate against him based on race and gender under § 1985(3). These allegations describe direct personal involvement by officials taking clearly unlawful retaliatory actions against an employee exercising established constitutional rights - conduct that any reasonable official would have known violated the law. The claims involve individual actors conspiring to punish protected activity and engage in discrimination, not the kind of internal departmental policy consultations that created legal uncertainty in *Ziglar*. Where *Ziglar* centered on whether policy discussions could constitute a conspiracy, Erwine's claims allege classic conspiratorial conduct targeting an individual's clearly established constitutional rights.

I.Bivens Claim

Defendants' argument against the Bivens claim fails because it overlooks the explicit federal role for Tribal officers created by the Public Law 93-638 contract. Unlike the circumstances in *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009), the contract here explicitly designated Defendants as federal officials for liability purposes. FAC ¶¶25-27. The First Amended Complaint alleges Defendants utilized this federal authority to discriminate against Erwine based on race while acting under color of federal law. FAC ¶¶247-250.

Moreover, Defendants' reliance on Judge Jones's decision in *Boney v. Valline*, 597 F. Supp. 2d 1167 (D. Nev. 2009), is misplaced for three distinct reasons. First, *Boney* was decided on a Federal Rule of Civil Procedure 56 motion for summary judgment, which imposes a significantly higher evidentiary burden than the plausible pleading standard applicable to the current Federal Rule of Civil Procedure 12(b)(6) motion to dismiss under *Iqbal, supra.* – Judge Jones did not hold that such claims are precluded as a matter of law, but rather, that no genuine issue of material fact existed for trial in the *Boney* case. Second, the *Boney* court actually denied the defendants' motion to dismiss, finding that the plaintiff had sufficiently alleged the defendant's status as a federal actor. Third, and most significantly, the *Boney* decision explicitly limited its holding to a specific context entirely distinguishable from the present case: "That is, the Court's denial of a Bivens-type remedy

is limited to a tribal officer who violates a tribal member's rights on tribal lands in the course of enforcing tribal law." *Id.* at 1186. These circumstances are fundamentally different from Erwine's case, as he is neither a tribal member nor is he alleging that Defendants enforced tribal law against him.

While the Supreme Court has generally limited the expansion of new Bivens remedies in recent years, it has consistently upheld Bivens claims in the context of discrimination under the Fifth Amendment, as established in *Davis v. Passman*, 442 U.S. 228 (1979). See *Egbert v. Boule*, 596 U.S. 482, 502, 142 S. Ct. 1793, 1809 (2022). In *Passman*, the Court specifically recognized a Bivens remedy for employment discrimination based on sex in violation of the Fifth Amendment's due process clause. This precedent remains valid and directly relevant to discrimination claims like Erwine's, where federal officials are alleged to have engaged in unconstitutional discrimination on the basis of sex and race. The fact that courts have become more restrictive in recognizing new types of Bivens claims in other contexts does not undermine the continued validity of Bivens remedies for constitutional discrimination claims against federal officials - particularly where, as here, the claim falls squarely within the established *Passman* framework for Fifth Amendment discrimination claims.

II. DERIVATIVE SOVEREIGN IMMUNITY

Defendants next argue they possess derivative sovereign immunity despite being sued in their individual capacities. Under *Lewis v. Clark*, 581 U.S. 155, 163 (2017), and *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901 (9th Cir. 2021), individual capacity suits against tribal officials generally do not implicate sovereign immunity unless the judgment sought would: (1) expend itself on the public treasury, (2) interfere with public administration, or (3) restrain the sovereign or compel it to act. *Id.* This case meets none of these criteria. The claims seek damages from Defendants personally for their discriminatory and retaliatory conduct taken outside and against legitimate tribal authority. The FAC details numerous instances where Defendants acted for personal reasons rather than tribal interests: making threats against Erwine's employment (FAC

¶131), physically intimidating him (FAC ¶144), manufacturing false charges (FAC ¶¶184-187), and denying him proper grievance procedures (FAC ¶¶190-193).

Unlike in *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), holding these individuals liable would not interfere with tribal governance - it would simply require them to pay damages for personal wrongdoing that violated both tribal rules and federal law. The FAC alleges Defendants acted contrary to tribal policy by denying Erwine proper grievance procedures, concealing information from tribal leadership, and making false statements in personnel records. FAC ¶¶190-199. These actions demonstrate Defendants were not carrying out legitimate tribal functions but were instead pursuing personal vendettas.

In the landmark Supreme Court case *Lewis v. Clark*, 518 U.S. 155, 137 S. Ct. 1285 (2017) the court held that a suit brought against a tribal employee in his individual capacity for a tort committed in the scope of employment, the employee, not the tribe, is the real party in interest and the Tribes sovereign immunity is not implicated. The Ninth Circuit recently revisited this issue subsequent to *Clark* in *Acres Bonusing, Inc v. Marston*, 17 F.4th 901 (9th Cir. 2021) and held that the suit in question was against the officials and others in their individual capacities, seeking damages from them as individuals, and thus fell within Clark - the individual and not the tribe were the real party in interest.

Defendants are sued in their individual capacities. The allegations in Erwine's Complaint center around actions these individuals took during their employment at the Tribe, directly impacting Erwine's employment and subsequent professional difficulties. The claims aim to hold these individuals personally accountable for their conduct, seeking damages from them in their individual capacity rather than from the Tribe. The *Lewis v. Clark* and *Acres Bonusing* decisions delineate that such suits do not implicate Tribal sovereign immunity because the actions and the resulting liabilities are attributed to the officials in their personal capacities. As set forth in these cases, the Court has subject matter jurisdiction over Erwine's claims. The action does not challenge the Tribe directly nor seeks any relief from the Tribal entity itself.

III. THE TRIBE IS NOT AN INDISPENSABLE PARTY

Finally, Defendants argue this case must be dismissed for failure to join the Tribe as an indispensable party under Rule 19. Under Rule 19, dismissal is required only if: (1) the absent party is necessary, (2) joinder is not feasible, and (3) equity and good conscience require dismissal considering the enumerated factors. *Diné Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843, 851 (9th Cir. 2019).

The Tribe is not a necessary party because complete relief can be accorded through damages against Defendants personally for their discriminatory and retaliatory actions taken outside tribal authority. The FAC demonstrates Defendants acted contrary to tribal procedures by denying proper grievance rights (FAC ¶¶190-193), concealing facts from tribal leadership (FAC ¶197), and making false statements in personnel records (FAC ¶¶184-187). Unlike in *Diné Citizens*, this case does not impact the Tribe's control over its resources or governance. The FAC specifically challenges individual misconduct that violated both state and federal law.

Moreover, the claims do not implicate tribal sovereignty as they challenge individual wrongdoing, not tribal policy. The FAC alleges Defendants acted outside tribal authority by retaliating against Erwine for being a whistleblower, manufacturing false charges, and denying him proper procedures. FAC ¶¶175-187. This conduct violated rather than implemented tribal policy. The tribal chairman was not even aware of the circumstances of Erwine's termination or his attempts to file grievances, demonstrating these actions were taken by Defendants personally rather than as legitimate tribal functions. FAC ¶197.

The Washoe Tribe is not an indispensable party and does not need to be joined under FRCP 19 as a condition for granting the relief Erwine seeks. The Tribe does not possess a legally protected interest in the present case, as any judgment favoring Erwine would not affect the Tribe's sovereignty or its capacity to govern itself and its members. A favorable judgment for Erwine would only obligate the Defendants to fulfill any monetary damages awarded to him. "There is no precise formula for determining whether a particular non-party is necessary to an action. The

determination is heavily influenced by the facts and circumstances of each case." *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (internal citations and quotations omitted). An inability to obtain complete relief arises "frequently where plaintiffs are unable to obtain declaratory and injunctive relief against absent parties and are thus unable to obtain full redress." *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 907-08 (9th Cir. 1994). "To come within the bounds of Rule 19(a)(1)(B)(i), the interest of the absent party must be a legally protected interest and not merely some stake in the outcome of the litigation." J*amul Action Comm. v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020). The interest "must be 'more than a financial stake.'" *Dine Citizens Against Ruining Our Env't*, 932 F.3d at 852 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

Complete relief can be provided between the existing parties in this case, as Erwine is solely seeking monetary damages from the Officer Defendants and Burke, not the Tribe itself. As established in *Lewis v. Clark*, 518 U.S. 155, 137 S. Ct. 1285 (2017), this suit does not impact the Tribe's sovereignty nor require any action on the part of the sovereign, since it is directed against the defendants for their personal actions, not their official capacities. Furthermore, the Tribe does not hold a legally protected interest in this lawsuit, nor is it the "real substantive party in interest." This interpretation is supported by numerous decisions such as *Lexington Ins. Co. v. Muller* (C.D. Cal. Feb. 3, 2023), which rejected similar assertions to dismiss a case on the grounds of non-joinder of the tribe, aligning with Ninth Circuit precedents in *Yellowstone Cnty. v. Pease*, 96 F.3d 1169 (1996), and *Salt River Project*, 672 F.3d at 1177, affirming that such a dismissal is unwarranted when the tribe itself is not directly implicated by the litigation.

In *Andrade v. Station Casinos LLC* (N.D. Cal. Mar. 22, 2021), the district court recognized the decision in *Clark* and rejected the defendants' argument that the Tribe was a required party that could not be joined, and therefore the case should be dismissed. Similarly, in the current case, the Defendants contend that Erwine's failure to join other Tribe members involved in his employment somehow prejudices the Tribe's interests. However, as the *Andrade* Court articulated, even if the

Tribe is a joint tortfeasor, it does not necessitate their inclusion as a necessary party in the action. This accords with the established principle that all joint tortfeasors need not be named in a single lawsuit, as affirmed in *Ward v. Apple Inc*., 179 F.3d 1041, 1048 (9th Cir. 2015), quoting *Temple v. Synthes Corp*., 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed 2d 263 (1990).

Requiring joinder of the Tribe as an indispensable party would effectively nullify the Supreme Court's holding in *Lewis v. Clark*, 137 S. Ct. 1285 (2017). The Court in *Lewis* explicitly held that tribal employees can be sued in their individual capacities for personal liability without implicating tribal sovereign immunity. If Rule 19 required joining tribes whenever their employees are sued individually, defendants could circumvent *Lewis* simply by arguing the tribe is an indispensable party - and then seeking dismissal because the tribe cannot be joined due to sovereign immunity. This circular logic would render *Lewis* meaningless, as every individual capacity suit against tribal employees could be defeated through Rule 19, regardless of merit. Such an interpretation would transform Rule 19 from a procedural safeguard into a backdoor mechanism for expanding tribal sovereign immunity beyond what the Supreme Court intended in *Lewis*. The Court's careful distinction between individual and official capacity suits would be erased if defendants could simply reframe every individual capacity claim as requiring tribal joinder.

CONCLUSION

For these reasons, and viewing the FAC's detailed factual allegations in the light most favorable to Plaintiff as required at this stage, the Officer Defendants' motion to dismiss and Burke's Joinder should be denied. They have failed to establish either form of official immunity, derivative sovereign immunity does not apply to these individual capacity claims for personal wrongdoing, and the Tribe is not an indispensable party under Rule 19. In other alternative, or grant leave to amend the Plaintiff's Complaint as applicable.

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Dated: Thursday, December 5, 2024

By: */s/ Luke Busby*

Luke Busby, Esq.
Nevada State Bar #10319
316 California Avenue
Reno, Nevada 89509
Phone (775) 453-0112
luke@lukeandrewbusbyltd.com
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I certify that on the date shown below, I caused service to be completed of a true and correct copy of the foregoing by:

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Katherine F. Parks, Esq.
Thorndal Armstrong
6590 S. McCarran Blvd. Suite B.
Reno, NV 89509

Patrick A Rose
U.S. Attorney's Office
501 Las Vegas Blvd. South, Suite 1100
Las Vegas, NV 89101
702-388-6336
Email: Patrick.Rose@usdoj.gov

Melanie Bernstein Chapman
2460 Professional Court # 110
Las Vegas, NV 89128
702-408-6332
Email: melanie.chapman@cardinalefayardlaw.com

Gene Burk
geneburke@msn.com

Thursday, December 5, 2024

By: /s/ Luke Busby, Esq.