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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL ERWINE,

Plaintiff,

vs.

UNITED STATES OF AMERICA et al.,

Defendants.

CASE NO.: 3:24-cv-00045-MMD-CSD

DEFENDANTS ZACHARY WESTBROOK, JOHN LEONARD, AND MICHEL HALL'S REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS

INTRODUCTION

Tribal immunity compels dismissal of the claims against Defendants Zachary Westbrook, John Leonard, and Michel Hall ("Tribal Defendants"). Tribal Defendants possess official immunity from suit (absolute immunity and, at minimum, qualified immunity), because their alleged conduct occurred within the scope of their duties as officers and employees of the Washoe Tribe of Nevada and California ("Washoe Tribe" or "Tribe"). They also possess derivative sovereign immunity, because Plaintiff's claims against Tribal Defendants would interfere with the Washoe Tribe's public administration. And the Washoe Tribe itself possesses direct sovereign immunity from suit, which requires dismissal here because the Washoe Tribe is a necessary and indispensable party that cannot be joined. These

immunities—individually and collectively—all prevent Plaintiff's suit from continuing any further against Tribal Defendants.

Plaintiff's response misses the mark as to each of these applicable immunities. With respect to absolute immunity, Plaintiff misreads tribal law and misstates applicable federal law principles, which recognize that absolute immunity flows to tribal officials and employees when they engage in management and personnel functions like those at issue here. As to qualified immunity, Plaintiff fails to show any alleged violations of "clearly established law" that would get him around the qualified immunity barrier to suit —indeed, at times, his arguments actually underscore the uncertainty within the Ninth Circuit as to the legal questions at issue. As to derivative sovereign immunity, Plaintiff cannot avoid the impact his suit would have on Washoe tribal governance. And with regard to Federal Rule of Civil Procedure 19, Plaintiff cannot overcome the fact that his claims against Tribal Defendants put the Tribe's sovereign interests at stake, including the operations of its tribal police department.

For these reasons, those set forth in Tribal Defendants' renewed motion, and those set forth below, Plaintiff's First Amended Complaint ("FAC") must be dismissed.

ARGUMENT

I. TRIBAL DEFENDANTS POSSESS OFFICIAL IMMUNITY FROM SUIT.

A. Absolute Immunity Bars This Suit.

1. The Tribe Has Expressly Conferred Absolute Immunity On Tribal Defendants.

At the outset, all of Plaintiff's claims against Tribal Defendants fail because the Tribe has granted Tribal Defendants absolute immunity from suit. As the Ninth Circuit has long held, tribes "enjoy[] sufficient independent status and control over [their] own laws and internal relationships to be able to accord absolute privilege to [their] officers within the areas of tribal control." *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968). And here, the Tribe has provided immunity against "claim[s]" "to recover damages from … an officer or employee of the Tribe." Washoe Tribal Code §§ 33-20(2), 33-30-010, *available at* https://washoetribe.us/documents/37/Title_33_Sovereign_Immunity_Tax-5-1-19.pdf; *see* Renewed Motion to Dismiss at 7, ECF No. 111 ("Renewed MTD"). Those are the types of claims

Plaintiff asserts here. *See* Renewed MTD at 9. Absolute immunity thus applies and bars Plaintiff's suit against Tribal Defendants.

Plaintiff argues that tribal law does not confer absolute immunity on Tribal Defendants because the relevant tribal provisions "refer[] to 'sovereign immunity' for tribal officer and employees." Resp. to Renewed MTD at 4, ECF No. 115 ("Resp."). Tribal Defendants, however, already addressed that argument. *See* Renewed MTD at 8. As explained, tribal law specifies "that immunity applies to any claims 'to recover damages *from* … an officer or employee of the Tribe.'" *Id.* (quoting Washoe Tribal Code § 33-20(2) (emphasis added)). The immunity the Tribe has extended, therefore, is that which is necessary to bar suits to impose individual liability on tribal officials and employees for acts taken within the scope of their duties. That is exactly what Plaintiff has filed—a suit seeking to impose individual liability on Tribal Defendants for acts taken as part of their official duties. *See id.* at 9.

Notably, Plaintiff never contests that, even if his arguments had merit (and they do not), the proper course would be to certify this important question of tribal law for the tribal court to decide, given his arguments' implications for the Tribe's ability to fulfill its public duties. *Id.* at 8 n.2. But the Court need not ultimately take that path here. It is plain that the Tribe has acted to protect its officials and employees from liability arising out of their duties. Absolute immunity applies to Plaintiff's claims against Tribal Defendants, and the Court can dismiss the Tribal Defendants on this ground alone.

2. Federal Law Principles Confirm Tribal Defendants' Absolute Immunity.

Tribal Defendants' absolute immunity is confirmed by applicable federal law principles, which here would extend absolute immunity to Tribal Defendants even if tribal law did not speak to the issue. Renewed MTD at 9-10. *Davis v. Littel* is instructive. In *Davis,* the Ninth Circuit recognized that a tribal general counsel was immune from liability arising out of his evaluation of an inferior employee. 398 F.2d at 83-85. Such immunity was necessary, the Ninth Circuit explained, to "eliminat[e]… the 'constant dread of retaliation' for injury committed in the course of duty" and to "allow[] … 'unflinching discharge of (official) duties.'" *Id.* at 85 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1941)). Plaintiff's claims implicate the same tribal functions as in *Davis*: the claims arise from Defendants' actions to investigate a subordinate employee's misconduct, take disciplinary action against that employee, determine his work schedule, evaluate his performance, place him on administrative leave, and ultimately

terminate that subordinate's employment. *See* Renewed MTD at 9. Thus, just as absolute immunity was present in *Davis*, it applies here as well.

Disagreeing, Plaintiff insists that there are only five circumstances where absolute immunity applies, and that police officers in particular can only claim immunity when testifying, which Tribal Defendants were not doing here. Resp. at 3-4, 7. That is, simply, wrong. *Romero v. Peterson*, 930 F.2d 1502 (10th Cir. 1991), which recognized immunity for tribal police officers who allegedly beat a plaintiff, belies that claim. *See* Renewed MTD at 10. So too do decisions concerning the immunity of foreign police officers. *See id.* at 10 n.3 (collecting cases).

The decisions Plaintiff cites—*Paine v. City of Lompoc*, 265 F.3d 975 (9th Cir. 2001), and *Cunningham v. Gates*, 229 F.3d 1271 (9th Cir. 2001)—are not to the contrary. *See* Resp. at 7. They merely held that "*testimonial* immunity does not encompass non-testimonial acts such as fabricating evidence." *Cunningham*, 229 F.3d at 1291 (emphasis added). Tribal Defendants do not invoke testimonial immunity here, so limits on that particular form of immunity are irrelevant.

Plaintiff also claims that Tribal Defendants do not enjoy immunity because, rather than fulfill their official duties, they pursued "personal vendettas." Resp. at 5-7. But that argument is a non-starter. "Under federal common law, personal motives are irrelevant to the official immunity analysis." *Walkwell Int'l Lab'ys, Inc. v. Nordian Admin. Servs., LLC*, No. 1:13-cv-0199, 2014 WL 174948, at *8 (D. Idaho Jan. 13, 2014). So long as Tribal Defendants acted "within [their] authority" (which they did), absolute immunity applies, even if they allegedly abused that authority to benefit themselves. *Id.* at *9; *see also, e.g.*, *Ricci v. Key Bancshares of Maine, Inc.,* 768 F.2d 456, 462 (1st Cir. 1985) ("[T]he malicious nature of the conduct is, for purposes of immunity analysis, irrelevant. The conduct need only be the *kind* of action which, if done for legitimate purposes, falls within the scope of the official's authority." (emphasis in original)).

As for *Davis*, Plaintiff suggests that that case extends absolute immunity only to tribal general counsel. Resp. at 4-5. But "[i]t is the nature of the function performed, not the identity of the actor who performed it, that determines whether an official is cloaked by absolute immunity." *Chudacoff v. Univ. Med. Ctr.*, 954 F. Supp. 2d 1065, 1075 (D. Nev. 2013) (quotation marks omitted). As Plaintiff acknowledges, the function performed in *Davis* was "evaluating a subordinate employee." Resp. at 4.

Tribal Defendants performed similar—and at times identical—functions here. *See* Renewed MTD at 9, 11. Hence, they possess absolute immunity under *Davis*.

Nor does Plaintiff avoid *Davis* on the grounds that it addressed a state law defamation claim, while here he asserts "conduct that is actionable under federal law." Resp. at 5. "Absolute immunity is an extraordinary attribute." *Brooks v. Clark Cnty.*, 828 F.3d 910, 915 (9th Cir. 2016). "Those who act while clad in its armor cannot be held liable for damages under any circumstances, *even if they violate clearly established federal rights*, and even if they do so intentionally or maliciously." *Id.* at 915-16 (emphasis added).

Perhaps recognizing that he loses under *Davis*, Plaintiff also asks this Court to disregard it, arguing that it is "outdated" after *Lewis v. Clarke*, 581 U.S. 155 (2017). Resp. at 8. But *Lewis* was a *sovereign* immunity decision, while *David* concerned *personal* immunity. The two are not the same. Indeed, *Lewis* itself recognized that a tribal employee "may be able to assert *personal* immunity defenses" when derivative sovereign immunity is unavailable. *Lewis*, 581 U.S. at 163 (emphasis in original). And when the Ninth Circuit subsequently applied *Lewis*, it confirmed that "[t]ribal officials, like federal and state officials, can invoke personal immunity defenses" even when derivative sovereign immunity does not apply. *Acres Bonusing, Inc. v. Marston* ("*Acres I*"), 17 F.4th 901, 915 (9th Cir. 2021). In fact, the Ninth Circuit expressly identified *Davis* as an absolute immunity decision, and specifically noted that "[w]hether tribal officials enjoy personal immunities from suit is a different question from whether tribal sovereign immunity applies." *Id.* at 913 n.4. *Lewis* thus casts no doubt on *Davis*'s continued validity.

Under both tribal law and applicable federal law principles, Tribal Defendants possess absolute immunity. The claims against them must therefore be dismissed.

B. Qualified Immunity Also Bars Plaintiff's Claims Against Tribal Defendants.

Even if Tribal Defendants merely possessed qualified immunity, that immunity would still require dismissal of Plaintiff's claims against Tribal Defendants. Tribal Defendants address Plaintiff's Section 1981 claim, Section 1985 claims, and *Bivens* claim in turn.

1. Plaintiff's Section 1981 Claim

Qualified immunity bars Plaintiff's claim under 42 U.S.C. § 1981 because Section 1981 does not apply to tribal employment decisions. As many courts have recognized, Title VII of the Civil Rights Act

of 1964 exempts tribes from employment discrimination claims, including employment discrimination claims asserted under Section 1981. *See* Renewed MTD at 12-13. That exemption encompasses tribal agents as well, as tribes may only act through their agents. *See id.* at 13. In fact, here Congress exempted Tribal Defendants from employment discrimination claims twice over, as Congress also provided that those operating under a 638 contract like the one here *must* prefer Native Americans to the greatest extent feasible when making employment decisions. *See id.* (citing 25 U.S.C. § 5307(b)); *see also* Renewed MTD Ex. A, Art. II, § 21 (638 contract between the Tribe and the United States) (providing that 25 U.S.C. § 5307(b) applies to the Tribe's police department). Tribal Defendants' alleged decision to treat a Native American employee more favorably than Plaintiff, therefore, cannot give rise to a Section 1981 claim.

Plaintiff maintains that there is a "distinction between *tribal sovereign immunity* and individual liability for international discrimination under the Civil Rights Act and the anti-workplace discrimination provisions of Title VII." Resp. at 9 (emphasis added). However, Tribal Defendants have invoked the *statutory* exemptions found in Title VII and 25 U.S.C. § 5307(b) (and the provision in the Tribe's 638 contract requiring compliance with Section 5307(b)), not the tribe's common law immunity from suit. And those exemptions extend to tribes' agents. To the extent Plaintiff vaguely suggests otherwise (*see* Resp. at 9), he offers nothing to support that conclusion. Indeed, Plaintiff's interpretation would render the exemptions a nullity. They would achieve nothing if they permitted tribes to consider race in employment, but then left tribal agents liable for doing just that. *See* Renewed MTD at 13.

Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989), is not to the contrary. *See* Resp. at 10. *Evans* concerned a Section 1981 claim based on discrimination *outside* the employment context. *See* 869 F.2d at 1344-45. It casts no doubt on the conclusion that Title VII and 25 U.S.C. § 5307(b) exempt tribal agents from *employment* discrimination claims.

At minimum, it was not clearly established that Tribal Defendants fell outside the scope of the Title VII exemption and 25 U.S.C. § 5307(b). Qualified immunity thus compels dismissal of this claim.

2. Plaintiff's Section 1985(2) and 1985(3) Claims

Plaintiff's claims under 42 U.S.C. § 1985 likewise cannot overcome qualified immunity. Plaintiff maintains that Tribal Defendants and co-defendant Gene Burke conspired to deter Plaintiff from testifying (the Section 1985(2) claim) and to deprive him of his equal protection and employment due

process rights (the Section 1985(3) claim). FAC ¶¶ 293-95, 304, 312. But Tribal Defendants and Burke were all employed by the same entity—the Tribe. *See* FAC ¶¶ 175-80, 184-85, 295. Plaintiff's Section 1985 claims thus fail under the intracorporate conspiracy doctrine. Renewed MTD at 14-15.

Maintaining otherwise, Plaintiff asserts that because Tribal Defendants qualify as federal employees for purposes of the Federal Tort Claims Act ("FTCA"), they were not tribal agents for purposes of the intracorporate conspiracy doctrine. Resp. at 11. Precedent, however, holds otherwise. The Ninth Circuit has rejected the argument that the United States' decision "to assume liability under the FTCA for tribal officers' torts" "means [tribal officers] are employees of the [United States] for all purposes." *Snyder v. Navajo Nation*, 382 F.3d 892, 897 (9th Cir. 2004). Just the opposite. Except for those purposes that Congress has expressly identified (which do not include the intracorporate conspiracy doctrine), a tribal officer operating under a 638 contract is "not otherwise a Federal employee." 25 U.S.C. § 2804(f); *see Murgia v. United States*, No. 2:07-cv-0101, 2010 WL 11628039, at *4 (D. Ariz. Apr. 28, 2010) ("25 U.S.C. § 2804(f) plainly provides that tribal police officers are not <u>otherwise</u> federal employees and that they are <u>only</u> considered federal employees for purposes of sections 111 and 1114 of Title 18." (emphases in original)).

Alternatively, plaintiff maintains that the intracorporate conspiracy doctrine does not apply because Tribal Defendants acted "for personal advantage rather than on behalf of their employer." Resp. at 11-13. That argument, however, merely stumbles into another split of authority, and thus again triggers the rule that when "the courts are divided … the law … is not well established." *Ziglar v. Abbasi*, 582 U.S. 120, 154 (2017). Specifically, "courts are split on the application of the intracorporate rule or *on the breadth of any exceptions to it*." *Hirata v. S. Nevada Health Dist.*, No. 2:13-CV-2302-LDG-VCF, 2014 WL 4798612, at *6 (D. Nev. Sept. 26, 2014) (emphasis added). While some cases recognize "an exception … when individuals have an 'independent personal stake,' in the conspiracy," *id.*, other courts have rejected that exception. *E.g.*, *Jackman v. 20th Jud. Cir. Ct. Admin.*, No. 2:19-cv-828, 2020 WL 6321921, at *3 & n.7 (M.D. Fla. Oct. 28, 2020) (collecting such cases); *Trarms, Inc. v. Leapers, Inc.*, No. 16-14229, 2017 WL 1908787, at *9 (E.D. Mich. May 10, 2017) ("[T]he Sixth Circuit has explicitly declined to adopt the independent personal stake exception."). The existence of "a *possible* exception to the intraconspiracy doctrine … where … employees act for their own personal purposes," *Benningfield*

v. City of Houston, 157 F.3d 369, 379 (5th Cir. 1998) (emphasis added), therefore, does not show *clearly established* law.

Plaintiff nevertheless argues that the law is clear on this point because "[t]he Ninth Circuit follows the Nevada Supreme Court's standard on civil conspiracies for cases arising in that district." Resp. at 11. Not so. The case Plaintiff relies on—*Armstrong v. Reynolds*, 22 F.4th 1058 (9th Cir. 2022)—applied Nevada law because it was deciding a Nevada *state* law conspiracy claim. *Id.* at 1063-64, 1084. As to *federal* conspiracy claims, *Armstrong* noted that the Ninth Circuit "has expressly reserved the question 'whether individual members of a single government entity can form a "conspiracy" within the meaning of section 1985.'" *Id.* at 1085 n.8 (quoting *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993)); *see* Renewed MTD at 14 (citing *Armstrong* for this point). *Armstrong*, therefore, further *underscores* the lack of clearly established law in this Circuit.

Finally, as to the Section 1985(3) claim in particular, that claim also fails because Plaintiff cannot show that he had any federal constitutional rights in his tribal employment. *See* Renewed MTD at 15. Plaintiff does not even attempt to rebut this argument.

Even accepting Plaintiff's allegations as true, it was not clearly established that Tribal Defendants' actions constituted a conspiracy in violation of Section 1985, nor that Plaintiff had federal constitutional rights in his employment for purposes of Section 1985(3). Qualified immunity accordingly bars Plaintiff's Section 1985 claims against Tribal Defendants.

3. Plaintiff's* Bivens *Claim

Lastly, Plaintiff's *Bivens* claim also runs up against the wall of qualified immunity. A *Bivens* claim requires a showing that tribal employees acted under color of federal authority. *Bressi v. Ford*, 575 F.3d 891, 898 (9th Cir. 2009). An action under color of federal authority occurs only when there is some interdependence between the federal government and the tribal department where the tribal employee works. *Id.* To try to meet that test, Plaintiff relies solely on the existence of the self-determination contract (also known as a "638 contract") between the Tribe and the United States concerning operation of the Tribe's police department. *See* Renewed MTD at 16. That is not enough. As Judge Jones explained in *Boney v. Valline*, 597 F. Supp. 2d 1167 (D. Nev. 2009), a 638 contract by

itself "does not qualify [a defendant] as a federal actor for liability under *Bivens*." *Id.* at 1177. Accordingly, no *Bivens* claim is available here.

Plaintiff's attempts to distinguish *Boney* miss the mark. He points out that *Boney* was decided after discovery. Resp. at 15. Yet the only facts that matter here are the terms of the Tribe's 638 contract, which is already before the Court, and which this Court can consider in the course of deciding the renewed motion to dismiss. *See* Renewed MTD at 13 n.4.[1] There is thus no reason for this Court to wait for summary judgment. Plaintiff further tries to limit *Boney* to situations where "a tribal officer … violates a tribal member's rights on tribal lands." Resp. at 16 (quoting *Boney*, 597 F. Supp. at 1186). *Boney*'s logic, however, is not so confined. Just like in *Boney*, here "Plaintiff has merely pointed to the existence of the Tribe's 638 contract with the BIA" to establish federal-actor status. 597 F. Supp. 2d at 1186. Under *Boney*, that fact alone cannot show "that Defendant was acting under the color of federal law." *Id.*

Plaintiff also fails to place his suit within an existing *Bivens* context. *See* Resp. at 16. A case presents a new *Bivens* context so long as it "is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Ziglar*, 582 U.S. at 139. The circumstances that satisfy that test are expansive: "A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 139-40. "[E]ven a modest extension is still an extension." *Id.* at 147. And as *Boney* explained, this context is not simply new; it is one that has "dangerous implications" for tribal sovereignty. *Boney*, 597 F. Supp. 2d at 1183. Hence, the Court should decline Plaintiff's request to extend *Bivens* here.

[1] Plaintiff previously provided the baseline agreement and the 2020-2021 funding agreement that, together, constitute the 638 contract that was in effect during the events underlying this suit. *See* Renewed MTD Exs. A, B. To avoid any doubt that the record is complete, Tribal Defendants have also attached to this reply all amendments to the 2020-2021 funding agreement. Those amendments are not germane to this dispute, except that the second amendment extends the 2020-2021 funding agreement to cover calendar year 2022, and thus confirm that the 2020-2021 funding agreement governed during the entire period at issue here. *See* Reply Ex. A at 7.

For this claim, too, Plaintiff has shown no viable claim, let alone a violation of clearly established law. Qualified immunity compels dismissal of Plaintiff's *Bivens* claim.

II. TRIBAL DEFENDANTS POSSESS DERIVATIVE SOVEREIGN IMMUNITY.

In addition to possessing official immunity, Tribal Defendants enjoy derivative sovereign immunity from suit. As Plaintiff acknowledges, an individual-capacity suit against a tribal official or employee must be dismissed when the judgment sought would interfere with the public administration of the Tribe. *See* Resp. at 16. Plaintiff's suit here fits within that category, as holding tribal officers and employees liable for police department management and personnel decisions would obstruct the Tribe's ability to direct its employees. *See* Renewed MTD at 19-20.

Plaintiff argues that the Tribe's administration is not implicated here because Tribal Defendants "were not carrying out legitimate tribal functions but were instead [allegedly] pursuing personal vendettas." Resp. at 17. But personnel disputes like this one often arouse intense feelings and give rise to retaliatory suits by disciplined or terminated employees who make personal-vendetta allegations. *See Acres v. Marston ("Acres III")*, 287 Cal. Rptr. 3d 327, 348 (Cal. Ct. App. 2021) (making similar points in the context of contractual disputes). If such allegations were enough to circumvent sovereign immunity, then these cases would always go forward, and tribal officials and employees would "be inhibited in the faithful performance of [their] duties by the threat of harassing lawsuits against [them]." *Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986). Nor, in any event, is Plaintiff's case neatly cabined in the way he suggests. His racial discrimination claims, for instance, clearly go to the Tribe's policy (required by federal statute and the Tribe's 638 contract) to give "preferences and opportunities for training and employment in connection with the administration of [the contract] … to Indians." 25 U.S.C. § 5307(b). A judgment against Tribal Defendants, therefore, would functionally prevent the Tribe from being able to prefer Native Americans in employment in the future.

Plaintiff also rehashes Magistrate Judge Denney's argument that sovereign immunity is unavailable because this is an individual-capacity suit. Resp. at 17. Tribal Defendants addressed that argument in their renewed motion, so they will not repeat their response here. *See* Renewed MTD at 20-21. Suffice to say for present purposes, Tribal Defendants acknowledge there is Ninth Circuit dicta that, given its broadest possible reading, supports that argument, but they respectfully submit that Ninth Circuit

law is properly interpreted more narrowly. Adopting Plaintiff's position would all but eviscerate the principle that derivative sovereign immunity applies to individual-capacity suits that would interfere with the public administration of the Tribe.

III. EVEN IF TRIBAL DEFENDANTS LACK IMMUNITY, THIS CASE MUST BE DISMISSED FOR FAILURE TO JOIN THE TRIBE.

Plaintiff's claims against Tribal Defendants must be dismissed for yet another reason. Regardless of whether Tribal Defendants themselves can assert immunity, the *Tribe* possesses immunity from suit, and its sovereign interests are directly at stake. *See* Renewed MTD at 22-24. Specifically, Plaintiff's suit implicates the actions of the Tribe's highest official (the Chairman), the Tribe's right to exclude, and the Tribe's ability to control the department charged with ensuring public safety on its reservation. *Id.* at 22-23. The Tribe is thus a necessary and indispensable party that cannot be joined, necessitating dismissal under Federal Rule of Civil Procedure 19. *Id.* at 22-24.

Plaintiff's counterarguments lack merit. He first says the Tribe's interests are not at stake because "Defendants acted outside tribal authority" by "violat[ing] rather than implement[ing] tribal policy." Resp. at 18. But that assertion merely underscores that Plaintiff wants to litigate internal tribal matters like what is and is not "tribal policy"—the things that go to the core of tribal self-determination. Thus, Plaintiff's argument itself demonstrates that the Tribe's interests are implicated.

Plaintiff next tries to avoid Rule 19 by pointing out that he sued Tribal Defendants in their individual capacities, so the Tribe will not be on the hook for any potential judgment. *See* Resp. at 18-19. Yet contrary to Plaintiff's suggestion (*see id.*), Tribal Defendants do not claim that the Nation is a required party because it has a financial interest at stake. They claim that this case implicates the Tribe's *sovereign* interests, such as its control over its police department. Renewed MTD at 22-23.

Plaintiff's cases, meanwhile, are far afield. *See* Resp. at 19-20. Starting with *Salt River Project Agricultural Improvement & Power District v. Lee*, 672 F.3d 1176 (9th Cir. 2012), that case found that the Navajo Nation's "general interest in governing [its] reservation" *was* an interest that triggered Rule 19 and *was* implicated by the suit at issue. 672 F.2d at 1180. True, *Salt River* recognized that "Navajo official defendants" sued in their official capacity "can be expected to adequately represent the Navajo Nation's interests," rendering dismissal unnecessary. *Id.* But that was because "[a] suit against a tribe's

officials in their official capacities is a suit against the tribe." *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (cleaned up) (quoting *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013). Here, by contrast, Tribal Defendants are sued in their individual capacities, as Plaintiff himself stresses. The "adequate representative" logic thus does not apply.

Plaintiff's other cases are no more relevant. *Lexington Insurance Co. v. Mueller*, No. 5:22-cv-15, 2023 WL 2056041 (C.D. Cal. 2023), merely followed *Salt River* without analysis. *See* 2023 WL 2056041, at *8. *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996), was about the authority of a *county* within Indian country, not a tribe. *Id.* at 1173. And *Andrade v. Station Casinos LLC*, No. 20-cv-6495, 2021 WL 4441990 (N.D. Cal. Mar. 22, 2021), concerned the circumstances where complete relief can be afforded in the absence of a Tribe, not the circumstances present in this case, where a Tribe has a legally protected interest in the subject of a suit. *See id.* at *2-3. *Andrade* is therefore irrelevant.

Finally, the allegation that Tribal Defendants are seeking to circumvent *Lewis* is meritless. *See* Resp. at 20. *Lewis* recognized that while derivative sovereign immunity is sometimes unavailable in individual capacity suits, *other* grounds for dismissal can still apply. *See* 581 U.S. at 168 (noting that personal immunity defenses may be available). Tribal Defendants' arguments are thus perfectly consistent with *Lewis*. Nor, in any event, would Tribal Defendants' arguments even apply in a case like *Lewis*. Tribal Defendants maintain that the conduct underlying the complaint—management and personnel decisions within the Tribe's police department—implicates the Tribe's core sovereign interests. A tort claim arising from a casino limousine driver's off-reservation automobile accident such as in *Lewis*, by contrast, presents no similar concerns for tribal sovereignty. *See id.* at 159-60.

CONCLUSION

For the foregoing reasons, the claims against Tribal Defendants must be dismissed.

DATED: December 12, 2024

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