

Exhibit 1, ¶24. He also applied for the right to run for Tribal President on an absentee ballot because he was living in Minnesota at the time. Adams' Affidavit, ¶10.

II. BIRDNECKLACE HAS FAILED TO STATE A CLAIM UNDER §1985 UPON WHICH RELIEF MAY BE GRANTED.

A. Birdnecklace has not met the required elements of §1985 to state a claim upon which relief can be granted.

Mr. Birdnecklace has alleged a cause of action under §1985(c), claiming that the Defendants deprived “plaintiff and membership of the Oglala Sioux Tribe¹ access to a guaranteed right to vote, violating 42 U.S.C. §1985 . . .” After this Court’s Order Granting in Part, and Denying in Part Defendant’s Motion to Dismiss Pursuant to Rule 12(b)(1), the only claim surviving under §1985(c) is the one against the Defendants in their “individual capacities.”

However, Mr. Birdnecklace has failed to state a claim upon which relief may be granted under §1985(c). *While Griffen v. Breckeridge* has recognized a cause of action for individuals to conspire, there are still four requirements that must be met for a cause of action under §1985(c): (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, (3) an act in furtherance of the conspiracy, and (4) resulting injury or the deprivation of any right or privilege of a citizen of the United States. See 403 U.S. 88, 102-103 (1971). Under this standard, Mr. Birdnecklace’s claim must fail for two reasons.

Mr. Birdnecklace has not put forth any claim that the Defendants conspired against him personally or because he was a member of a protected class. *Griffin* held that part

¹ Mr. Birdnecklace is the only named Plaintiff, and therefore no cause of action can be asserted on behalf of the Oglala Sioux Tribal membership or any other person or group. Furthermore, as a non-licensed *pro se* litigant, Mr. Birdnecklace lacks standing and is prohibited from representing anybody besides himself.

two of the above-referenced test "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. In *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), the court distinguished and limited its previous holding in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975). In *Means*, the Plaintiff was able to prevail by showing that the Defendant discriminated against Means and his supporters because they were AIM members or supporters. But in *Shortbull*, the court held that the Plaintiff's political opposition to said defendants does not appear to raise a class-based claim. 677 F.2d at 649. Like *Shortbull*, Mr. Birdnecklace has failed to identify himself as part of any class of persons that the Defendants discriminate against. And as in *Shortbull*, the failure to prove just one of the four parts of the *Griffin* test means that there is no cause of action under §1985. *Id.* at 651.

Mr. Birdnecklace has not alleged any other cognizable civil rights violations in his First Amended complaint. While it is true that §1985 allows for the conspiracy by private individuals, and the Defendants *have* been sued in their individual capacity, there can be no violation of rights that Mr. Birdnecklace does not possess. The law is clear that reservation Indians have no Fourteenth Amendment rights, or any other United States Constitutional rights vis a vis their tribal governments. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The inapplicability of the U.S. Constitution to Indian tribal governments has been repeatedly recognized. See *Talton v. Mayes*, 163 U.S. 376 (1896) (Fifth Amendment is not applicable to tribes); *Native Am.*

Church of North Am. V. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (First Amendment not applicable to a tribe); *Barta v. Oglala Sioux Tribe*, 259 F.2d 533 (8th Cir. 1958) (Fifth Amendment and Fourteenth Amendments are not applicable to Oglala Sioux Tribe). Also see F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.), §14.03. Mr. Birdnecklace's claim in ¶49 of his First Amended Complaint that he is due equal protection under the OST Constitution, Art. III is erroneous. Art. III refers to the governing body of the tribe, and there is no right to equal protection in that section, or any other section of the Oglala Sioux Constitution. The only civil rights due to Indians while they are within the boundaries of Indian Reservations are those granted by Title I and II of the 1968 Indian Civil Rights Act (ICRA), 25 U.S.C §§1301 and 1302. But ICRA does not afford any rights against those who act in their individual capacities. Section 1302 is not actionable against them in their individual capacities. *See Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975) ("25 U.S.C. § 1302 provides rights only against the tribe and governmental subdivisions thereof, and not against tribe members acting in their individual capacities") (internal quotations and citations omitted); *Two Hawk v. Rosebud Sioux Tribe*, 404 F. Supp. 1327, 1330 (D.S.D. 1975) ("The plain language on the face of the statute that no Indian tribe in exercising powers of self-government . . . makes it clear that Congress intended to constrain only actions of the tribe and tribal bodies. Therefore this Court has no subject matter jurisdiction over defendants named as individuals") (internal quotations and citations omitted). Mr. Birdnecklace has no claim against the Defendants in their individual capacities for violating §1985.

If each element of his complaint were accepted as true, that would only mean that this Court must accept that Mr. Birdnecklace was deprived of his right to vote. He has not properly alleged he had any other civil rights due to him. He has further failed to allege any other necessary facts or claims to succeed under §1985. Mr. Birdnecklace has not pled the requirements for a §1985 claim, and therefore that claim must be dismissed pursuant to Rule 12(b)(6).

III. BIRDNECKLACE HAS FAILED TO STATE A CLAIM UNDER 18 U.S.C. §1962 UPON WHICH RELIEF MAY BE GRANTED.

A. Birdnecklace has failed to meet the elements for a valid cause of action under 18 U.S.C. §1962.

Mr. Birdnecklace failed to plead a valid cause of action under 18 U.S.C. §1962 against the Defendants in their individual capacities. To state a claim under §1962(c), a plaintiff must establish (1) the existence of an enterprise; (2) conduct by the defendants in association with the enterprise; (3) the defendants' participation in at least two predicate acts of racketeering; and (4) conduct that constitutes a pattern of racketeering activity.

In re Sac & Fox Tribe of the Miss. in Iowa / Meskwaki Casino Litig., 340 F.3d 749, 767 (8th Cir. 2003).

Sac & Fox, is factually similar to this case. There, members of the tribe were dissatisfied with the conduct of the Tribal Council, and so petitioned for a recall election pursuant to the Tribal Constitution. Despite meeting the Constitutional requirements, the Tribal Council refused to recognize the petition. A hereditary chief of the tribe appointed an Interim Council, which took control of tribal operations, including the gaming operations. The Elected Council filed a civil RICO action against the Interim Council in federal court. The district court found, and was subsequently affirmed by the Eighth

Circuit Court of Appeals, “that the predicate violations alleged by the Elected Council could not be considered qualifying predicate violations unless the court first concluded that the Appointed Council was not the lawful governing body of the Tribe.” *Id.* The Eighth Circuit found in the alternative that “to define the Appointed Council as an ‘enterprise’ separate from the Tribe itself we would first have to conclude that the Appointed Council does not, in fact, represent the Tribe. The district court lacked subject matter jurisdiction to decide these underlying, intra-tribal matters. *Id.*”

While the RICO actions are asserted against the Defendants in their individual capacities in the instant case, the actions alleged to be taken by the Defendants were all done in their capacity as Tribal Council members or members of the Executive Committee. Election disputes and allegations of election violations are intra-tribal in nature. *Learned v Cheyenne-Arapaho Tribe*, 596 F Supp 537 (WD Okla 1984). Election disputes concerning tribal councils are a “non-justiciable intra-tribal matter.” *In re Sac & Fox*, 340 F.3d at 764. Their actions can only be an enterprise if they were not the lawful government of the Oglala Sioux Tribe, which is a question the Eighth Circuit has already ruled that the federal government lacks subject matter jurisdiction to decide.

However, even if the actions of the Defendants in their individual capacity give rise to an enterprise, Mr. Birdnecklace has still failed to plead the necessary elements of a cause of action under §1962. He did not claim what the existence of an enterprise was, nor did he identify what the conduct by the defendants in association with the enterprise was, nor did he identify the defendants' participation in at least two predicate acts of racketeering or any conduct that constitutes a pattern of racketeering activity. He has not

alleged any activities that fall within the definition of racketeering, as defined in 18 U.S.C. §1961.

Furthermore, 18 U.S.C. §1962 provides which activities are prohibited. Parts “a” through “c” each require that *interstate* or foreign commerce be affected. The governing affairs of an Indian tribe, even if those members are unlawfully acting as the government of an Indian tribe, in no way affect interstate commerce. The elections took place on the Pine Ridge Indian Reservation, the swearing in ceremonies were conducted on the Pine Ridge Indian Reservation, and council meetings only occurred on the Pine Ridge Indian Reservation. Mr. Birdnecklace has failed to allege a single activity that affects interstate commerce. Therefore, there can be no claim of a RICO violation.

B. Even when the facts alleged by Birdnecklace are accepted as true, he is not entitled to any damages under civil RICO.

Moreover, Mr. Birdnecklace’s claims for treble damages under RICO are premised on the claim that as a lay advocate who practices in tribal court, he has suffered business losses because he is unable to litigate in a court that cannot grant relief. Mr. Birdnecklace claims that the Defendants’ actions have damaged his business, affecting his clients who collectively have damages totaling \$19,102,793.00. Despite his claims of illegitimacy, the Oglala Sioux Tribal Court has continuously operated before and after the contested election. The tribal court has granted numerous civil and criminal judgments, including many claims for monetary damages that have been enforced. A South Dakota state court has formally recognized at least one of those civil claims through a petition for

recognition of a foreign judgment. See Exhibit ‘ 2 short, Mr. Birdnecklace has suffered no economic harm that is attributable to the Oglala Sioux Tribal Court.

Mr. Birdnecklace claims he is due damages in the amount of \$19,102,793.00 because he cannot litigate in court. However, he stipulates that that figure is the total amount of his clients’ claims. Leaving aside the fact that Mr. Birdnecklace cannot have any clients because the Supreme Court suspended him, that figure represents *their* claims. Mr. Birdnecklace is not due \$19,102,793.00 in legal fees.

Mr. Birdnecklace further alleges that the “Tribal Council, Offices of OST President, Vice-President, OST Chief Judge and the OST Judiciary, are currently acting outside the laws of the OST Law and Order Code . . . as prescribed by the OST Constitution, and concurrently governed by the U.S. Constitution by and through the Indian Reorganization Act and all applicable law.” First Amended Complaint ¶66. However, the Bureau of Indian Affairs has formally recognized the current Oglala Sioux Tribal Council. See Exhibit ‘ 3

C. The Supreme Court of the Oglala Sioux Nation suspended Mr. Birdnecklace’s license to practice in tribal court; therefore, he cannot litigate his clients’ claims there.

The Supreme Court of the Oglala Sioux Nation suspended Mr. Birdnecklace’s license to practice in the tribal courts of the Oglala Sioux Nation. Under the Oglala Sioux Tribe’s Law and Order Code, Ch. 45, Sec. 7, the Oglala Supreme Court has the sole authority to suspend or revoke a bar member’s license to practice in the Tribe’s courts. Marilyn White filed a complaint against Mr. Birdnecklace because she paid him approximately \$1,400 for legal representation and the only legal services provided was the preparation of and

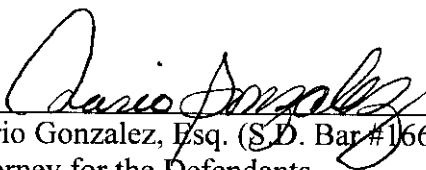
² See e.g. *Oglala Sioux Tribe v. John Cedarface* Civ. 04-0624, by the Honorable Judge Adams, as docketed in South Dakota Circuit Court, Fall River County, Docket Number: 23Civ07000120-01, filed September 7, 2007, docketed September 10, 2007.

the filing of a protection order, and he neglected to provide the other contracted services. The court found that Mr. Birdnecklace attempted to defraud the court by submitting to them a photocopy of a \$1,000 check that he purportedly sent to Ms. White for reimbursement, but which she never received. See Exhibit "4". The Supreme Court ordered that Mr. Birdnecklace was immediately suspended from the practice of law as an advocate in the Tribal courts and Administrative Tribunals of the Oglala Sioux Tribe, and that the suspension would continue for a period of six months from the date that Ms. White is reimbursed the sum of \$1,000. Because of his previous attempts at deception, the court further ordered that the \$1,000 reimbursement must be paid through the Clerk of the Supreme Court. To date, Mr. Birdnecklace has failed to repay Ms. White. Until such time, and for a period of six months after, Mr. Birdnecklace cannot practice in any court of the Oglala Sioux Tribe. Mr. Birdnecklace's inability to advocate for his clients in tribal court is solely of his own doing, and cannot be attributed to illegitimacy on the part of the Oglala Sioux Tribal Court.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff's claims be dismissed for failure to state a claim upon which relief can be granted.

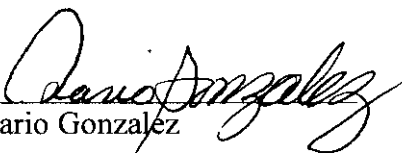
Respectfully submitted this 5th day of October, 2007.


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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Memorandum of Law in Support of Motion to Dismiss, Pursuant to Rule 12(b)(6) was furnished to the persons herein next designated, on the date below shown, by depositing a true and correct copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, and an envelope addressed to:

William Birdnecklace
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