

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

SAULT STE. MARIE TRIBE OF  
CHIPPEWA INDIANS,

Plaintiff,

2:09-cv-95

v

Hon. Gordon J. Quist

JAMES HAMILTON, CAROLYN HAMILTON,  
KELLY DENCKLAU, JAMIE DENCKLAU,  
BARBARA DENCKLAU, ROGER DENCKLAU,  
NEAL DENCKLAU, TINA GARDNER,  
BAY MOUNTAIN TRADERS, LLC,  
and BMT ENTERPRISES, d/b/a BLACK  
MOUNTAIN TRADERS, INC.

Defendants.

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**PLAINTIFF'S MOTION TO DISMISS**  
**DEFENDANT, TINA GARDNER'S COUNTER-CLAIM**

**NOW COMES** Plaintiff, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, by and through its attorneys, PLUNKETT COONEY, and for its Motion to Dismiss Defendant, Tina Gardner's Counter-Claim states onto this Honorable Court as follows:

1. On August 27, 2009, Defendant, Tina Gardner, hereinafter referred to as "Defendant") filed her Counter-Claim for defamation against Plaintiff, Sault Ste. Marie Tribe of Chippewa Indians (hereinafter referred to as "the Tribe").

2. Defendant's Counter-Claim should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6) because:

(a) The Tribe, as a federally recognized Indian Tribe, is entitled to sovereign immunity; and

(b) Defendant has failed to plead her claims for defamation with the requisite specificity.

3. Plaintiff incorporates its Brief in Support and the case law cited therein by reference.

4. Plaintiff contacted defense counsel on September 3, 2009 regarding concurrence in this motion and no response was received.

WHEREFORE, Plaintiff respectfully requests this Honorable Court grants its Motion and dismiss Defendant's Counter-Claim.

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Dated: August 28, 2009

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**PLAINTIFF'S BRIEF IN SUPPORT OF**  
**MOTION TO DISMISS**

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**STATEMENT OF ISSUES**

**I.**

**WHETHER DEFENDANT'S COUNTER-CLAIM MUST BE DISMISSED AS THE TRIBE IS ENTITLED TO SOVEREIGN IMMUNITY?**

**PLAINTIFF'S ANSWER: YES.**

**DEFENDANT'S ANSWER: PRESUMABLY, NO.**

**II.**

**WHETHER DEFENDANT HAS FAILED TO ADEQUATELY STATE A CLAIM FOR DEFAMATION AND DISMISSAL IS APPROPRIATE?**

**PLAINTIFF'S ANSWER: YES.**

**DEFENDANT'S ANSWER: PRESUMABLY, NO.**

## I. STATEMENT OF FACTS

On April 23, 2009, Plaintiff, Sault Ste. Marie Tribe of Chippewa Indians (hereinafter referred to as “the Tribe”) filed the instant action alleging the various Defendants violated Racketeer Influences and Corrupt Organizations Act (hereinafter referred to as “RICO”), 18 U.S.C. §1961, *et seq.* and committed fraud in perpetrating a multi-year fraudulent scheme, which resulted in the Tribe losing in excess of \$500,000. On August 27, 2009, Defendant, Tina Gardner, (hereinafter referred to as “Defendant”) filed her Counter-Claim for defamation against the Tribe.

In lieu of answering Defendant’s Counter-Claim, Plaintiff now moves for dismissal of Defendant’s Cross-Claim pursuant to Fed. R. Civ. Pro. 12(b)(6) as Defendant’s Counter-Claim is barred by the Tribe’s sovereign immunity. Further, Defendant has failed to plead her claims for defamation with the requisite specificity. As such, Defendant’s Counter-Claim must be dismissed.

## II. STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. Pro. 12 (b)(6) tests the legal sufficiency of the pleading, asking whether the claimant has stated a claim for which the law provides relief. *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994). Technically, a 12(b) motion does not attack the merits of the case, it merely challenges the pleader’s failure to state a claim properly. In deciding a 12(b)(6) motion, a district court must determine whether the Plaintiff’s complaint sets forth sufficient allegations to establish a claim for relief. The court must accept all allegations in the complaint at face value and construe them in a light most favorable to the Plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983); *Jackson v. Richards*

*Medical Co.*, 961 F.2d 575, 577 (6th Cir. 1992). A court need not, however, accept as true legal conclusions or unwarranted factual inferences, *Morgan v Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). A district court may properly grant a motion to dismiss when no set of facts exists which would allow the Plaintiff to recover. *Carter by Carter v. Cornwell*, 983 F.2d 52, 54 (6th Cir. 1993).

### III. LEGAL ANALYSIS

#### A. **DEFENDANT'S COUNTER-CLAIM MUST BE DISMISSED AS THE TRIBE IS ENTITLED TO SOVEREIGN IMMUNITY.**

Defendant's Counter-Claim must be dismissed because the Tribe, as a federally recognized Indian Tribe, is entitled to sovereign immunity. Suits against federally recognized Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the tribe or congressional authorization. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509; 111 S. Ct. 905, 112 L.Ed.2d 112 (1991). Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981(1998).

In this case, the Tribe has not waived its right to sovereign immunity nor is there any type of congressional authorization for Defendant's Counter-Claim, which is based on defamation and wrongful termination. Accordingly, in the absence of a waiver or congressional abrogation, the Tribe is immune from suit in this case and Defendant's Counter-Claim must be dismissed.

**B. DEFENDANT HAS FAILED TO ADEQUATELY STATE A CLAIM FOR DEFAMATION.**

Even if the Tribe were not entitled to sovereign immunity, Defendant has failed to adequately state a claim for defamation, and dismissal of Defendant's defamation claim is appropriate. Michigan courts have emphasized the importance of specificity pleading. *Royal Palace Homes v. Channel 7*, 197 Mich. App. 48, 54, 495 N.W.2d 392 (1992). "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice." *Id.* (quoting the Michigan Supreme Court and affirming the grant of summary disposition in a libel case).

In Michigan, the courts have consistently held that the elements of a claimant's defamation claim must be pled with specificity.<sup>1</sup> *Id.* See also, *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich. App. 415, 421, 205 N.W.2d 504 (1973); *Stencel v. Augat Wiring Sys.*, 173 F. Supp. 2d 669, 680 (E.D. Mich. 2001)(holding that plaintiff did not plead an actionable defamation claim, which requires that the elements of defamation be pleaded with particularity); *Gonyea v. Motor Parts Fed'l Credit Union*, 192 Mich App 74, 77, 480 N.W.2d 297 (1991) (holding that the plaintiff's claim was subject to dismissal because the plaintiff failed to specifically plead all defamation elements). "The essential elements of a cause of action for libel or slander must be stated in the complaint, including allegations as to the particular defamatory words complained of, the connection of the defamatory words with the plaintiff where such words are not clear or are ambiguous, and the publication of the alleged defamatory words." *Pursell*, 44 Mich. App. at 421.

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<sup>1</sup> In Michigan, the elements of a defamation claim are: (1) False and defamatory statement concerning the plaintiff; (2) An unprivileged communication to a third party; (3) Fault amounting at least to negligence on the part of the publisher; and (4) Either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v. Campbell*, 474 Mich. 21, 24, 706 N.W.2d 420 (2005).

Here, Defendant has failed to plead the essential elements of a defamation claim, and her claim for defamation should be dismissed.

a. **Defendant Has Failed To Whom The Allegedly Defamatory Statements Were Published.**

Defendant has failed to plead to whom the allegedly defamatory statements were published.

Specifically, her Complaint states:

Soo Tribe published false and defamatory statements about Gardner orally and in written form that she had perpetrated a fraud and/or that she engaged in a pattern or practice of mail and wire fraud in the manner described in the complaint.

(Exhibit A, Defendant's Counter-Claim ¶ 20).

A claim for defamation must include the essentials of a slander cause of action, including the publication of the alleged defamatory words. *Pursell*, 44 Mich. App. at 421. The pleading **must name the specific parties to whom the statement was made.** *Wood v. Unison Corp.*, (No.199931, rel'd 12/19/97) (unpublished) (attached as Exhibit B).

In *Wood*, the court affirmed summary disposition of a defamation claim where the Plaintiff alleged two instances of defamation by the Defendant but did not name the particular parties to whom the statements were made. *Id.* at \*5. Further, the court noted that even if it allowed the Plaintiff to amend his complaint, the Plaintiff had previously admitted his lack of knowledge as to whom the allegedly defamatory statements were published and thus his complaint would nonetheless fail. *Id.*

The Sixth Circuit has likewise held that a defamation claim brought under Michigan law failed as a matter of law where the Plaintiff did not plead to whom the individual Defendant

published the allegedly defamatory statements. *Kahlich v. City of Grosse Pointe Farms*, 120 Fed. App. 580, 586 (6th Cir. 2005)(citing *Gonyea*).

Here, Defendant's claim for defamation is completely devoid of any statements regarding to whom the allegedly defamatory statements were made. (Exhibit A, Defendant's Counter-Claim, ¶ 19-21). Accordingly, her claim for defamation must be dismissed.

#### IV. CONCLUSION

For all the reasons stated above, Plaintiff respectfully requests this Honorable Court grant its Motion to Dismiss Defendant's Counter-Claim.

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Dated: September 17, 2009

**PROOF OF SERVICE**

The undersigned certifies that on I electronically filed the foregoing pleading with the Clerk of the Court using ECF system which will send notification of such filing to the all attorneys of record of all parties in the above cause; a copy of which was sent via U.S. Mail to Robert A. Gust.

s/Peter W. Peacock

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