IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

Gladys D. Dallas,

Plaintiff,

v. Case No. 18-CV-1657

Tehassi Hill, Brandon Stevens, Trish King, Lisa Summers, Daniel Guzman King, David P. Jordan, Kirby Metoxen, Ernie Stevens III, and Jennifer Webster,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Dated December 17, 2018

ONEIDA LAW OFFICE

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

Introduction

Plaintiff Gladys Dallas ("Plaintiff") is a member of the Oneida Nation ("Nation"). Defendants Tehassi Hill, Brandon Stevens, Trish King, Lisa Summers, Daniel Guzman King, David P. Jordan, Kirby Metoxen, Ernie Stevens III, and Jennifer Webster ("Defendants") are also members of the Nation, and are currently serving as members of the Oneida Business Committee, a nine-person board elected at large by the qualified voters of the Nation to exercise executive and legislative functions pursuant to the Nation's Constitution.

Plaintiff asks the Court to overturn a decision of the Oneida Business Committee, and to compel the Oneida Business Committee to convene a meeting of the Nation's General Tribal Council, at a cost of approximately $245,000, so that Plaintiff can address the General Tribal Council regarding her petition for a $5,000 per capita distribution to the tribal membership. Plaintiff claims the Oneida Business Committee's refusal to convene such a meeting violates her right to freedom of speech under the First Amendment to the United States Constitution, the corresponding provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §1301-1303, and the Oneida Constitution and Iroquoian law, and is actionable under federal civil rights statutes, 42 U.S.C. §§ 1983 and 1985.

The Court lacks jurisdiction over Plaintiff's claims because (1) the First Amendment is not applicable to the Nation and its officials; (2) neither the First Amendment nor ICRA requires the Nation and its officials to facilitate Plaintiff's speech, and Plaintiff's claims to the contrary are wholly unsubstantiated and frivolous; (3) ICRA does not create a federal cause of action for Plaintiff; (4) 42 U.S.C. §1983 is not applicable to the Nation and its officials, and Plaintiff has not alleged any conduct that is actionable under that statute; (5) Plaintiff has not alleged any conduct that is actionable under 42 U.S.C. §1985; and (6) the Court lacks jurisdiction to interpret

and enforce tribal laws. For these same reasons, Plaintiff has failed to state a claim upon which relief can be granted. Finally, because Plaintiff complains of official action taken by the Nation's governing body, and the relief she seeks runs primarily against the Nation, her claims are barred by the doctrine of tribal sovereign immunity.

Statement of Facts

The Nation is a federally recognized Indian tribe. Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Department of the Interior Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan.30, 2018). The Oneida Constitution establishes the General Tribal Council, composed of all the qualified voters of the Nation, as the governing body of the Nation. Oneida Constitution, art. III, § 1.[1] The Oneida Constitution also establishes the Oneida Business Committee, composed of a chairman, vice-chairman, secretary, treasurer and five councilmembers elected at large by the qualified voters, and authorizes the Business Committee to perform duties delegated to it by the General Tribal Council. Oneida Constitution, art. III, § 3. The Oneida Constitution mandates that the General Tribal Council establish the Oneida Judiciary, and the General Tribal Council has done so and authorized the Oneida Judiciary to hear claims arising under the Oneida Constitution. Oneida Constitution, art. V; Oneida Code of Laws, Title 8, chp. 801.[2] The General Tribal Council is required to hold regular meetings in January and July of each year, and the chairman or fifty qualified voters may, by written notice, call special meetings of the General Tribal Council. Oneida Constitution, art. III, §§ 4 and 6.

[1] The Oneida Constitution is available online at https://oneida-nsn.gov/dl-file.php?file=2018/06/2015-06-16-Tribal-Constitution.pdf and at ECF No. 13-1.
[2] Chapter 801 of the Oneida Code of Laws is available online at https://oneida-nsn.gov/dl-file.php?file=2016/02/Chapter-801-Judiciary-GTC-01-07-13-B.pdf.

Plaintiff is a member of the Nation and resides at W1386 Legacy Lane, De Pere, Wisconsin. Plaintiff's Amended Complaint, ECF No. 11, pp. 1-2.[3] Defendants are the elected members of the Oneida Business Committee and reside in Brown and Outagamie Counties, Wisconsin. *Id.* at 2. In April of 2018, Plaintiff submitted a petition requesting that Chairman Tehassi Hill call a meeting of the General Tribal Council to consider the issuance of a $5,000 per capita payment to every enrolled member of the Nation within 45 days. ECF No. 11-1, p. 16. The Nation's Enrollment Department verified the signatures on the petition, and in June of 2018 the Nation's Finance Department issued a Fiscal Impact Statement. *Id.* The Finance Department determined that in April of 2018 there were 17,261 enrolled tribal members, and it would cost approximately $86,305,000 to make a per capita payment of $5,000 to every tribal member. *Id.* at 17. In addition, the Finance Department determined it would cost approximately $244,921 to hold a General Tribal Council meeting to consider Plaintiff's petition. *Id.* Finally, the Finance Department determined there were not sufficient funds in the Nation's budget to make the proposed per capita payment, the Nation did not have the capacity to borrow sufficient funds to make the proposed per capita payment, and the Nation could only fund the proposed per capita payment through drastic measures such as laying off 1,500 employees for 18 months and shuttering nearly all governmental programs, or selling all of the Nation's landholdings. *Id.* at 17-28. Based upon these findings, the Finance Department concluded:

> Due to our fiduciary responsibility to the Oneida Nation, the General Tribal Council, and the community, the Finance Department is compelled to recommend the denial of this Petition. Finance is unable to recommend an existing funding source with adequate cash availability to fund the financial impact of petitioner's per capita request. The Oneida Nation does not have the ability to acquire new debt sufficient to fund the financial impact of petitioner's per capita request.

[3] For purposes of Defendants' Motion to Dismiss, the Court must accept the well-pleaded factual allegations of Plaintiff's Amended Complaint as true, and the facts set forth herein are taken from Plaintiff's Amended Complaint and attachments (ECF Nos. 11, 11-1 and 13-1).

> Finance is in opposition to this petition due to the potential for current and long term irreparable damage to existing employment, programs, and services as a result of the Oneida Nation's inability to fund the financial impact of petitioner's per capita request with existing Oneida Nation resources.

Id. at 28.

The Oneida Business Committee reviewed the Financial Impact Statement and legislative and legal analyses of the petition, and on June 29, 2018, issued public notice of its decision not to convene a General Tribal Council meeting on the Plaintiff's per capita petition. *Id.* at 30-33. The Oneida Business Committee noted the detrimental impact the proposed per capita payment would have on the Nation:

> Based on our review of the petition and analyses, we have determined that the petition will not be presented to the General Tribal Council because the Nation does not have the funds to make the suggested payment, the payment cannot be made within the requested time period, and in order to try to make such a payment, it would take almost two years to earn and accumulate the funds—while at the same time gutting all programming, returning all grant funds, and laying off all non-enterprise related personnel.

Id. at 30. The Oneida Business Committee also concluded that the proposed per capita payment would violate tribal and federal laws and the Oneida Business Committee's fiduciary responsibilities to the Nation and its members:

> For all of the above reasons the Oneida Business Committee by unanimous decision has determined that the petition submitted by Gladys Dallas requesting the General Tribal Council to approve a $5000 per capita payment to be paid within 45 days is in violation of the Constitution and laws of the Oneida Nation, action on this petition would be in violation of the Indian Gaming Regulatory Act and related regulations, presentation of this petition would be in violation of the Oneida Business Committee's fiduciary responsibilities to the Nation and all of its members, and the Nation does not have the financial ability to make such a payment.

Id. at 33.

Plaintiff claims the Oneida Business Committee's decision violates her right to freedom of speech under the First Amendment to the United States Constitution, the corresponding

provision of ICRA, and the Oneida Constitution and Iroquoian law, and is actionable under 42 U.S.C. §§ 1983 and 1985. ECF No. 11, pp. 1, 4, 9-11. Plaintiff further claims this Court has federal question jurisdiction under 42 U.S.C. § 1331. She is asking the Court to reverse the decision of the Oneida Business Committee, and to order the Oneida Business Committee to convene a General Tribal Council meeting on her petition. *Id.* at 11. Plaintiff also seeks punitive damages in the amount of $10,000 from each member of the Oneida Business Committee. *Id.*

Argument

I. Standard of Review.

A. Lack of Federal Jurisdiction.

The court has "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. "A motion to dismiss under Rule 12(b)(1) tests the jurisdictional sufficiency of the complaint, accepting as true all well-pleaded factual allegations and drawing reasonable inferences in favor of the plaintiffs." *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017). "The existence of federal question jurisdiction. . . must, under the long-standing precedent of the Supreme Court of the United States, be determined from the face of the complaint." *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1316 (7th Cir. 1997) (citing *Bell v. Hood*, 327 U.S. 678, 680-82 (1946)). However, a federal court is permitted to "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co*. v. FDIC, 999 F.2d 188, 191 (1993) (quoting *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979).

Although it is "well settled that failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," an action may

nonetheless "be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous." *Turner/Ozanne*, 111 F.3d at 1316-17 (internal quotation mark omitted) (quoting *Bell*, 327 U.S. at 682-83). "A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Roppo v. Travelers Commercial Ins. Co*., 869 F.3d 568, 587 (7th Cir. 2017) (quoting *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974)). *S*ee *also Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010) (utterly frivolous lawsuit does not engage the jurisdiction of the federal courts); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir. 1988) (lawsuit that is frivolous on its face fails to invoke federal jurisdiction).

B. Failure to State a Claim.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); accord *Mattek v. Deutsche Bank Nat'l Trust Co.*, 766 F. Supp. 2d 899, 900 (E.D. Wis. 2011).

The court must accept the factual allegations as true and liberally construe them in plaintiff's favor. *Turley v. Rednour*, 729 F.3d 645, 651 (7th Cir. 2013). Nonetheless, a complainant's allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, a complaint that includes mere conclusory assertions and labels without the necessary factual allegations fails to meet this standard. "Threadbare recitals

of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citation omitted).

Although factual allegations are accepted as true for purposes of a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Additionally, while the allegations of the complaint of a pro se plaintiff are entitled to liberal construction, a court is not compelled to "fill in all of the blanks in a *pro se* complaint." *Hamlin v. Vaudenberg*, 95 F.3d 580, 583 (7th Cir. 1996).

II. Plaintiff's Amended Complaint Must be Dismissed For Lack of Federal Jurisdiction.

Neither the United States Constitution nor any federal statute provides a basis for federal jurisdiction in this case. Plaintiff's reliance on Oneida and Iroquoian law is also misplaced, as the Court does not have jurisdiction over claims arising under tribal law. Plaintiff's Amended Complaint should therefore be dismissed under Fed. R. Civ. Pro. 12(b)(1).

A. The First Amendment Does Not Provide a Basis for Jurisdiction.

1. The First Amendment does not apply to Indian Tribes and Tribal Officials.

"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 Supreme Court first addressed this question in *Talton v. Mayes*, 163 U.S. 376 (1896), and held that the Cherokee Nation, in exercising the power to prosecute a tribal member for the offense of murder, was not constrained by the provisions of the Fifth Amendment. The Court stated:

> True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States . . . . But the existence of this right in

> Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. If follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which . . . had as its sole object to control the powers conferred by the Constitution on the National Government.

Id. at 384.

Lower courts have extended the holding of *Talton* to "the Bill of Rights and the Fourteenth Amendment." *Settler v. Lameer*, 507 F.2d 231, 241 (9th Cir. 1974). In *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the Tenth Circuit specifically held that the First Amendment and the Fourteenth Amendment do not apply to Indian tribes:

> The First Amendment applies only to Congress. . . . It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the actions of Congress and the of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not States. . . . No provision of the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact on rights to some extent on forms of religious worship.

Id. at 134-35.

Because the First Amendment does not apply to the Nation and tribal officers such as Defendants, the First Amendment does not provide a basis for federal question jurisdiction in this case.

2. Plaintiff's First Amendment Claim is Wholly Insubstantial and Frivolous.

Even if the First Amendment were applicable to Indian tribes and tribal officials, Plaintiff's First Amendment claim would not support federal question jurisdiction, because it is wholly insubstantial and frivolous. Plaintiff is not claiming Defendants abridged her freedom of

speech by imposing a penalty on her or by placing restraints on her speech. Instead, she is claiming the First Amendment requires Defendants to call a meeting at which she may express her views. It is well-settled that the First Amendment does not require government officials to create public fora at which individuals may express their views. *See, e.g., Pahls v. Thomas,* 718 F.3d 1210, 1239 (10th Cir. 2013) ("The First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints. . . . To the contrary, freedom of speech is a negative liberty. The First Amendment is a restriction on the government's power to 'abridge[e]' speech, *U.S. Const. amend. I*, not a source of government power — much less a mandate — to orchestrate public discussion."). Plaintiff's First Amendment claim is therefore wholly insubstantial and frivolous and does not support the exercise of federal jurisdiction. *Turner/Ozanne,* 111 F.3d at 1316-17; *Roppo,* 869 F.3d at 587; *Carr*, 591 F.3d at 917; *Crowley Cutlery*, 849 F.2d at 278.

B. ICRA Does Not Provide a Basis for Federal Jurisdiction.

Congress enacted ICRA "to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and Fourteenth Amendment." *Santa Clara Pueblo,* 436 U.S. at 57 (1978). ICRA does not, however, create a private cause of action to secure enforcement of those rights, except for habeas corpus to challenge the legality of detention by order of an Indian tribe. *Id.* at 69-70 (citing 25 U.S.C. §1303). "Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for injunctive or declaratory relief," *id.* at 59, and in enacting ICRA Congress did "not expos[e] tribal officials to the full array of federal remedies available to redress actions of federal and state officials . . ." *Id.* at 71. Federal courts therefore do not have jurisdiction to hear disputes between an Indian tribe or tribal officials and

litigants alleging violations of ICRA, and the only relief available under ICRA is a writ of habeas corpus. *Runs After v. United* States, 766 F.2d 347, 353 (8th Cir. 1985); *Ross v. Flandreau Santee Sioux Tribe*, 809 F.Supp. 738, 744 (D. S.D. 1992). Accordingly, federal courts have no jurisdiction to issue an injunction or award monetary damages for any other ICRA claims. *Santa Clara Pueblo*, 436 U.S. at 59, 72; *United States v. Turtle Mountain Housing Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987).

Plaintiff is neither a prisoner nor a detainee of the Nation, and is not seeking a writ of habeas corpus. ICRA therefore does not provide a federal cause of action for Plaintiff or a basis for federal jurisdiction in this case. Moreover, even if ICRA did create a federal cause of action, Plaintiff's claim that Defendants violated her freedom of speech, as guaranteed by ICRA, would be wholly insubstantial and frivolous for the same reasons her First Amendment claim is wholly insubstantial and frivolous, i.e., Defendants are not required to facilitate Plaintiff's speech.

C. 42 U.S.C. § 1983 Does Not Provide a Basis for Federal Jurisdiction.

Under 42 U.S.C. § 1983, an individual may be liable for actions taken under color of state or territorial law. To state a claim for relief under section 1983, a plaintiff must allege that (1) she was deprived of a right secured by the Constitution or laws of the United States, and (2) the deprivation was visited upon her by a person or persons acting under the color of state or territorial law. *See, e.g., Buchanan-Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009) (citing *Kramer v. Vill. of N. Fond du Lac*, 384 F.3d 856, 861 (7th Cir. 2004)); see also *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Section 1983 does not apply to individuals acting under color of tribal law. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) ("A 42 U.S.C. § 1983 action is unavailable 'for persons alleging deprivation of constitutional rights under color

of tribal law.'") (*quoting R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir.1983))).

1. Plaintiff has not been deprived of a right guaranteed by the Constitution or laws of the United States.

Plaintiff has failed to establish that Defendants deprived her of a right secured by the Constitution or laws of the United States. Plaintiff premises her section 1983 claim on the alleged deprivation of her rights under the First Amendment and ICRA. As discussed above, the First Amendment does not apply to Indian tribes and tribal officials, and ICRA does not create a federal cause of action other than habeas corpus. In addition, even if the First Amendment were applicable, or if ICRA authorized a federal cause of action against tribal officials, Plaintiff's First Amendment and ICRA claims are wholly insubstantial, because neither the First Amendment nor the corresponding provision of ICRA require Defendants to facilitate Plaintiff's dissemination of her views.

2. Defendants were not acting under State of territorial law.

Plaintiff merely asserts that Defendants were acting under color of territorial law, but such is not the case. Defendants are the elected members of the Oneida Business Committee. Plaintiff claims the Oneida Constitution requires Defendants to convene a General Tribal Council on her per capita petition. In deciding otherwise, Defendants were acting under color of tribal law. Section 1983 is therefore inapplicable and does not provide a basis for federal jurisdiction. *Burrell*, 456 F.3d at 1174; *R.J. Williams Co.*, 719 F.2d at 982. Plaintiff's bald assertion that Defendants were acting under territorial law is plainly wrong as a matter of law.

D. 42 U.S.C. § 1985 Does Not Provide a Basis for Federal Jurisdiction.

Although Plaintiff alleges Defendants conspired to interfere with her civil rights in violation 42 U.S.C. § 1985, her Amended Complaint does not set forth any allegations which fall

within the ambit of that statute, which addresses conspiracies to prevent an officer of the United States from discharging duties, 42 U.S.C. § 1985(1); conspiracies to obstruct or intimidate a party, witness or juror in a court of the United States, 42 U.S.C. § 1985(2); and conspiracies to deprive a person or class of people equal protection of the laws, equal privileges and immunities, and voting rights. 42 U.S.C. § 1985(3). In order to prove a claim under subsection (3), a plaintiff "must prove, first, that the defendants conspired; second, that they did so for the purpose of depriving any person or class of persons the equal protection of the laws; and third, that the plaintiff was injured by an act done in furtherance of the conspiracy." *Hartman v. Board of Trustees of Community College Dist. No. 508,* 4 F.3d 465, 469 (7th Cir. 1993) (citation omitted). Plaintiff's claim fails for several reasons.

First, individual members of a tribe's governing body, acting in their official capacity as such, cannot conspire when they act together with other members of the governing body in taking official action on behalf of the governing body. *Runs After v. United States*, 766 F.2d 347, 354 (1985) ("The tribal defendants are all members of the Tribal Council, the governing body of the tribe, who acted, in passing the two Tribal Council resolutions at issue, in their official capacities as tribal council members."). Defendants in the present case are members of the Nation's governing body, and acted in their official capacities in taking action on Plaintiff's petition. Under these circumstances, Plaintiff cannot establish that Defendants conspired.

Second, Plaintiff makes no claim that the alleged conspiracy was directed at preventing an officer of the United States from discharging duties, obstructing or intimidating a participant in a court proceeding, or denying any person equal protection of the laws. Her assertion that Defendants violated the 42 U.S.C. 1985 by conspiring to violate her First Amendment rights is patently frivolous and not establish federal jurisdiction over her claims. *Turner/Ozanne*, 111

F.3d at 1316-17; *Roppo*, 869 F.3d at 587; *Carr*, 591 F.3d at 917; *Crowley Cutlery*, 849 F.2d at 278.

E. The Court Lacks Jurisdiction to Hear Claims Based Upon Tribal Law.

Federal courts do not have jurisdiction to resolve disputes arising under tribal law. *Runs After*, 766 F.2d at 352 (dispute requiring interpretation of a tribal constitution and tribal law "is not within the jurisdiction of the district court"). Such disputes are within the exclusive jurisdiction of tribal courts. Plaintiff's claims under Oneida and Iroquoian law therefore do not provide a basis for federal jurisdiction.

III. Plaintiff Has Failed to State a Claim Upon Which Relief May Be Granted.

For the reasons discussed above, Plaintiff has failed to state a claim under the First Amendment, ICRA, and federal civil rights statutes, and the Court lacks jurisdiction to hear Plaintiff's claims under tribal law. Plaintiff therefore has failed to state a claim upon which relief may be granted, and her Amended Complaint should be dismissed under Fed. R. Civ. Pro. 12(b)(6).

IV. Plaintiff's Claims Are Barred by Tribal Sovereign Immunity.

In the Seventh Circuit, the issue of sovereign immunity is technically not "jurisdictional" in nature. *Meyers v. Oneida Tribe of Indians of Wisconsin*, No. 15-CV-445, 2015 WL 13186223, at *2 (E.D. Wis. Sept. 4, 2015), aff'd, 836 F.3d 818 (7th Cir. 2016). The Court can decide the question of tribal sovereign immunity at the pleading stage under Fed. R. Civ. P. 12(b)(6) where, as here, "the immunity issue is clearly raised by the facts in the complaint." *Id.*; *see also Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 823 (7th Cir. 2016), cert. denied, 137 S. Ct. 1331 (2017) (a court may choose among different "non-merits threshold" grounds for dismissing an action, including tribal sovereign immunity; "a federal court has

leeway to choose among threshold grounds for denying an audience on the merits, and our conclusion that the defendants have sovereign immunity resolves a non-merits threshold matter without further burden on the courts and parties . . . .").

An Indian tribe possesses "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. "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 Okla. v. Mfg. Techs. Inc*., 523 U.S. 751, 754 (1998); accord *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 509 (1991) ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." (internal citation omitted)). The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as sovereign entities under the Indian commerce clause. See *U.S. Const. art. I, § 8*. As the Supreme Court has indicated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). Tribal sovereign immunity extends to tribal officials or employees acting within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). "When tribal officials act in their official capacity and within the scope of their authority, they are immune." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Plaintiff has named the individual members of the Oneida Business Committee as Defendants, rather than the Oneida Nation, apparently to plead around sovereign immunity. She indicates she is suing the members of the Oneida Business Committee "as individuals, acting

outside-the-scope of their authority . . . ." ECF No. 11, p. 2. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that "although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities." *Id*. at 1295. The Court applied the common law principles governing sovereign immunity for state and federal employees to distinguish between official-capacity and individual-capacity suits. *Id*. at 1291.

> Our cases establish that, in the context of lawsuits against state and federal employees or entities, **courts should look to whether the sovereign is the real party in interest** to determine whether sovereign immunity bars the suit. In making this assessment, **courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign**. If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. . . .
>
> The distinction between individual- and official-capacity is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and is in fact against the official's office and thus the sovereign itself.

Id. at 1291-92 (citations and internal quotation marks omitted) (emphasis supplied).

Applying these principles, the Court determined the suit in *Lewis* was against the tribal employee in his individual capacity:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property.

Id. at 1292.

In the instant case, Plaintiff would have the Court overturn a decision of the Oneida Business Committee, and order the Oneida Business Committee to convene a meeting of the

General Tribal Council, at a cost to the Nation of approximately $245,000. Despite the characterizations in her Complaint, her suit is against the members of the Oneida Business Committee in their official capacities, and the remedy she seeks is truly against the Nation, as the members of the Oneida Business Committee, in their individual capacities, have no authority to convene a General Tribal Council meeting of expend tribal funds. Plaintiff's claims are thus barred by tribal sovereign immunity.

In this regard, *Imperial Granite* is instructive. In that case, the plaintiff argued that tribal officials are not necessarily immune from suit. The Ninth Circuit determined, however, that the plaintiff's suit challenged official action of the tribe, and was therefore barred by sovereign immunity.

> The complaint alleges no individual actions by any of the tribal officials named as defendants. As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury.

940 F.2d at 1271. The same analysis applies here, and dictates that Plaintiff's lawsuit against Defendants must be dismissed. *See also Brown v. Garcia*, 17 Cal. App. 5th 1198, 1207, 225 Cal. Rptr. 3d 910 (Ct. App. 2017) ("Despite plaintiffs' careful pleading, their action sought to hold defendants liable for their legislative functions and is thus in reality an official capacity suit properly subject to sovereign immunity." (internal quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons, the Nation respectfully request that the Court dismiss Plaintiff's Amended Complaint.

Dated this 17th day of December, 2018.

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