

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

AMBER BROOKS, *et al.*)
)
Plaintiffs,)
)
v.)
)
KENNETH BRANHAM, *et al.*)
)
Defendants)

Civil Action No.: 6:22cv00033-NKM-RSB

**PLAINTIFFS’ DOCUMENTARY RESPONSE IN OPPOSITION TO THE
DEFENDANT’S SUPPLEMENT REGARDING SUBJECT MATTER
JURISDICTION**

COMES NOW the Plaintiffs, Amber Brooks, et al. by counsel and states that this response is made following Plaintiff’s supplemental submission of documents establishing that the Defendants in this matter are not the lawful government officials, and the filing by the Defendants of the documents which they allege support their contention that the Defendants are the Tribal officials of the Monacan Indian Nation.

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ARGUMENT

INTRODUCTION

The Defendants, in their October 31, 2022, response to Plaintiff’s supplemental filing of documents, submitted nineteen exhibits and a proposed order. No document was a Tribal governmental document, providing a foundation in Monacan Indian Nation Tribal law, which established that any of the three Defendants are Tribal Government Officials. In fact, their entire position on this point is eviscerated by Defendant’s Exhibit J, which establishes that the BIA makes no determination about, and intends to remain uninvolved, in the internal Tribal leadership dispute. Plaintiffs’ Exhibit 1, IBIA Remand Order to this response is the October 26, 2022, Order from the IBIA that stated that the IBIA took the same position.

In short, there is no federal recognition of Defendants as Tribal leaders, and the fact that they received six or more letters in correspondence with federal agencies, who addressed

Kenneth Branham as chief, or even that Kenneth Branham, without legal authority, signed a self-determination Education funding amendment, Defendant's Exhibit F, addressed to him at his home at 2009 Kenmore Rd, Amherst, VA, and not at any tribal address, does not confer any authority upon the defendants which is not granted in accordance with the 2013 bylaws as amended, (*Exhibit I, from the Plaintiff's Amended Complaint*) which is the only primary document which grants Tribal Authority. Kenneth Branham's use of an alternative address is consistent with the actions that he has taken to conceal the fact that he is not the Chief or a Tribal Official, or a Tribal Council Member.

The confusion and disruption caused by these three individuals is no substitute for lawful authority. Neither can they claim to be the Nation when they sidetrack correspondence for delivery to their home, make tribal government postings on the internet without governmental authority, and attempt to manufacture a tribal Council, which does not conform to the 2013 Bylaws, (*Exhibit I, from the Plaintiff's Amended Complaint*), and which cannot exist because the lawful Tribal Council from 2018 continues to exist and discharge its duties.

The Defendant's Response dated October 31, 2022, does not address the court's directive to provide documentary evidence to support each party's claim that the defendants are, or are not, tribal officials. The Court specifically asked for each party to provide the Tribal governmental basis for their claim and the defendant's filing sidesteps this issue and directive. The complete absence of a documentary foundation in Monacan Indian Nation law by the defendants means their Motion to Dismiss must fail.

I.

SPECIFIC REFERENCES TO ENABLING TRIBAL LAW

A.) TRIBAL REPRESENTATIVE

Defendant's response in opposition to Plaintiff's submission of documents did not include any document that contested or contradicted the resolution dated September 3, 2020, (*Exhibit 4A, from Plaintiff's Supplemental Response*) naming Contessa Sancho as the Tribal Representative. Adrian Compton's email dated October 13, 2020, (Plaintiff's Exhibit 4) has yet to be substantiated by any Tribal government action and the defendant's response included no government document supporting this email.

The mere fact that Government agencies choose to correspond with Kenneth Branham or with any other person based on incorrect information posted on any website or the internet, does not confer lawful authority to be Tribal Representative upon any person other than Contessa Sancho as lawfully designated by the Resolution. Receipt of this designation as acknowledged by Kimberly Bouchard on January 25, 2021, is herein included (Exhibit III., of Plaintiff's Amended Complaint).

B.) TRIBAL COUNCIL

The Defendant's response provides no tribal government documents that established that the Tribal Council which sat in March 2018, and in November 2021, and continues to sit today, does not manage the business and affairs of the Monacan Indian Nation. The Defendants are not members of this council, nor can they produce, or have they produced, documents which certify their election to any governmental position.

C.) CHIEF

There was no document submitted by the Defendants that contested the 2013 and 2021 Bylaws of the Monacan Indian Nation as being the governing documents of the tribe. Neither was there any document from the Department of the Interior at any level, including the Bureau of

Indian Affairs, which even suggested that the statement in the January 25, 2021, letter from Kimberly Bouchard which stated that the 2013 Bylaws are the foundational governing document of the Monacan Indian Nation as considered after their federal recognition in 2018. The IBIA Order dated October 26, 2022, affirmed the position of the Solicitor in their representative capacity for the Department of Interior for the United States of America, and established the position of the United States that the Department of the Interior was not going to intervene in inter-Tribal governmental affairs and therefore the 2013 Bylaws as amended are the foundational government documents of the Monacan Indian Nation.

D.) ADRIAN COMPTON AND AMBER FINK AS TRIBAL OFFICIALS

The Defendant's response provides no tribal government documents that established Adrian Compton and Amber Fink are tribal government officials. Defendant's Exhibit A fails to provide any Contract authorized by Tribal Council which establishes Adrian Compton's role with the Nation and therefore does not establish his role in any manner that would require the allegations in the complaint to not be considered as true. The lack of such a contract confirms the allegations. Defendants do not contest Plaintiff's allegations that Adrian Compton was involved in a major health care disaster in Australia and was not a CPA causing his application to be rejected.

Defendant's Exhibit C fails to provide any certification of voting totals that established Amber Fink as Treasurer of the Monacan Indian Nation and the statement of Teresa Covington, who also has no contract authorized by Monacan Indian Nation Tribal Council, is the mere opinion of a person who has no defined duties with Tribal Government and no authority to comment on behalf of Tribal Council.

II.

REFUTATION OF DEFENDANT'S SUPPLEMENT

The Defendants make numerous significant misstatements of the facts. First, on page 1 of the Defendants' proposed Order Granting Defendants' Motion to Dismiss, section I, line 1, they claim that the BIA concluded that the Plaintiffs were making efforts to stage a coup, when they know that no such statement was made. The BIA and the IBIA take no position on the merits of the internal tribal dispute.(Plaintiff's Exhibit 1). Additionally, this complaint was not brought by The Tribal Council. Second, the Defendant's assertion on page 2 of their response that the Bureau of Indian Affairs holds the federal government's authority to confirm the official leaders of the Tribe is incorrect and not supported by any legal authority which exists or which they present. Third, the defendant's assertion on page 2 subparagraph (F) that the Plaintiff's tribal citizenship is irrelevant to the complaint is incorrect as this was the initial premise of the complaint and the subject of the court's inquiry regarding these supplemental responses.

Addressing the numbered paragraphs individually the Plaintiffs state:

A.) With respect to the defendant's contentions on page two of their response, this contention has been fully addressed before the IBIA in recent months and is resolved by examining the response of the solicitor representing the BIA in her filing dated October 11, 2022, in which she requests that the letter from the BIA dated August 12, 2022, be vacated and the matter remanded to the BIA as the BIA intends to remain uninvolved in the internal tribal leadership dispute. The order of the IBIA dated November 2, 2022, which vacated the decision and remanded the matter eliminates any reliance on BIA determinations as confirmed by the January 25, 2021, letter from Kimberly Bouchard. This letter states that the BIA does not interfere in leadership disagreements and does not take any position regarding the current leadership dispute. Plaintiffs Exhibit 1. The only source of authority for any person claiming

tribal authority is the 2013 bylaws as amended. Tribal Council has the power to manage the business and affairs of the Monacan Indian Nation and the defendants are not members of that Council, nor is Kenneth Branham the chief under those bylaws.

B.) As stated in the prior response, the claim that the federal government recognizes Kenneth Branham as the chief is not supported by legal authority. The mere listing of Kenneth Branham as chief by any agency in its correspondence with the tribe does not establish this authority. Such authority must come from tribal government documents and the bylaws do not support the defendant's claims. It is true that Kenneth Branham is listed on the BIA web site as chief and such listing likely causes other agencies to address their concerns to him, but the BIA has stated directly that they take no position regarding the leadership dispute, and the posting carries no authority and comes with a disclaimer that the BIA does not guarantee the accuracy of this information. Defendant's Exhibit G. No other agency can rise above the BIA's stated position and elevate Kenneth Branham's claim without finding authority from the tribal governing documents. The question of the identity of the chief does not address the issue of the management of the business and affairs of the Monacan Nation, as this power rests solely with Tribal Council. To that extent, all actions by other federal agencies is misplaced as they are not dealing or corresponding with the proper entity.

C.) The Defendant's contention that only the Monacan Tribal Government can provide the relief that the plaintiffs seek is not consistent with the complaint, which seeks to enjoin three individuals, not the Monacan Government, from interfering with the delivery of benefits to tribal citizens. The actions which plaintiffs seek to enjoin are actions of individuals who are not tribal officials, due to their lack of authority, based on tribal governing documents. Contrary to the

Defendant's contentions in the last sentence of their argument on page nine of their response, the court must consider the bylaws when it ascertains whether the defendants are tribal government officials.

D.) The Plaintiff's assertions that they did not receive funds in the past because of the actions of the Defendants as individuals must be taken as true at this stage of the suit. Plaintiffs allege that Federal Government funds are being paid to the tribe on the basis of the number of tribal members and that these members are included in the funding totals. As an example, Anita Mayo was scheduled to receive Indian Health Services funds and no such disbursements were made as set forth in the complaint. Plaintiff's Exhibit 5. These actions and the related actions from the factual allegations contained in the complaint are the actions which the plaintiffs say are unlawful and must be enjoined from being repeated.

A motion to dismiss tests the sufficiency of a complaint without resolving factual issues, and a District Court must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff. *Kensington Volunteer Fire Department v Montgomery Cty.* 684 F.3d 462,467 (4th Cir. 2012). "Jurisdiction is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction." *Hagans v. Lavine* 415 U.S. 528, 542 (1978).

Paragraphs 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 44, 45, and 52 specifically set forth funding deficiencies that occurred in the past and related circumstances. These circumstances are likely to occur in the future, so long as the three Defendants remain involved in any way with Tribal funding. In addition to Anita Mayo's Affidavit concerning the

interference with Indian Health Services funds, Adrian Compton through an email, Plaintiff's Exhibit 4, attempted to interfere with numerous tribal members benefits, and Cordelia Derr was subjected to an attempt to limit her participation in back-to-school events by Kenneth Branham, during the pendency of this suit on August 3, 2022, Plaintiff's Exhibit 6.

E). The plaintiffs do not allege mismanagement of funds on behalf of the tribe, merely on behalf of the defendants. The defendants should not be permitted to infer that the Department of the Treasury and the Department of the Interior are not investigating the defendant's use of Cares Act and other funds when they are fully aware of such investigation. The Plaintiff's allegations that they have not brought suit against the Monacan Indian Nation or Tribal Officials must be taken as true. *Kensington Volunteer Fire Department v Montgomery Cty.* 684 F.3d 462,467 (4th Cir. 2012). "Jurisdiction is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction." *Hagans v. Lavine* 415 U.S. 528, 542 (1978).

F.) Tribal Citizenship is necessary to establish entitlement to federal funds. While the allegations in the complaint are adequate to establish this fact, the exhibits showing tribal membership cards conclusively establish this fact.

Defendants attempt to rely upon a document dated March 22, 2022, Defendant's Exhibit M, to establish a disenrollment, not authorized by the 2013 bylaws, and enacted by an alleged tribal council sitting without tribal authority, having never been elected to replace the Tribal Council, which has been in place since 2018, is without any support by tribal governmental documents.

The claim by the supposed Tribal Council members is not supported under Article 7 of the 2013 Bylaws as its composition does not satisfy the Article 7 requirements concerning election and nomination, and nothing under Article 7 allows a second Tribal Council, under any circumstance, to take action. Establishing its tribal authority by use of and supposed reliance upon Robert's rules of order is clearly in conflict with the Articles of the 2013 Bylaws and is an incorrect and incomplete reading of those documents and those rules of order. Robert's rules of order can never contradict or replace the specific provisions of the bylaws.

Kenneth Branham was clearly chief of the Monacan Indian Nation as it existed under the 501(c) (3) designation and after tribal recognition by the Commonwealth of Virginia, but he has not been eligible to be chief after federal recognition, nor was he chief at the time of the filing of this complaint, due to the resolutions of tribal council (Exhibit IV from the amended complaint) and the January 15, 2022 election, (Exhibit II from the amended complaint). The tribal governmental dispute is entirely caused by Kenneth Branham's refusal to disengage from claims to hold office when he has no basis for such a claim in tribal governance documents, and none of the defendants has presented such documentation despite the court's directive. In fact, the March 22, 2022, Defendant's Exhibit M, claiming a disenrollment by a tribal council is a legal fiction as none of these tribal council members can demonstrate a tribal governance document that establishes their place in tribal government, and the 2013 Bylaws do not allow disenrollment unless you are a member of another tribe.

Exhibit I of the Defendant's response is an Order from the IBIA which clearly identifies the parties to the tribal intergovernmental dispute, and properly states the governing law on page three, concerning any agency giving due deference to a Tribal government's interpretation of its own laws and says in footnote one that the board's comments shall not be

construed as expressing any view on the underlying merits of the dispute. The board directed a review of an August 12, 2022, letter from the BIA, in response to Bobby Thompson's filing on behalf of the Monacan Indian Nation Tribal Council with the BIA, Plaintiff's Exhibit 7, which stated that the BIA needed further documentation to act on the results of the January 15, 2022, election, and after such a review the BIA vacated the statements, it had issued. The BIA expressly did not attempt to offer a determination regarding the internal tribal leadership dispute, and stated it wished to remain uninvolved in the dispute. Defendant's Exhibit J. Hengle v. Treppa, 19 F. 4th 324 (4th Cir. 2021) does not allow a sovereign immunity bar even for the Tribe in circumstances where perspective injunctive relief is sought to prevent Defendants from improper actions regarding federal law.

CONCLUSION

There is certainly an ongoing inter-tribal government dispute, but there's no dispute concerning the tribal governing documents. These are the 2013 bylaws, and they establish the Tribal Government. Kenneth Branham could not be elected chief under these documents, and he was removed from his purported position by Tribal Council. He attempted to form his own Tribal Council but never complied with the bylaws in this regard or put forth a properly constituted council. The 2018 Tribal Council has continued until today and does not recognize the Defendants (Plaintiff's Exhibit II, from the Amended Complaint). The defendants have caused confusion in a great number of circumstances by refusing to acknowledge their lack of tribal government authority and encouraging misperceptions by corresponding with agencies and individuals, Plaintiff's Exhibit 8, and interjecting themselves into roles that they know they can't lawfully fulfil. Their attempts to exercise this authority continue to shrink as they have been told

that they can't bar tribal citizens from tribal property by the General District Court of the County of Amherst Plaintiff's Exhibit 9-12), and they have not even maintained proper addresses for their contacts with agencies, as demonstrated by Defendant's Exhibit F.

WHEREFORE upon consideration of the foregoing and all previous submissions by the Plaintiffs' that this Motion to Dismiss be Dismissed.

Dated: November 7, 2022,

Respectfully submitted,

/s/ Joseph A. Sanzone

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November 2022, I electronically filed the foregoing Response with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Greg Werkheiser, Esq., counsel for Defendants.

s/ Joseph A. Sanzone