STEVEN D. SANDVEN
LAW OFFICE PC

PRINCIPAL
STEVEN D. SANDVEN

Admitted in South Dakota, Minnesota & Washington D.C.

3600 SOUTH WESTPORT AVENUE, SUITE 200
SIOUX FALLS, SOUTH DAKOTA 57106-6344
TELEPHONE (605) 332-4408
FACSIMILE (605) 332-4496
SSANDVENLAW@AOL.COM

December 8, 2014

Clerk of Court
Rosebud Sioux Tribe
P.O. 129
Mission SD 57570

Re: Scott v. Walking Eagle, et al.
CV 14-490

Dear Clerk of Court:

Please find for filing the attached Defendants' Memorandum in Opposition, Affidavit of Lorraine Walking Eagle and Certificate of Service in the above-described matter.

Please contact me if there are any questions.

Sincerely,

STEVEN D. SANDVEN
Attorney for Defendants

Enclosures

Cc: Al Arendt, P.O. Box 1077, Pierre SD 57501
Rosebud Sioux Tribal Council
Rosebud Sioux Tribe Ethics Commission

ROSEBUD SIOUX TRIBAL COURT)
ROSEBUD INDIAN RESERVATION: SS
ROSEBUD, SOUTH DAKOTA)

IN TRIBAL COURT

CYRIL SCOTT,

Plaintiff,

v.

LORRAINE WALKING EAGLE, Chairman, RST Ethics Committee; JULIE PENEAUX, RST Tribal Secretary, on behalf of the RST Tribal Council; and WILLIAM KINDLE, Vice-Chairman of the RST Tribal Council,

Defendants.

CASE NO. 14-490

DEFENDANTS' OPPOSITION TO PLAINTIFF'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now, Defendants LORRAINE WALKING EAGLE, in her official capacity as Chairperson of the Rosebud Sioux Tribe ("RST") Ethics Committee, JULIE PENEAUX, in her official capacity as RST Tribal Secretary, and WILLIAM KINDLE, Vice-Chairman of the RST Tribal Council, by and through their attorney of record, Steven Sandven, to respectfully object to and oppose Plaintiff's Ex Parte Motion for Temporary Restraining Order. As grounds why Plaintiff's Motion should be denied, Defendants submit the following:

INTRODUCTION

Plaintiff asks this Court to step into a Tribal government mechanism for addressing ethics issues and declare him the winner. Specifically, Plaintiff asks this Court to enjoin the action of the Rosebud Sioux Tribe Ethics Committee and Tribal Council for the following reasons: (i) a violation of the Constitutional limitation on the rights to discipline and to remove the Tribal President; (ii) a violation of the Tribal President's due process rights under Article X, Section

1(e) of the Tribe's Constitution; and (iii) the Wilcox complaint is barred by the doctrine of res judicata. Using factually disingenuous and legally frivolous constitutional claims, Plaintiff effectively seeks to obstruct the legislative branch from performing its Constitutional duties. Nothing in Tribal law, however, gives the Court such a right to intercede in legislative proceedings at this juncture – especially when there has been no waiver of sovereign immunity.

As the Court noted in *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, in which case the Plaintiff could not point to anything in the RST Constitution or Code that would authorize the Tribal Court to get involved in Tribal Council removal proceedings: "This is not unusual because removal proceedings against elected officials are generally 'political proceedings' that are beyond the purview of a Court's jurisdiction unless such authority is delegated to the judicial branch of government by the executive or legislative branch of government." *Id.* at 8. Nothing has changed since the Court issued its ruling in *Valandra*. Indeed, the role of the RST Ethics Commission has been consistent for nearly 40 years since enactment of Resolution No. 86-62 in 1986 (*Ex. 1 Walking Eagle Affidavit*). Defendant Ethics Commission's role is, and has always been, to make a recommendation whether an ethics hearing before Tribal Council is appropriate. During the investigative process, the Commission has no statutory obligation to meet with the accused. In this case, however, the Commission made several attempts to give Plaintiff an opportunity to reply. After several months of silence from the Plaintiff, the Ethics Commission made their recommendation to Tribal Council on October 9, 2014. Plaintiff was granted an initial 29 days to prepare for the Tribal Council hearing. Plaintiff would have had ample opportunity to present his side of the story but instead chose to seek an ex parte order enjoining the Tribe and Ethics Commission from proceeding consistent with nearly 40 years of past practice.

CLARIFICATION

In his Complaint, Plaintiff attempts to convolute the issues involved herein. For example, he avers that "[o]ver the next two hours, the Rosebud Sioux Tribe Ethics Committee faxed approximately 226 pages of documentation allegedly substantiating, or providing details of the two alleged ethical complaints against the Plaintiff." (*Complaint at p. 2*). The Ethics Commission has received two complaints from Ms. Wilcox and Mr. Calvin Waln. However, the Commission has not acted upon Mr. Waln's complaint, and so, the same has not been the subject of an investigation nor has it been referred to the Tribal Council. The only complaint subject to the Tribal Council hearing is that of Ms. Wilcox.

STANDARD OF REVIEW

To obtain injunctive relief, Rule 65(c) of RST Law and Order Code, Title IV, requires: (1) That the party making application has no adequate legal remedy; (2) That the party making application has exhausted all administrative remedies; (3) That irreparable harm will result which cannot be solved by the awarding of money damages unless the injunction or temporary restraining order is granted, and (4) That greater harm will be done to the party making application by the refusal of the injunctive relief than will be occasioned to the opposing party by the granting of such relief. *Moran v. Rosebud Housing Authority,* CA 90-03, pp. 7-8 (1991). In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, the Honorable BJ Jones added the following fifth factor for injunctive relief: probability of success on the merits of the complaint. *Id.* at p. 2.

FACTUAL BACKGROUND

On October 21, 2013, Plaintiff "directed" the RST Transportation Department to discharge Ms. Wilcox for (1) insubordination, misconduct or gross neglect of duty or refusal to

comply with lawful instructions and breach of chain of command by employees; (2) using or threatening to use personal or political influence in an effort to secure special consideration as a Tribal employee; (3) harassment, intimidation, using offensive language or, generally being discourteous to another employee, tribal official or the general public; and (4) all other conduct on the job not in keeping with acceptable standards of behavior generally associated with employment. *(Ex. 3 Walking Eagle Aff.)* Plaintiff provided no details as to Ms. Wilcox's alleged misconduct but did note that "[i]t has been brought to my attention that one of your employees, a Tammy Wilcox has filed charges against me for making the decision to lay off some of your staff including her." *Id.*

On October 30, 2013, Ms. Wilcox submitted a complaint against the Plaintiff with the Ethics Commission alleging that "President Scott brought a personal issue into [her] work place creating a hostile work environment me (sic) and used his authority and position as the Tribal President to retaliate against [her]…" *Id.*

On July 30, 2014, the Ethics Commission informed the Plaintiff via certified mail that an ethics complaint had been received and was under review. *(Ex. 4 Walking Eagle Aff.)* The letter was received by Shawna Frazier on August 7, 2014. (*Ex. 6 Walking Eagle Aff.*)

On August 18, 2014, the Ethics Commission provided notice to Plaintiff that an ethics complaint filed by Ms. Wilcox was reviewed. (*Ex. 5 Walking Eagle Aff.*) The Commission asked the Plaintiff to meet with them to discuss the allegations. *Id.* This memorandum was sent via certified mail on August 26, 2014. On August 29, 2014, the August 18th memorandum was hand-delivered to the President's office and was signed for by the Plaintiff's aide, Gerri Night Pipe[1]. *(Id.; Ex. 7 Walking Eagle Aff.)* On September 8, 2014, Ms. Night Pipe informed Ethics

[1] *(Ex. 9 Walking Eagle Aff.)*

Commissioner High Pipe that she would speak to the Plaintiff about scheduling a meeting with the Ethics Commission. *(Ex. 8 Walking Eagle Aff.)*

On October 6, 2014, Plaintiff signed an acknowledgement that he received the complaint. (*Plaintiff's Aff. at p. 2.*)

On October 9, 2014, the Ethics Commission notified the Tribal Council that an ethics complaint had been filed against the Plaintiff and recommended the Council hold a hearing on the issue. (*Ex. 10 Walking Eagle Aff.*) On that same day, the Tribal Council adopted the following motion:

> Motion to schedule a hearing on November 14, 2014, at 10:00 a.m. in the Council Chambers and that the Tribal Court provide a Hearing Officer and that both parties be notified and that the Secretary's Office send out notices to the complainant, the defendant, and the Tribal Council. Motion by Calvin Waln Jr., second by Michael Boltz, question by Brian Dillon. Motion carried with eleven in favor, zero opposed and two not voting.

(*Ex. 12 Walking Eagle Aff.*) Also, on October 9, 2014, Plaintiff's legal counsel was faxed the complaint. (*Ex. 11 Walking Eagle Aff.*)

On October 15, 2014, Defendant Peneaux sent out a Notice of Hearing to Plaintiff for November 14, 2014. (*Ex. 13 Walking Eagle Aff.*) Therein, Plaintiff was informed that he could present witnesses and evidence, be represented by legal counsel and have an opportunity to review the evidence before the Tribal Council. *Id.*

On October 28, 2014, Defendant Peneaux sent out another Notice of Hearing informing the parties that the hearing originally scheduled for November 14, 2014, had been postponed until November 17, 2014. (*Ex. 14 Walking Eagle Aff.*)

On November 14, 2014, Plaintiff filed a Complaint and an Ex Parte Motion for Temporary Restraining Order seeking to enjoin the Tribal Council from proceeding with its

legislative functions of holding disciplinary proceedings. Additionally, on this day, the Honorable Sherman Marshall recused himself as hearing officer. (*Ex 15 Walking Eagle Aff.*)

On November 14, 2014, the Tribal Court granted Plaintiff's request for a restraining order thereby enjoining the Tribal Council and the Ethics Commission from conducting a trial on the alleged ethics charges filed against the Plaintiff pending further order of the Court.

On November 25, 2014, Plaintiff's counsel filed a Notice of Postponement rescheduling the hearing in this matter from December 5, 2014 to December 11, 2014. (*Ex. 17 Walking Eagle Aff.*) Additionally, on that day, Plaintiff provided the Tribal Court with a Notice of Entry of Order and an Order of Dismissal without Prejudice in the case entitled *Wilcox v. Scott*, Case # 13-433.

ARGUMENT

I. THE TRIBE'S OFFICIALS ARE PROTECTED BY SOVEREIGN IMMUNITY.

The Defendants' immunity from the instant action is coextensive with the Tribe's sovereign immunity. Tribal officers are protected and entitled to sovereign immunity in official capacity claims. *Dry v. United States*, 235 F.3d 1249, 1254 (10th Cir. 2000). The doctrine of sovereign immunity "extends to individual tribal officials acting in their representative capacity and within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *See also Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574 (10th Cir. 1984). Therefore, if a complaint "alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Tenneco*, 725 F.2d at 574. Otherwise, a Tribe's sovereign immunity may not be avoided simply by suing Tribal officers. *See Kenai Oil & Gas, Inc. v. Department of the Interior*, 522 F.Supp. 521, 531 (D.Utah

1981)(held that individual claims against Business Committee members were essentially against the Tribe itself and barred by sovereign immunity); Felix Cohen, *Handbook on Federal Indian Law*, at 284 (reprinted. 1984)("[I]t has been held that where the Tribe itself is not subject to suit, tribal officers cannot be sued on the basis of tribal obligations.") (footnote omitted).

Because a governmental entity can only act through its officials, a lawsuit imposed upon a Tribal official is generally considered to be a lawsuit against the sovereign. Hence, Tribal officials acting in their official capacities share the Tribe's immunity from suit when "acting in their representative capacity and within the scope of their authority." *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989).[2] A plaintiff cannot circumvent a sovereign's immunity simply by substituting a suit against the sovereign's agents for a direct suit against the sovereign. *Snow v. Quinault Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984)(stating that one cannot avoid "the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant rather than the sovereign entity.") Hence, a Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. *Baker Elec. Co-op., Inc, v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994)(stating that if Tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").[3]

---

[2] *See also Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burlington Northern v. Blackfeet Indian Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

[3] *See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir 1993); *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*,

The Courts have long recognized the importance of extending sovereign immunity to Tribal officials working on the Tribe's behalf. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981)(Tribe's "immunity also extends to tribal officials when acting in their official capacity and within the scope of their authority"). The reason for this rule is clear: the sovereign immunity of individual Tribal officials is founded "on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired." *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). Accordingly, sovereign immunity attaches to officials who "perform a high level or governing role in the affairs of the tribe" such that they occupy "a discretionary or policymaking position."[4]

---

657 F.2d 1009, 1012 n.8 (9th Cir. 1982); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969).

[4]The immunity of Tribal officials is not limited to high level officers or officials who are performing governmental functions and exercising discretion. *Basset v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 277-78 (D.Conn. 2002). Instead, Tribal immunity extends to all Tribal employees acting within their representative capacity and within the scope of their official authority. *Id.* at 278. *See E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001)(holding that claims against employees of a Tribal social service agency in their official capacities were barred by sovereign immunity); *Dry*, 235 F.3d at 1252-53 (holding that various Tribal officials, including the Tribe's general legal counsel, prosecutor, director of law enforcement, and seven other law enforcement personnel, were immune from suit in their official capacities); *Hardin*, 779 F.2d at 479-80 (holding that claims against "various tribal officials" were "barred by the Tribe's sovereign immunity"); *Snow*, 709 F.2d at 1322 (holding that claims against a tribal revenue clerk were barred by sovereign immunity). Accordingly, federal district courts across the country have overwhelmingly treated sovereign immunity as a bar to claims against a wide variety of Tribal officials and employees, including: the president of a Tribal college; a boxing promoter; a marketing manager; the Executive Director of a museum; the Projects Director of a museum; Tribal attorneys; members of a Tribal business council; employees responsible for the maintenance of a casino parking lot; and a consultant. *See Cohen v. Winkleman*, 428 F.Supp.2d 1184, 1189 (W.D. Okla. 2006) (dismissing claims against a Tribal college and its president on the basis of sovereign immunity); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 309-10 (N.D. N.Y. 2003) (dismissing claims for injunctive relief against chief, boxing promoter, and marketing manager for acts taken

The series of cases, *Chayoon v. Mashantucket Pequot Tribal Nation*, Docket No. 3:02CV0163 (D.Conn. 2002), *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004), *cert. denied sub nom. Chayoon v. Reels*, 543 U.S. 966 (2004), and *Chayoon v. Sherlock*, 89 Conn.App. 821(Conn.App. 2005) are directly on point. The plaintiff in these cases, Joseph Chayoon, was an employee of the Foxwoods Casino, a casino owned and operated by the Mashantucket Pequot Gaming Enterprise, an arm of the Mashantucket Pequot Tribe. In his first lawsuit, Plaintiff sued the Tribe and Foxwoods Casino for wrongful termination. The case was dismissed for lack of subject matter jurisdiction, based on the sovereign immunity of the Tribe and the casino. Plaintiff then filed a second lawsuit, naming 18 individual defendants, including seven (7) members of the Tribal Council. Plaintiff's second case was similarly dismissed with the Court explaining:

> Chayoon cannot circumvent tribal immunity by merely naming officers or employees of the Tribe where the complaint concerns actions taken in defendant's official or representative capacities and the complaint does not allege they acted outside the scope of their authority.

---

in their official capacities as agents of the Oneida Nation and its Casino); *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 277-78 (D. Conn. 2002) (finding that Tribal immunity applied to the Executive Director of a museum and to the Projects Director of the museum); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 923 (S.D. N.Y. 2002) (holding that a Tribe's sovereign immunity extended to its attorneys); *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914, 921 (D. Wyo. 1997) (holding that members of Tribal business council were entitled to sovereign immunity); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996), *aff'd on other grounds*, 114 F.3d 15 (2nd Cir. 1997) (characterizing a plaintiff's action against Tribal employees responsible for the maintenance of a casino parking lot as "a suit against the tribe" and holding that "the individual defendants' immunity from suit is coextensive with the Tribe's immunity from suit."); *United States ex rel.Shakopee Mdewakanton Sioux Cmty. v. Pan American*, 650 F.Supp. 278, 281 n.5 (D. Minn. 1986) (Community officials and a consultant hired by the Community would be protected by the Community's immunity if they acted in their official capacities and within the authority granted them).

Chayoon v. Chao, 355 F.3d at 143.

Nevertheless, Chayoon filed a third wrongful termination lawsuit in state court naming eight individuals of the casino. *Chayoon v. Sherlock*, 89 Conn. App. At 824. Plaintiff argued sovereign immunity should not apply because defendants were not Indians and were being sued individually, and because in terminating his employment defendants acted in violation of federal law and therefore beyond the scope of their authority. *Id.* at 825. Defendants argued that at the time plaintiff was terminated they were all casino employees, and plaintiff's claims related to conduct undertaken pursuant to their employment responsibilities. The court agreed with the defendants, affirming dismissal on the basis of sovereign immunity. The court began by observing that "[t]ribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their official authority." *Id.* at 826.

With that established, the primary issue for the *Chayoon v. Sherlock* court was "whether the plaintiff had made sufficient claim that the defendants acted beyond the scope of their authority so as to denude them of the protection of sovereign immunity." *Id.* at 828. The Court explained:

> To overcome sovereign immunity, plaintiff "must do more than allege the defendants' conduct was in excess of their …authority; [he] must allege or otherwise establish facts that reasonably support those allegations." *Id.* The court held that nothing alleged by plaintiff suggested that defendants acted "manifestly or palpably beyond their authority in their conduct regarding the termination of his employment."

Id. at 829. In language that applies equally well to Plaintiff's claims here, the *Chayoon v. Sherlock* court stated:

> [T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal

> law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F.Supp.2d at 280-81. Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted "without any colorable claim of authority...."

Id. at 281. The court concluded that the Plaintiff had made no proffer of such conduct and that he merely alleged that he sued the defendants in their personal capacities and that they acted outside the scope of their authority. Without more, the court dismissed all claims against the Tribal officials.

Here, as in *Chayoon*, Plaintiff has failed to plead facts showing that the Defendants acted "without any colorable claim of authority." *Id. See also Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 2007 WL 1673535 (N.D.Okla. 2007)("tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts 'without any colorable claim of authority'"); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th at 644 ("Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies")(*citing Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Nor has the Plaintiff alleged that the Defendants acted manifestly or palpably beyond their authority in their conduct regarding their roles in the Tribe's disciplinary proceedings. *Bassett v. Mashantucket Pequot Museum*, 221 F.Supp.2d at 280. In this case, Plaintiff's complaint is directed at preventing the Tribal Council and the Ethics Commission from adhering to Tribal law. The Plaintiff's request for relief is not directed at the Defendants in their individual capacities, but rather at the Tribal Council and the Ethics Commission for which Plaintiff chose not to name as parties. If, in fact, the relief sought was solely against Defendants,

the Tribal Court could simply reassign the underlying case to a different governmental body who could then proceed to hear the case. Obviously, the Plaintiff seeks to prohibit any entity from hearing the complaint. As such, the claims against the Defendants should be dismissed.

II. THE ACTION AGAINST THE DEFENDANTS SHOULD BE DISMISSED BASED UPON INDIVIDUAL IMMUNITY.

While claims against tribal officials in their individual capacities are occasionally justified, the Plaintiff here has not successfully supported such a claim against the Defendants in their individual capacities. Even if the Plaintiff had asserted such a claim, it could not stand alone. Like state and federal agents and officials, tribal agents and officials are generally protected by the sovereign's immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[5] A Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994) (stating that if tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").[6]

To be successful in hailing Tribal officials into court, Plaintiff must prove that the conduct in question is not related to their current or former governmental duties. To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). The allegation and proof that an official acted outside his or her authority is necessary to

---

[5] *See also Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burlington Northern v. Blackfeet Indian Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

[6] *See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993); *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1982); *Davis v. Littell*, 398 F.2d 83, 84-84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018, Jan. 13, 1969.

convert the action from one against the sovereign to one against the official in their individual capacity. *Malone v. Bowdoin*, 369 U.S. 643, 646-48 (1962). Plaintiff's complaint must be dismissed based upon his failure to prove, or even attempt to prove, any conduct where the Defendants have acted outside the scope of their authority.

However, even if this Court finds that the Plaintiff has met his burden of establishing that the Defendants have acted outside the scope of their authority, the allegations are insufficient to strip them of their immunity. "A tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Shenandoah v. Halbritter*, 275 F.Supp.2d. 279, 287 n.5 (N.D. N.Y. 2003) (*citing Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2nd Cir. 2000). *See also Hardin*, 779 F.2d at 479-80 (holding that various Tribal officials sued in their individual capacities were still entitled to the protection of sovereign immunity because they had acted within the scope of their authority). Further, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Id.* Finally, a mere claim of error in the exercise of an official's authority is not sufficient. *Larson*, 337 U.S. at 690. *See also Snow*, 709 F.2d at 1322 (holding that Tribal immunity extended to Tribal revenue clerk where there had "been no allegation that [the clerk] exceeded the scope of her authority); *Bassett*, 221 F.Supp.2d at 280 (stating that a claim against a Tribal official "lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a Tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). If an official's actions relate to the performance of their official duties, they are generally treated as being within the scope of their authority. *See Romanella*, 933 F.Supp. at 168 (holding that Tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual

capacities even if they may have been negligent, because the claims related directly to their performance of their official duties). Plaintiff asserts claims against the Defendants in their individual capacities. However, no allegation in the complaint would support a theory of liability against them as such.

Plaintiff has failed to make any factual allegations that would support the conclusion that the Defendants exceeded the scope of their authority. To the contrary, the Plaintiff alleges only actions which would reasonably fall within the scope of the authority of a Tribal official. As such, the Defendants must not be stripped of their immunity from suit. *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

III. PLAINTIFF WILL NOT SUCCEED ON THE MERITS OF HIS COMPLAINT.

A. Res Judicata Does Not Bar the Complaint of Tamaleon Wilcox

Plaintiff argues that due to the dismissal of Tamaleon Wilcox's complaint, the "matter is barred by res judicata." (*Complaint at p. 3*). However, Plaintiff fails to inform this Court that the Honorable Steven Emery dismissed Ms. Wilcox's complaint without prejudice, and based thereon, res judicata does not apply.

Black letter procedure dictates that when a court dismisses an action without prejudice, then the judgment is not on the merits and it should not be afforded claim preclusive effect. James Wm. Moore, et al, Moore's Federal Practice § 131.30[3][e] *and* § 131.54 (3rd Ed. 2009), *citing Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1986) (Dismissal without prejudice does not operate as adjudication on the merits and will have no preclusive effect.). Accordingly, where, as here, a dismissal is without prejudice, then the claimant has the right to sue again on the same cause of action and this prevents the decree of dismissal from operating as a bar to a subsequent suit. *Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003); *see also Santana v. City*

of Tulsa, 359 F.3d 1241, 1246 n.3 (10th Cir. 2004)("Generally, a dismissal without prejudice is a dismissal that does not operate as an adjudication on the merits, and thus does not have *res judicata* effect."); *In re Hallahan*, 936 F.2d 1496, 1499 n.2 (7th Cir. 1991) ("The case was dismissed without prejudice, and such a dismissal has no *res judicata* effect"); *Rinieri v. News Syndicate Co.*, 385 F.2d 818, 821 (2d Cir. 1967)("[A] dismissal without prejudice permits a new action (assuming the statute of limitations has not run) without regard to *res judicata* principles[.]").[7]

The Supreme Court addressed the meaning of "dismissal without prejudice" in *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). "[A]n adjudication upon the merits is the opposite of a dismissal without prejudice." *Id.* The Court goes on to discuss that Black's Law Dictionary (7th ed. 1999) defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim," and defines "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period." *Id.* at 505-506 (some citations omitted).

Plaintiff takes great pains to avoid mentioning that the Court's order dismissed Ms. Wilcox's complaint without prejudice and correspondingly fails to address the fact that this negates any *res judicata* effect. Nonetheless, the law could not be more clear - Ms. Wilcox's claims are not barred by *res judicata* because the court dismissed her claims without prejudice based upon her failure to exhaust administrative remedies under RST Ordinance #2009-10.

---

[7]*See also, Venuto v. Whitco Corp.*, 117 F.3d 754 (3d Cir. 1997) (each court to consider the effect of dismissal "without prejudice" have permitted the second action to proceed), *citing Guzowski v. Hartman*, 849 F.2d 252, 255 (6th Cir. 1988); *Blackwelder v. Millman*, 522 F.2d 766, 773 (4th Cir. 1975).

B. <u>The Actions of Tribal Council and the Ethics Committee are Constitutional</u>.

Plaintiff argues that the "RST Tribal Council and Ethics Committee's attempts to remove the President/Plaintiff are unconstitutional because it violated Article VII, Section 3." *(Complaint at p. 7)*. Plaintiff further alleges that the "Tribal Council has no authority to suspend, recall, or remove the Tribal President. The sole remedy to discipline the Tribal President is by recall." *Id.* To the contrary, Plaintiff conveniently overlooks Article VII, Section 4 of the Constitution which provides as follows:

> Tribal Council may by a two-thirds vote of the total members of the Tribal Council, after due notice and an opportunity to be heard, remove any Tribal Council member for neglect of duty or gross misconduct. The decision of the Tribal Council shall be final.

Now, prior to the 2007 Constitutional amendments, the foregoing Section read:

> **Section 2**. The tribal council may, by a two-thirds vote, expel any member, ***except the President or Vice-President***, for neglect of duty or gross misconduct, after due notice of charges and an opportunity to be heard. Procedures for the recall of the President or Vice-President may be initiated by a petition signed by at least fifty (50) per cent of those members who voted in the last tribal election. The Tribal Council shall adopt a recall ordinance with procedures that include, but not be limited to, specific charges for recall, provisions for hearings between the petitioners and the person whom charges at brought against. The Tribal Council shall call for an election of recall if the evidence submitted at the hearing so warrant. (Amendment No. XVII - September 23, 1985)(Emphasis added).

On July 26, 2007, Tribal members participated in a Secretarial Election and adopted Amendment U which now deleted the language "except the President or Vice-President" thereby making the removal language of Article VII applicable to the President.

Indeed, this is not the first time a Tribal Council member attempted to embroil the Court in a legislative function by arguing against the Council's authority. In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, a member of the Tribal Council brought an action against the Tribe and Tribal Council seeking to enjoin them from suspending him from his elected position. *Id.* at 1. Therein, Plaintiff argued that that the newly-enacted Constitution did not allow the Tribal

Council to suspend an elected official. *Id.* at 3. The Court upheld both the Council's right to suspend and remove one of its members:

> The Plaintiff also argues that the RST Constitution does not permit suspension of elected officials and even if it does it requires the same level of due process as a removal. This Court is permitted to resolve this issue under Article VI, Section 3 of the RST Constitution. This Court finds that the right to remove an elected official subsumes the right to suspend him pending removal. There are two methods of removal of elected councilpersons under the new RST Code – removal by the Tribal Council and recall by tribal members who put Councilpersons into office. However, the RST Constitution also directs that the Council may prescribe its own rules governing the procedure of the Council, Article IV, Section 1(t). This right, coupled with the right of removal under VII, Section 4, are broad enough to justify the right of the Council to suspend an elected official pending removal proceedings.

Id. at 7. See also *Ex. 16 Walking Eagle Aff.* (Motion by Edd Charging Elk that President pay the balance of the disallowed cost and that he be suspended for two weeks beginning May 18; and that within two weeks from that date the balance be paid back in full. Seconded by Wayne Ducheneaux. Question by Earl Bordeaux, Sr. The vote count was seventeen (17) in favor, zero (0) opposed, zero (0) not voting. MOTION CARRIED.)

The Tribe's ethics procedures have been in place since 1986 and have already been upheld by this Court. Plaintiff has not provided a scintilla of evidence that would allow this Court to break from tradition.

C. Plaintiff Does Not Have a Property Interest in his Elected Office.

To trigger an inquiry into due process, three factors must be considered: (1) some substantive right—life, liberty or property—must be at stake; (2) some deprivation of that substantive right must occur; and (3) the deprivation must occur without due process. If the process for the deprivation is adequate, then no due process violation has occurred. *See generally Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84

L.Ed.2d 494 (1985); *Board of Regents v. Roth,* 408 U.S. 564, 569–70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

The threshold inquiry in any Due Process claim is whether the plaintiff possessed a liberty or property interest in the subject matter at issue. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Because there is no constitutionally protected liberty or property interest in holding an elected office, Plaintiff's Due Process claims must fail.

In *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, the Tribal Court found that the right to hold elective office is a property right entitled to ICRA protection. *Id.* at p. 5. To arrive at that conclusion, the Court relied upon the decision in *Loudermill*. However, *Loudermill* involved a terminated employee and not an elected official. More on point, other Supreme Court decisions have long made clear that there is no property or liberty interest in an elected office. *Taylor v. Beckham*, 178 U.S. 548 (1900); *accord Snowden v. Hughes*, 321 U.S. 1, 7 (1944) (holding that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause"). In *Snowden,* the Court, reaffirming *Taylor,* again asserted that elected officers cannot constitute "property" within the meaning of the Fourteenth Amendment:

> More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property ... secured by the due process clause. *Taylor and Marshall v. Beckham,* 178 U.S. 548, 20 S.Ct. 1009 [44 L.Ed. 1187]. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave v. State of Missouri ex rel. Newell,* 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921, *as we reaffirm it now.*

Snowden, 321 U.S. at 7, 64 S.Ct. 397.

The Court's pronouncements in *Taylor* and *Snowden* have since been echoed in numerous decisions. *See, e.g., Burks v. Perk,* 470 F.2d 163, 165 (6th Cir.1972) (per curiam) ("Public office is not property within the meaning of the Fourteenth Amendment.") (citing *Taylor*); *Rabkin v.*

Dean, 856 F.Supp. 543, 549 (N.D.Cal.1994) (asserting that elected officials are not "employees" in the traditional sense, and hence do not hold a property interest in their positions); *Sweeney v. Tucker,* 473 Pa. 493, 524, 375 A.2d 698 (1977) (rejecting legislator's property interest claim, and noting that, because an elected official "holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office," an elected office "is a public trust, not the private domain of the officeholder."); *Guzman Flores v. College of Optometrists,* 106 F.Supp.2d 212, 214 (D.Puerto Rico 2000) (relying on *Taylor* and *Snowden* to dismiss a property interest claim put forth by a candidate for public office, and stating, "the Supreme Court squarely addressed the issue now before the Court and held that there was no due process right to seek election to public office.... Therefore, Guzman does not have a valid due process claim in the instant case."); *Velez v. Levy,* 401 F.3d 75, 86–87 (2d Cir.2005) (holding plaintiff did not state procedural due process claim because she lacked protected interest in her elected office); *Corn v. City of Oakland City*, 415 N.E.2d 129 (Ind. Ct. App. 1981) (finding no property interest in office based upon nomination); *Lahart v. Thompson*, 118 N.W. 398 (Iowa 1908) ("The nomination at a primary election gives the person receiving it no vested interest in the office for which he is named or in any place upon the official ballot which may not be taken away by the . . . Legislature or [a] . . . body to whom the power has been delegated"); *State ex rel. Pecyk v. Greene*, 114 N.E.2d 922, 927 (Ohio Ct. App. 1953) (finding that because there is no vested right in public office, there can be no vested right in the mere nomination to such office); *Emanuele v. Town of Greeneville*, 143 F. Supp. 2d 325, 333 (S.D.N.Y. 2001) (holding that a candidate has no property or liberty interest in being elected); *Cornett v. Sheldon*, 894 F.Supp. 715, 725 (S.D.N.Y

1995) (holding that candidate for federal office possessed either property or liberty interest in being placed on the ballot).[8]

As the foregoing illustrates, Plaintiff does not have a property interest in his elected position, and therefore, is not entitled to due process under the ICRA.

D. Plaintiff Was Afforded Due Process

Even if the Court were to conclude that it can reach the merits of Plaintiff's Due Process claims, it would not change the proper outcome here, as his factual allegations (even if taken as true) would not constitute a violation of his alleged Due Process rights. "Due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands."). The essence of due process is that a deprivation of a property or liberty interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950); *see also Loudermill,* 470 U.S. at 546, 105 S.Ct. at 1495.

In determining what process is due in a particular situation, federal courts utilize the test announced in *Matthews v. Eldridge* to balance governmental and private interests:

> [I]dentification of the specific dictates of due process generally requires consideration of . . . the private interest that will be affected . . . , the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional . . . procedural safeguards,

---

[8] Other courts have followed these cases to hold that nomination or election to a public office is not property within the meaning of the Fourteenth Amendment. *Taylor v. Nealon,* 132 Tex. 60, 120 S.W.2d 586, 587 (Tex.1938); *Rowe ex rel. Schwartz v. Lloyd,* 348 Pa. 545, 36 A.2d 317, 319 (Penn.1944).

and, finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). While a resolution of this test can be fact-dependent at times, the additional procedural protections Plaintiff alleges are required here far exceed the *Matthews* standard on their face.

1. **The Time Limit Between the Notice and the Hearing Satisfied Due Process Requirements**.

Plaintiff admits he received Notice of the Hearing on October 16, 2014 – 29 days before the scheduled date. (*Complaint at p. 3*). And yet, he contends that his due process rights were violated because he did not have sufficient time between the time he received notice and the date of the hearing. "[U]nlike some rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Nat'l Council of Resistance of Iron v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001)(quoting *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L.Ed.120 (1997). To the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed. 484 (1972)). At a minimum, "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Because due process is flexible, notice need not be in advance, so long as the timing of the notice does not deprive the potentially-impacted party from telling his side of the story. See *Griatek v. City of Philadelphia*, 808 F.2d 241, 244-245 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987).

In response to Plaintiff's request, the Tribal Council extended the hearing until November 17, 2014, thereby giving the Plaintiff 32 days to prepare his defense. Based upon the circumstances, this time limit is more than generous to satisfy due process requirements. Indeed,

Plaintiff was given more time that most state legislators are allowed to prepare a defense. *See* Delaware – not less than 10 days (Del.C.Ann.Const., Art. 3 § 13); Arizona – not less than 10 days (A.R.S. § 38-313); California – not less than 10 days (West's Ann.Cal.Gov. Code § 3063); Idaho – not less than 10 days (I.C. § 19-4004); Indiana – not less than 10 days (IC 5-8-1-4); Missouri – not less than 20 days or greater than 30 days (V.A.M.S. 106.090); Montana – not less than 10 days (MCA 5-5-414); North Dakota – not less than 20 days (NDCC 44-09-05); Nevada – not less than 10 days (N.R.S. 283.170); New York – not less than 20 days (New York McKinney's Judicial Law § 416). Indeed, even Robert's Rules of Order note that "[w]ith reference to an appropriate date for which to set the trial, thirty days is a reasonable time to allow the accused to prepare his defenses." *RONR*, p. 634, lns. 29-31.

In this case, Plaintiff had more than enough time to prepare his defense – especially considering he was first notified in August that a complaint was filed and the Commission wished to meet with him to discuss. Plaintiff never took advantage of this opportunity and cannot now complain that he had insufficient time to prepare.

2. <u>Council's Executive Session Did Not Violate Plaintiff's Due Process Rights</u>.

Plaintiff contends that the Council's Executive Session was out of order because no motion was made to appoint the treasurer as pro temp. On March 16, 2006, the Tribal Council adopted Ordinance No. 86-13 which provides for its rules of order. Therein, Section J provides that if no Tribal law is on point, Robert's Rules of Order will apply. The Council has not adopted rules addressing appointment of a pro temp, and so, the following provision in Robert's Rules of Order is applicable:

> If neither the president nor any vice-president is present, the secretary – or in the secretary's absence some other member – should call the meeting to order, and the assembly should immediately elect a chairman pro tem to preside during that session.

RONR, p. 437; lns. 13-17. There is no provision in either the Tribe's Rules of Order or Robert's Rules of Order that would require the adoption of a formal motion to appoint a pro temp. With the removal of Vice-President William Kindle[9], the remaining members of the Tribal Council chose the Treasurer to chair the meeting.

3. <u>Despite Plaintiff's Assertions, Calvin Jones, Sr. Recused Himself from the Executive Session</u>.

Plaintiff avers that Calvin Jones Sr. should have recused himself from the Executive Session because he is Ms. Wilcox's grandfather. (*Complaint at p. 5*). Plaintiff claims this failure violates his due process rights. *Id.* Contrary to Plaintiff's unsupported assertions, Mr. Jones did recuse himself from the Executive Session and did not participate in any discussions regarding his granddaughter's complaint.

4. <u>Plaintiff Called the Executive Session</u>.

Plaintiff contends that "the Council went into executive session, and in violation of [the] Plaintiff's due process right, would not allow any participation by [the] Plaintiff, his counsel, or representative." This statement is entirely false. Plaintiff himself called the Council into Executive Session and ended the meeting on his own accord. **Ex.1**.

5. Plaintiff Was Granted Numerous Opportunities to Meet with the Ethics Commission.

Plaintiff claims his due process rights were violated because the Ethics Committee refused to give him an opportunity to respond the complaint.[10] (*Complaint at p. 6*). To the contrary, the Commission gave Plaintiff ample opportunity to meet with them – he chose not to take advantage of the opportunity.

---

[9] Plaintiff avers that Vice-President Kindle removed himself from the discussions "because of their impropriety." Complaint at p. 4. Plaintiff has provided no evidence to support this claim.
[10] Plaintiff also contends that the Ethics Commission "assisted in the drafting of the complaint herein." (*Complaint at p. 6*). This statement is false and not supported by an evidence.

The Tribe's system of addressing disciplinary proceedings is rather quite simple and ensures the accused is afforded due process throughout. In this case, the Tribe has established an Ethics Commission that is charged with the investigation of ethical complaints. Their role is investigative only – they do not have subpoena power nor are they authorized to hold hearings. For each complaint, the Commission generally holds three meetings. The first is held to open the complaint and notify the parties involved – including the accused. At the second meeting, the Commission reviews and discusses the Complaint, and at the third meeting, they meet with the parties involved. Pursuant to Tribal law, the Commission is not obligated to meet with the accused. However, in this case, the accused was provided both notice of the charges and an opportunity to be heard.

On October 30, 2013, Ms. Wilcox filed a formal complaint with the Ethics Commission against the Plaintiff. At that time, the Commission was not fully functioning. However, soon after the Commission was organized, they started the investigation, and Plaintiff was provided written notice via certified mail of their action on July 31, 2014. (*Ex. 6 Walking Eagle Aff.*) So, when Plaintiff is averring he was not made aware of the allegations until October 9, 2014, he is mistaken. Plaintiff failed to reply to the first certified notice, so on August 26, 2014, a second certified letter was sent - this notice was signed by the Plaintiff's aide. (*Ex. 7 Walking Eagle Aff.)* On August 29, 2014, a third notice was sent to the President and signed by his aide, and yet, the Plaintiff still chose to forego his opportunity to meet with the Commission. On September 5, 2014, the Commission made a fourth attempt via teleconference to confer with the Plaintiff regarding the charges. *(Ex. 8 Walking Eagle Aff.)* After another month of no communication by the Plaintiff, the Ethics Commission made the formal recommendation to the Tribal Council on October 9, 2014, that a hearing be held on the complaint filed by Ms. Wilcox. Once a

recommendation has been made to the Council, the Ethics Commission's obligations under Tribal law are complete.

In the end, Plaintiff had from August 7, 2014, through October 6, 2014, to take advantage of the Commission's offer to hear his side of the story. He chose not to do so.

IV. PLAINTIFF HAS AN ADEQUATE LEGAL REMEDY.

Plaintiff has an adequate remedy through the Tribal Council hearing that has now been delayed three additional weeks due to this Court's restraining order. He will be afforded a full and fair hearing in that tribunal, complete with the opportunity to introduce evidence and witnesses, make oral argument, be represented by legal counsel, and confront the complainant's evidence.

V. PLAINTIFF HAS NOT EXHAUSTED ALL HIS ADMINISTRATIVE REMEDIES.

Pursuant to RST Ordinance No. 86-04, the Ethics Commission was established to "review written evidence of any alleged violations of [the Ethics] Ordinance and to either recommend or not recommend to the Tribal Council that it hold a hearing involving such allegation." *(Ex. 1 and 2 Walking Eagle Aff.)* Accordingly, now that the Ethics Commission has completed its investigation and made a recommendation to the Council, a full hearing with the full myriad of due process protections would have been held.

VI. THE BALANCING TEST WEIGHS IN FAVOR OF THE DEFENDANTS.

Plaintiff seeks an extraordinary remedy, a restraining order by the Tribal Court against proceedings in a legislative tribunal, specifically a tribunal where the general rule is that disciplinary proceedings fall within the exclusive purview of the legislature. Plaintiff has identified no imminent irreparable harm at all to him if the Tribal Council is allowed to proceed with its Constitutional authorities. In the alternative, Plaintiff's claim would require this Court to

make a determination that is committed to the political branch of the government thereby infringing upon the rights of the Council and ruling against the interests of Tribal members who granted disciplinary authority to its elected leadership.

VII. PLAINTIFF WILL NOT BE IRREPARABLY HARMED.

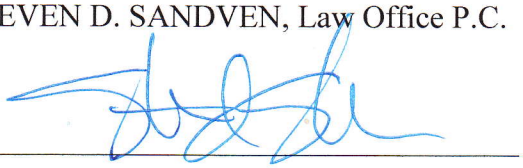
The Court in *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109 at n.9 (8th Cir. 1981), remarked that "in balancing the equities no single factor is determinative," it also stated that "the absence of a finding of irreparable injury is alone sufficient ground for vacating [denying] the preliminary injunction." *See also United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998). Thus, "the threat of irreparable harm" is a threshold inquiry. Consequently, Plaintiff must first establish that irreparable harm will result without injunctive relief and that such harm will not be compensable by money damages. *See In re Travel Agency Com'n Antitrust Litig.*, 898 F. Supp. 685, 689 (D. Minn. 1995) ("[A]n injunction cannot issue based on imagined consequences of an alleged wrong. Instead, there must be a showing of imminent irreparable injury.") Plaintiff has not shown an imminent threat of irreparable injury that cannot be compensated by monetary damages. Indeed, there can be no injury when Plaintiff has been properly subjected to ethics proceedings initiated by the governing body of the Tribe in accordance with Tribal law that has been in existence for almost four decades.

CONCLUSION

For the foregoing reasons, the Defendants move this Honorable Court for an order dismissing the Complaint.

Respectfully submitted this 8th day of December, 2014.

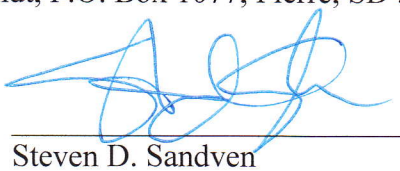
STEVEN D. SANDVEN, Law Office P.C.



STEVEN D. SANDVEN
Attorney for the Defendants
3600 South Westport Avenue, Suite 200
Sioux Falls SD 57106
Telephone: 605 332-4408
Facsimile 605 332-4496
ssandvenlaw@aol.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of December, 2014, a true and correct copy of the foregoing Defendants' Opposition to Plaintiff's Ex Parte Motion for Temporary Restraining Order was mailed by first-class mail to Al Arendt, P.O. Box 1077, Pierre, SD 57501 and emailed at al-arendtlaw@qwestoffice.net.



Steven D. Sandven

ROSEBUD SIOUX TRIBE
PO Box 430
Rosebud, SD 57570
Phone: 605.747.2381
Fax: 605.747.2243
Website: rosebudsiouxtribe-nsn.gov

Cyril Scott, President
Willie Kindle, Vice President
Byron Wright, Treasurer
Julia M. Peneaux, Secretary
Glen Yellow Eagle, Sergeant-at-Arms

MEMORANDUM

TO: Lorraine Walking Eagle, Chairperson
Ethics Commission

FROM: Linda L. Marshall, Recording Secretary
RST Office of the Tribal Secretary

DATE: December 4, 2014

SUBJECT: Motion Excerpt

In a duly called meeting of the Rosebud Sioux Tribal Council in session on October 9, 2014, an excerpt of the minutes is provided to you as requested by the Ethics Commission:

Ethics Commission

Chair declares executive session.

Chair declares meeting out of executive session.

Motion to schedule a hearing on November 14th, 2014, at 10:00 a.m. in the Council Chambers and that the Tribal Court provide a Hearing Officer and that both parties be notified and that the Secretary's Office send out notices to the complainant, the defendant, and the Tribal Council. Motion by Calvin Waln, Sr., second by Michael Boltz, question by Brian Dillon. Motion carried with eleven in favor, zero opposed and two not voting.