ROSEBUD SIOUX TRIBE
IN TRIBAL COURT

CYRIL SCOTT, PRESIDENT, Plaintiff, v. VICE PRESIDENT WILLIE KINDLE, et al. Defendants.	CIV 15-71 **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Come now, the Defendants, Vice-President Willie Kindle, both individually and in his capacity as Vice-President; Treasurer Byron Wright, both individually and in his capacity as Treasurer; Calvin Waln, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Richard Charging Hawk, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Todd Bear Shield, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Arnetta Brave, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Brian Hart, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Wayne Boyd, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Mary Waln, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Alvin Bettelyoun, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Webster Two Hawk, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Shizou LaPointe, both individually and his capacity as Council member of the Rosebud Sioux Tribe; Willie Bear Shield, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Wayne Frederick, both individually and in his capacity as Council member of the

Rosebud Sioux Tribe; Brian Dillion, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Rose Strenstrom, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Richard Lunderman, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Lila Kills In Sight, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Kathy Wooden Knife, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Kathy High Pipe, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Mike Boltz, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; and Richard Whipple, both individually and in his capacity as Council member of the Rosebud Sioux Tribe, by and through their attorney, Steven D. Sandven, and hereby submit Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss.

ARGUMENT

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

Defendants hereby incorporate by reference their argument incorporated in the Memorandum in Support of Motion to Dismiss dated March 12, 2015 on pages 6-11.

A. No Waiver of Sovereign Immunity Exists to Allow this Court to Exercise Jurisdiction over Tribal Officials.

Plaintiff has not, nor can he, allege that the Tribe has waived its sovereign immunity, and that of its officers to allow this case to proceed. The Tribe adopted RST Civil Procedure § 4-2-1 that explicitly provides how to effectuate a waiver of sovereign immunity:

> SOVEREIGN IMMUNITY—Except as required by federal law or the Constitution and bylaws of the Tribe or specifically waived by a resolution or ordinance of the Tribal Council making specific reference to such, the Rosebud Sioux Tribe and its officers and employees shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

A waiver of sovereign immunity can only be accomplished pursuant to federal law, the Tribe's Constitution and Bylaws, or by Tribal resolution or ordinance. Here, none of these are present, and based thereon, Plaintiff cannot demonstrate that the Tribe has expressly waived its officers' sovereign immunity.

B. The Actions Against Defendants Should Be Dismissed Based Upon Individual Immunity.

Defendants hereby incorporate by reference their argument incorporated in the Memorandum in Support of Motion to Dismiss dated March 12, 2015 on pages 11-13.

Plaintiff argues that "Defendant(s) have acted outside the scope of their authority and have named said individuals in their individual capacity." Opp. Memo. at p. 5. Further, he avers that "[n]o damages are expected from the Tribe or from the individuals acting in their official capacity" as the "named individuals acted ultra vires and should be liable for their individual and egregious actions as individuals." *Id.* at 8. Plaintiff quite clearly misunderstands the concept of individual immunity.

Although the complaint names individual tribal council members as defendants, it is clear from "the essential nature and effect" of the relief sought that the tribe "is the real, substantial party in interest." *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). The Supreme Court has instructed that:

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar,* 330 U.S. 731, 738 [67 S.Ct. 1009, 1012, 91 L.Ed. 1209] (1947), ***or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."*** *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 704 [69 S.Ct. 1457, 1468, 93 L.Ed. 1628] (1949)(Emphasis added).

Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). The real party in interest in the complaint is therefore the sovereign tribe; indeed, were it not so, the Court would not be able to grant the relief requested in Plaintiff's complaint, i.e., enjoining the Defendants

from suspending or removing the Plaintiff from his position as President. As the Court explained in *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir.1969):

> the purposes for the doctrine of sovereign immunity may be controlling in some suits against officers so that the suits must be dismissed as suits against the Government, even though the officers were not acting pursuant to valid statutory authority, because the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm. In such cases a party must be denied all judicial relief other than that available in a possible action for damages.

Id. at 1318. The relief sought in this case would prevent the absent tribe from exercising their Constitutional authority to discipline its own members – such authority bestowed upon the governing body by its constituents. It is difficult to imagine a more "intolerable burden on governmental functions."

Additionally, Plaintiff avers that the individual Defendants acted ultra vires in suspending him from his position. Case law clarifies that an officer may be said to act ultra vires only when he acts "without any authority whatever." *Florida Dep't of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 102 S.Ct. 3304, 3321, 73 L.Ed.2d 1057 (1982); accord *id.,* at 716, 102 S.Ct., at 3330 (test is whether there was no "colorable basis for the exercise of authority by state officials"). As the Court in *Larson* explained, an ultra vires claim rests on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson, supra,* 337 U.S., at 690, 69 S.Ct., at 1461. If a member of the Tribal Council acts completely outside their governmental authority, they have no immunity. *See Larson,* 337 U.S. at 689, 69 S.Ct. at 1461. But that is different from the situation where an employee acting as a government agent, commits an act that is arguably a mistake of fact or law. In *Aminoil U.S.A., Inc. v. California State Water Resources Control Board,* 674 F.2d 1227 (9th Cir.1982), the question was presented whether a government agent's decision that Aminoil violated a statute was "beyond the scope of his authority and [was] therefore not barred by sovereign immunity." *Id.* at 1234. Aminoil argued

that because the agent's decision was incorrect, the decision was beyond the scope of the agent's authority and was therefore not protected by sovereign immunity. *Id.* at 1234. The Ninth Circuit held that "*Larson,* however, clearly rejected this argument. A simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority. Official action is still action of the sovereign, even if it is wrong, if it 'do[es] not conflict with the terms of [the officer's] valid statutory authority....' 337 U.S. at 695, 69 S.Ct. at 1464." Scope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power. *Pennhurst,* 465 U.S. at 112 n. 22, 104 S.Ct. at 914 n. 22. Ultra vires claims rest on the official's lack of delegated power. *Id.* at 101 n. 11, 104 S.Ct. at 908 n. 11. Pursuant to Article VII, Section 4 of the Tribe's Constitution, the Tribal Council has the authority to discipline its own members, and as such, are entitled to sovereign immunity.

C. Defendants Have Not Violated Any Federal Law, and Therefore, the Ex Parte Young Doctrine Is Not Applicable.

Plaintiff cites several cases that invoke the *Ex Parte Young* doctrine. Opp. Memo. at p. 6. However, since no violation of federal law has been asserted in this case, said doctrine cannot be utilized to usurp the sovereign immunity of the Defendants. State officials may be sued for prospective injunctive relief when acting in their official capacities but without the authority of law. *See Ex Parte Young*, 209 U.S. 123 (1908). Based thereon, federal courts have applied the *Ex Parte Young* doctrine to Tribes so as to authorize suit against Tribal officials who enforce Tribal laws that conflict with federal law. *See Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991).

However, assuming Tribal officials, like state officials, may be liable for actions that are ultra vires as a matter of law, it is only based on a possible analogy *to Ex Parte Young.*

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991). *Young* is based on the supremacy of federal over state law. The analogy only fits when federal law applies to an Indian Tribe, and thereby limits the Tribe's authority and the authority of its officials, employees, and agents. In *Bassett*, for example, the claims against the non-Tribal defendants included violations of the Federal Copyright Act. Similarly, in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2nd Cir. 2001), the *Ex Parte Young* claim was based on a violation of federal civil rights law.

There are (at least) two important qualifications that must be satisfied to invoke the *Ex Parte Young* doctrine. First, any law under which Plaintiff seeks injunctive relief must apply substantively to the agency. Second, Plaintiff must have a private cause of action to enforce the substantive rule. Here, Plaintiff makes reference to the Indian Civil Rights Act ("ICRA"). However, the ICRA does not provide a private cause of action except via the writ of habeas corpus. *See Poodry v. Tonawanda Band,* 85 F.3d 874 (2d Cir.1996). Accordingly, Plaintiff has failed to assert any violation of federal law that would authorize the application of the *Ex Parte Young* doctrine to this action.

D. Defendants Enjoy Qualified Immunity.

Plaintiff argues that Defendants are not entitled to qualified immunity, because the Plaintiff has established a "statutory right to access his elected position as President of the Rosebud Sioux Tribe without hindrance from the Defendant(s)." Opp. Memo. at p. 8. "The doctrine of qualified immunity attempts to balance the strong policy of encouraging the vindication of federal civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope

to exercise vigorously the duties with which they are charged by relieving them from the fear of being sued personally and thereby made subject to monetary liability." *Rodriguez v. Phillips*, 66 F.3d 470, 475 (2d Cir. 1995) (citations omitted).

Under this doctrine, government officials performing discretionary functions are shielded from suit for civil damages if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights. See *Anderson v. Creighton*, 483 U.S. 635, 638-9, 107 S.Ct. 3034, 3038-39 (1987)."

Two factors are to be considered in determining whether qualified immunity protects the officer in question: (1) whether the facts alleged establish a violation of a constitutional or statutory rights, and (2) whether that right was clearly established at the time of the alleged violation, such that a reasonable officer would have known his actions were unlawful. *Clayborn v. Struebing,* 734 F.3d 807, 809 (8th Cir. 2013). Even where a defendant's actions violated clearly established rights, he can still assert qualified immunity if he can show that his actions were objectively reasonable, i.e., "that 'reasonable persons in his position would not have understood that their conduct was within the scope of the established prohibition.'" *Williams v. Greifinger*, 97 F.3d 699, 703 (2d Cir. 1996).

In this case, Defendants did not violate a clearly established right of which a reasonable defendant official would have known. Defendants did not set out to deprive Plaintiff of any Constitutional right, but to protect the Tribal membership from questionable conduct on the part of their President pursuant to Constitutional authority bestowed upon the Tribal Council. Indeed, Defendants did not commit any acts which can be construed, either legally or factually, to show

that they intended and did deny Plaintiff his constitutional rights. Plaintiff cannot point to any evidence which would establish that Defendants would have known that in conducting the disciplinary proceeding they were violating Plaintiff's constitutional rights. Clearly, no constitutional deprivation exists here. Accordingly, Defendants are entitled to qualified immunity.

E. Defendants Are Entitled to Legislative Immunity.

The Tribal Council, as legislators, are absolutely immune from civil liability for their legislative activities. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-32 (1980). Legislative immunity protects against suits for declaratory and injunctive relief as well as damages. *See Supreme Court of Virginia*, 446 U.S. at 732-33.

Legislative immunity is essential to preserving the ability of legislators in a democracy to act in a representative capacity without fear of personal liability, and without the distractions of lawsuits brought by those who disagree with their policy judgments. Given its fundamental importance, the doctrine applies to members of all legislative bodies, including the Tribal Council.

II. THE SEPARATION OF POWERS DOCTRINE IS INAPPLICABLE.

Plaintiff argues that the Tribe's separation of powers doctrine insulates the executive branch from the disciplinary authority of the legislators. This argument is nothing short of frivolous and is wholly unsupported by Tribal law. For example, in support of his argument, Plaintiff cites to Article XI, Section 1 of the Constitution. However, said Article actually states that the judicial branch shall be separate from the other branches of government. Additionally, Plaintiff cites to Ordinance No. 2003-01 as additional support. Said section merely provides that

the legislative body shall not interfere in judicial proceedings. Indeed, there is no provision in either of the cited documents that would support Plaintiff's position that the executive branch is considered wholly separate from the legislative branch.

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

A. The Actions of Tribal Council to Suspend Plaintiff are Constitutional.

1. The Tribal Council Has the Authority to Suspend the President.

Plaintiff argues that the Tribal Council's decision to suspend him as President violates the Tribe's Constitution. Complaint, at p. 7. Pertinent thereto, Article VII, Section 4 of the Constitution provides:

> 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.

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. *Sandven Affidavit Ex. 2*

Now, the question becomes does "removal" include the lesser penalty of suspension. Based upon the Tribe's history, the answer to that question is a resounding "yes". For example, 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 Tribe's highest 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. (Emphasis added.)

Id. at 7. Further, the following suspensions/removals have occurred over the last three decades.

- May 14, 1992: The Tribal President was required to pay the balance of the disallowed cost and was suspended by a vote of seventeen (17) in favor, zero (0) opposed, zero (0) not voting. *Sandven Affidavit Ex. 3*

- May 15, 1987: Councilman Thomas Walking Eagle was removed for gross misconduct. *Sandven Affidavit Ex. 10*

- April 21, 2009: Councilman Michael Valandra was suspended by a vote of 12 Yes, 0 No, 0 Abstain and 8 Absent. *Sandven Affidavit Ex. 11*

- June 30, 2003: Representative Tez Duysak, Jr. was "found guilty of gross misconduct of tribal affairs in violation of the Code of Ethics" and removed by a vote of 16 Yes, 0 No, 2 Abstain and 2 Absent.[1] *Sandven Affidavit Ex. 12*

Plaintiff has not provided any evidence that would allow this Court to break from tradition.

2. <u>The Constitutional Two-Thirds Requirement Was Satisfied</u>.

Defendants hereby incorporate by reference their argument incorporated in the Memorandum in Support of Motion to Dismiss dated March 12, 2015 on pages 15-16.

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[1] Chief Judge Sherman Marshall served as the hearing officer.

Additionally, one need only look into the Tribe's history to ascertain how the requisite percentage is calculated. In the 1992 removal of Tez Duysak, Jr., the vote was 16 yes, 0 No, 2 abstaining and 2 absent. If the Tribe's Constitutional officers were included, the number of voting would have been 24 – not 20. *Sandven Affidavit Ex. 3.* In the 2009 suspension of Michael Valandra, the vote was 12 yes, 0 no, 0 abstained, and 8 absent. *Sandven Affidavit Ex. 11.* Again, the Constitutional officers did not cast a vote. Clearly, Constitutional officers are not included in the 2/3 requirement, and Plaintiff's argument that 17 members are required to effectuate a removal/suspension must fail.

B. <u>There is No Permanent Deprivation of a Property Right.</u>

Defendants hereby incorporate by reference their argument in the Memorandum of Support of Motion to Dismiss dated March 12, 2015, on pages 18-22. Additionally, in *Valandra v. Rosebud Sioux Tribe, et al.*, CIV 09-183, the Tribe's highest Court concluded:

> [A] temporary suspension with pay put into escrow is not a permanent deprivation of property right which warrants this Court's intervention into this dispute at this time.

Id. at 9.

No one from the Tribe has committed any act that would interfere with the President ultimately receiving his pay should be Court order such. The Tribal Council approved the fiscal year 2015 general budget on September 17, 2014 and the indirect budget on September 25, 2014 that the included the budget for the President's office. These described budgeted line items for the President's office cannot be used for other Tribal expenditures without a budget modification. Budget modification requirements are listed in Sections 1.thru 1.6 of Ordinance 2003-05. *Sandven Affidavit Ex. 17* Here, a budget modification affecting the budget for the

President's office has not been requested or approved by Tribal Council.[2] In other words, the President's pay is set aside in an account similar to an escrow account.

C. <u>The Doctrine of Res Judicata Bars this Action</u>.

The doctrine of res judicata bars Plaintiff's claims. Under said doctrine, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *In re: Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). Typically, res judicata precludes "not only the specific claims brought in a complaint, but any other claims that 'stem out of the same nucleus of operative fact, or [are] based upon the same factual predicate.'" *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1290 (11th Cir. 2004) (*quoting* in part *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)).

On November 14, 2014, President Scott filed a Complaint and an Ex Parte Motion for Temporary Restraining Order in *Scott v. Walking Eagle, et al.*, CV 14-490 seeking to enjoin the Tribal Council from proceeding with its legislative functions of holding disciplinary proceedings against him. 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. However, Plaintiff requested a voluntary dismissal with prejudice of the temporary restraining order shortly before the hearing. *Sandven Affidavit Ex. 4* Further, Plaintiff requested dismissal of the temporary restraining order and the underlying action with prejudice at the December 11, 2014 hearing:

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[2] BUDGET MODIFICATION requires "all budget modifications of the Tribe will be properly authorized." Section 1.1 requires "the personnel preparing the budget modification will attached documentation supporting the proposed modification," Section 1.2 requires "the Finance Officer will review the proposed budget modification for accuracy and reasonableness" and Section 1.3 requires review by the Budget and Finance Committee. See *Sandven Affidavit Ex. 17*

MR. ARENDT: You know, Judge, I don't have a problem with you issuing the order today with prejudice.

THE COURT: Relative to the temporary restraining order?

MR. ARENDT: Right. (10:7-11)

THE COURT: Thank you. As I review 41(a), I don't think 41(a) requires any showing of reason. I think it's discretionary, and I don't think there is any requirement for any justification for dismissal. But I don't think we're here either because we have an order that's been entered. And based on the motion and the argument, I am going to vacate the temporary restraining order. I'm also going to order that no further applications for TROs may be filed under this particular case and that complaint. (18:6-15)

(Proceedings adjourned.)

(Court reopened the hearing.)

THE COURT: Mr. Arendt, do you have a motion?

MR. ARENDT: I do, Your Honor. I propose that this action be dismissed with prejudice.

THE COURT: The underlying action?

MR. ARENDT: The underlying action be dismissed with prejudice in its entirety by stipulation of the parties. I propose that I draft and submit to my client that motion, have him sign off on it. I'll sign off on it. I will then mail it to Mr. Sandven and obtain his signature. And once all the signatures are obtained, we will present it to you with a proposed order of dismissal with prejudice. (25:11-22)

See *Sandven Affidavit Ex. 5.* Special Judge Arganbright entered four Orders in CV 14-490 regarding Plaintiff's requirements for voluntary dismissal with prejudice:

- **December 12, 2014 Order**: "The Court, being duly advised in the premises, does vacate the Temporary Restraining Order previously entered herein by this Court, with prejudice … Plaintiff, by Al Arendt, moved the Court to dismiss the underlying action and Complaint filed herein, with prejudice. There being no objections, the Court enters a Condition Order of dismissal…."

- **January 27, 2015 Order**: "In the event that the Defendant wishes to proceed with the Defendant's counsel's motion as previously orally recited in Court on December 11, 2014, the Defendant shall file original executed written Stipulation to dismissal, executed by the Plaintiff, on or before the 17th day of February, 2015."

- **February 20, 2015 Order**: "The Court Clerk has advised that Plaintiff has not filed an original signed stipulation to dismissal as provided in the Order of this Court entered January 27, 2015."

- **March 4, 2015 Order**: "In the event Plaintiff desires to dismiss the action with prejudice as recited by Plaintiff's counsel in open court on December 11, 2014, then an originally executed Stipulation to dismissal with prejudice … The Court does further order that Defendant's Motion to Dismiss filed per Order of the Court of this day, shall be heard on the 18th day of March, 2015 at 9:00 A.M.…."

Sandven Affidavit Ex. 13 Plaintiff Scott brought this second lawsuit while he failed to respond to numerous requests from his attorney in CV 14-490.[3] Special Judge Arganbright executed the Stipulation to Dismiss with Prejudice and Order in CV 14-490 on March 18, 2015. *Sandven Affidavit Ex. 5.* Plaintiff's attorney entered Notice of Entry of Order in CIV 14-490 on March 20, 2015. *Sandven Affidavit Ex. 16.*

To succeed on motion to dismiss based upon the doctrine of res judicata, there must be (1) a judgment on the merits in a prior suit; (2) the same parties or their privies; and (3) the same cause of action. Here, the first case brought by Plaintiff has been dismissed with prejudice. A dismissal "with prejudice" is a final judgment on the merits which bars further litigation between the same parties. *Board of Trustees of the Hotel and Restaurant Employees Local 25 v. Madison Hotel, Inc.,* 97 F.3d 1479, 1489 n. 20 (D.C.Cir.1996).[4] Because there was a final judgment in the

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[3] Plaintiff's Attorney in CV 14-490 Al Arendt's March 17, 2015 email at 5:08 p.m to Special Judge Arganbright provided: "Judge - I am writing to you about tomorrow's hearing at 9 AM. I will attend but here is my response on this matter. Attached is a copy of my letter to J. Marshall with my letter of 12/15/14 to the clerk's office filing Cyril Scott's signed stipulation to dismiss with prejudice. I have called my client 3 times with no luck. I have written to him twice to respond to this matter. I have emailed him four times. I have not received any response. I know that the court wants Scott in court to confirm that this action is being dismissed with prejudice. However, my client has chosen not to communicate with me or respond to my entreaties. There is little more that I can do. I am also doing all of this gratis." *Sandven Affidavit Ex. 5.*

[4] *See also Warfield v. Allied Signal TBS Holdings, Inc.,* 267 F.3d 538, 542 (6th Cir.2001)(A voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect.); *Smoot v. Fox, 340 F.2d 301, 302 (6th Cir.1964)* ("Dismissal of an action with

prior action, the parties are identical[5], and the same underlying facts form the basis for Plaintiff's current claims[6], res judicata precludes him from relitigating issues which could have been raised

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prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties."); *Ciralsky v. C.I.A.*, 355 F.3d 661, 672 n. 11 (D.C.Cir.2004)("[A] suit that has been dismissed with prejudice cannot be refiled; the refiling is blocked by the doctrine of res judicata."); *Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 108 Cal.Rptr.3d 806, 230 P.3d 342, 345 (2010) (under California law, dismissal with prejudice is the equivalent of a final judgment on the merits); *Hempstead v. Cleveland Bd. of Ed.*, No. 90955, 2008 WL 4599644, at *2 (Ohio Ct.App. Oct. 16, 2008) ("In Ohio, a dismissal with prejudice is a final judgment for purposes of res judicata."); *Gambocz v. Yelencsics*, 468 F.2d 837, 840 (3d Cir.1972)(A dismissal "with prejudice" is treated as an adjudication of the merits and thus has preclusive effect.); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (holding that a lawsuit, dismissed with prejudice "bars a later suit on the same cause of action"); *Harnett v. Billman*, 800 F.2d 1308, 1312 (4th Cir.1986) (holding that a case dismissed with prejudice is a "judgment on the merits" for res judicata purposes); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir.1986) (A dismissal with prejudice should be considered a judgment on the merits.); *Astron Indus. Assoc., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 960 (5th Cir.1968) ("It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action.").

[5] Cyril Scott was the Plaintiff in *CV 14-490* and the Defendants were Lorraine Walking Eagle, Chairperson of RST Ethics Commission), Tribal Secretary Julie Peneaux "on behalf of Tribal Council" and Vice President William Kindle, Vice President of the Tribal Council. Cyril Scott is the Plaintiff in *CV 15-71* and the Defendants are Vice-President Willie Kindle, both individually and in his capacity as Vice-President; Treasurer Byron Wright, both individually and in his capacity as Treasurer; Calvin Waln, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Richard Charging Hawk, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Todd Bear Shield, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Arnetta Brave, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Brian Hart, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Wayne Boyd, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Mary Waln, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Alvin Bettelyoun, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Webster Two Hawk, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Shizou LaPointe, both individually and his capacity as Council member of the Rosebud Sioux Tribe; Willie Bear Shield, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Wayne Frederick, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Brian Dillion, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Rose Strenstrom, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Richard Lunderman, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; Lila Kills In Sight, both

and decided, in the earlier proceeding. *Drake v. FAA,* 291 F.3d 59, 66 (D.C.Cir.2002), *cert. denied,* 537 U.S. 1193, 123 S.Ct. 1295, 154 L.Ed.2d 1028 (2003).

IV. PLAINTIFF HAS FAILED TO ALLEGE IMMEDIATE AND IRREPARABLE HARM.

In *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981)(en banc), the Eighth Circuit remarked that "the absence of a finding of irreparable injury is alone sufficient ground for vacating [denying] the preliminary injunction." *Id.* at n.9. Thus, "the threat of irreparable harm" is a threshold inquiry. It is "the sine qua non for all injunctive relief." *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978). Consequently, a petitioner 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.") The essence of this inquiry is whether temporary equitable relief is required in order to prevent a change in circumstances that will work some harm to a party not amenable to remedy after a determination on the merits:

> The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and

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individually and in her capacity as Council member of the Rosebud Sioux Tribe; Kathy Wooden Knife, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Kathy High Pipe, both individually and in her capacity as Council member of the Rosebud Sioux Tribe; Mike Boltz, both individually and in his capacity as Council member of the Rosebud Sioux Tribe; and Richard Whipple, both individually and in his capacity as Council member of the Rosebud Sioux Tribe.

[6] *CV 14-490:* first count - Due Process Violations (paragraphs 17-18); second count – Res Judicata (paragraphs 19-20); third count – Violations of Ethics Ordinance (paragraphs 21-22); and fourth count – Constitutional Violation (paragraphs 23-24). *CV 15-71:* Constitution Violations (paragraphs 29-45); Ordinance 87-05 (paragraphs 46-50); Ordinance 86-04 (paragraphs 51-57) and Indian Civil Rights Act (paragraphs 58-62).

conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. *Dataphase* at 113 n.5.

Here, Plaintiff has not even alleged specific immediate and irreparable harm that cannot be compensable by monetary damages. In fact, he requests "damages in the sum of fifty ($50,000.00) per Defendant for their intentional and egregious illegal actions, including any consequential damages, back pay, plus interest, attorney fees and costs associated with the bringing of this action." Based thereon, it is quite clear that monetary damages would compensate Plaintiff for his alleged injuries. Complaint, at p. 14.

V. BALANCING OF HARMS WEIGHS IN FAVOR OF DENYING INJUNCTIVE RELIEF.

The court must consider the balance between the harm to the Plaintiff and the injury that granting the injunction will inflict on Defendants. If the court grants the motion, Plaintiff will only be minimally inconvenienced. However, the Defendants will be severely prejudiced in that they will no longer be able to discipline their own membership as contemplated by the Tribe's Constitution. In fact, an injunction blocks the Tribal Council from exercising their Constitutional authority. The preliminary injunction is urged by the President of the Tribal who unquestionably lack any authority over the Tribe's disciplinary process, which the Constitution and Tribal law commit exclusively to the Tribal Council. An injunction would also offend basic separation-of-powers principles, impinging on core legislative functions concerning the exercise of discretion in the complex task of determining disciplinary issues. As such, an injunction would necessarily cause irreparable harm to the Defendants that will not be cured even if the Order is later vacated.

VII. PLAINTIFF HAS AN ADEQUATE LEGAL REMEDY.

No alleged harm suffered by Plaintiff cannot be addressed by the Court through the normal process for litigating a civil complaint. Viewed in its proper perspective, Plaintiff's

motion is largely an effort to expedite litigation and postpone any disciplinary action that may be imposed upon him by the Tribal Council. The Court is being asked to hear Plaintiff's claims on an emergency basis and to order, as a matter of preliminary relief, the ultimate relief sought in the Complaint when the normal litigation process would have sufficed to address and, if necessary, rectify Plaintiff's alleged injury.

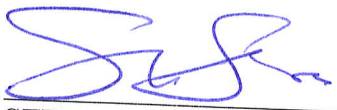
March 24, 2015

STEVEN D. SANDVEN, Law Office PC

By: 
STEVEN D. SANDVEN,
3600 South Westport Ave., Suite 200
Sioux Falls SD 57106

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of March, 2015, a true and correct copy of the foregoing DEFENDANTS' REPLY TO PLAINTIFF'S REESPONSE TO DEFENDANTS' MOTION TO DISMISS was mailed by first-class mail to Gary J. Montana, N12923 North Prairie Road, Osseo WI 54758.


STEVEN D. SANDVEN