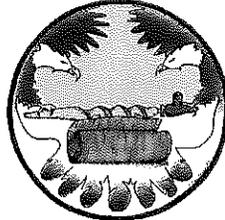


LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
OF TRIBAL COURT
CIVIL DIVISION

Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49670

Ph 231-242-1462



FRED KIOGIMA, Tribal Chairman, and
DEBBIE DELEON, Tribal Vice Chair
Plaintiffs,

v.

CASE NO.: C-204-1014

LTBB ELECTION BOARD,
MERLE CARSON, Chairperson
ALICE HUGHES, Vice-Chairperson
CAROL QUINONES, Secretary/Treasurer
JON SHAWA, Board Member, and
CHRISTINE A. SHOMIN, Board Member
Defendants,

ORDER FOLLOWING HEARING ON PRELIMINARY INJUNCTION

INTRODUCTION

This matter comes before the Court on Plaintiffs' requests for a Preliminary Injunction. On October 31, 2014, counsel for the Plaintiffs filed a *Summons, Complaint, Entry of Appearance, Motion for Preliminary Injunction, and Memo in Support of Plaintiffs' Motion for Preliminary Injunction*. Subsequently, on November 4, 2014, the Plaintiffs filed a *Second Motion for Preliminary Injunction*. On November 5, 2014, the Court issued a *Notice of Hearing*

on the motion and directed the Defendants to file a responsive pleading by November 7, 2014. Defendants filed their *Response to Motions for Preliminary Injunction* through counsel on November 7, 2014. The Parties appeared before the Court on November 12, 2014, with *pro tempore* Judge Jocelyn K. Fabry presiding. At the hearing, the Parties did not present any additional evidence or testimony, solely placing their legal arguments on the record. The Plaintiff seeks to enjoin the Recall Election currently underway, with ballots scheduled to be counted on Monday, November 17, 2014 and also requests this Court to issue an order compelling the Election Board to immediately disclose the signature pages to the Plaintiffs as Public Documents.¹

FINDINGS OF FACT

1. The Plaintiffs are the Chairperson and Vice-Chair of the Little Traverse Bay Bands of Odawa Indians.
2. The Defendants are the individuals who comprise the Election Board, a constitutionally established independent entity who is tasked with conducting all general and special elections. CONSTITUTION, Art. XI, § A.
3. Minutes from the July 12, 2014 meeting of the Election Board indicate that the Secretary/Treasurer reported that the “Tribal Citizens Rosanna Smalley and Annette VanDeCar picked up Recall Petitions for the Tribal Chairman, Fred Kiogima and the Tribal Vice-Chairman, Deb DeLeon. 161 signatures are needed for each petition. The petitions are due back to the Election Board by October 9, 2014. They were also given

¹ Although not specifically requested in the motions for the preliminary injunction, the parties put their arguments on the record as to an order requiring the disclosure of the petition and signature pages and the Court deems it necessary to rule on those arguments in order to rule on the motions for the preliminary injunction and in the interests of justice, as time is of the essence in this matter, with the ballots scheduled to be counted in a mere four days. More appropriately, Plaintiff should have brought the request as to the public documents exemption as an Extraordinary Writ pursuant to LTBBRCP Rule XII. Regardless, for those reasons, the Court rules on the request at this time.

an up-to-date registered Voter list.” *Def.’s Resp. to Mots. for Prelim. Inj.*, Ex. 1. The minutes were posted online in the Odawa Register on the Election Board portal.

4. On October 4, the Election Board passed a motion making the content, specifically the names of the signatories, of a recall petition exempt from disclosure as a public document. *Pl.’s Second Mot. for Prelim. Inj.*, unmarked attach.
5. On October 9, 2014, the Board certified the recall petition in question, certifying that at least 161 valid signatures were obtained. *Pl.’s Second Mot. for Prelim. Inj.*, unmarked attach.
6. On or about October 15, 2014, it was visible on the Remove Kiogima/DeLeon Facebook page that the Secretary/Treasurer of the Election Board had “liked” the page. It was also visible on her personal Facebook page that she had “liked” the recall effort page. These “likes” remained visible through at least October 20, 2014. *Compl.*, Ex. H-K.
7. Recall ballots were mailed to the Tribal membership sometime around October 18, 2014.
8. Plaintiff Kiogima drafted correspondence to the Defendants dated October 17, 2014 and delivered the letter at a scheduled meeting of the Defendants protesting the alleged breach of neutrality. *Compl.*, Ex. M.
9. Plaintiff Kiogima submitted a Public Document Request purportedly on October 22, 2014. *Compl.*, Ex. C. Defendants claim to have not received the request until October 31, 2014 and acted upon the request at the next meeting on November 1, 2014, deeming the petition sheets as exempt pursuant to their October 4 motion.
10. The Defendant Quinones drafted a correspondence to the Election Board dated October 23, 2014, providing her explanation of the “Facebook incident” and claiming to not have “liked” that page “to the best of [her] recollection.” *Def.’s Resp.*, Ex. 3.

11. The Defendants notified Plaintiffs, by letter dated November 1, 2014, that the Board voted to suspend the Board's Secretary/Treasurer until the recall election process was completed "[f]or the sake of protecting the public perception of transparency." *Pl. 's Second Mot. for Prelim. Inj.*, Ex. G.

DECISION

On October 4, 2014 the Election Board passed a motion, deeming the signatories' names on recall petitions exempt from public disclosure and on November 1, 2014, denied the Plaintiff Kiogima's Public Documents Request for the recall petition signature sheets. From at least October 15-20, 2014, it was visible to the public on Facebook that the Secretary/Treasurer had "liked" the Recall Kiogima/DeLeon Facebook page. The Plaintiffs request an injunction to prevent the continuation of the recall election currently underway and also seek an order compelling the Election Board to immediately disclose the petition and signature pages as public documents or, in the alternative, an order that the petition is void and cannot be used as the basis for an election.

The LTBB Rules of Civil Procedure provide the authority for requests for preliminary injunctions before the Court:

An injunction may be granted:

- (1) when it appears by the pleadings on file that a party is entitled to the relief demanded, and as such relief, or any part thereof, consists of restraining the commission or continuance of some act complained of, either for a limited period or perpetually;
- (2) when it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce irreparable injury to the party seeking injunctive relief;
- (3) when it appears during the litigation that either party is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party respecting the subject matter of the action, and tending to render the judgment ineffectual;

(4) in all other cases when an injunction would be proper in equity.

LTBBRCP Rule XI(f). The Plaintiffs' requests meet the circumstances proscribed by court rule to be appropriate for a preliminary injunction. However, the Court could not identify, in reviewing previous LTBB caselaw, nor did the parties offer, a legal standard for the purpose of evaluating such requests for preliminary injunctions. As a matter of first impression then, the Court determines to rely upon the standard four-part test commonly relied upon by other Tribes and state and federal courts in analyzing requests for preliminary injunctions. This four-part test requires that the moving party show that (1) whether the plaintiff will be irreparably harmed if the injunction is denied; (2) the threatened injury to the plaintiff outweighs the harms of issuing an injunction; (3) the plaintiff has a reasonable likelihood of success on the merits; and (4) granting the injunction serves the public interest. *E.g.*, *Winter v. NRDiC, Inc.*, 555 U.S. 7 (2008); *Mich. State Emp. Ass'n v. Dep't of Mental Health*, 421 Mich 152, 157-158 (1984); *Ho-Chunk Nation Election Board v. Aurelia Lera Hopinkah*, SU 98-08 (Ho-Chunk Nation Supreme Court 1999); *Freeman v. Freeman et. al.*, PTCV-14-001 (Paskenta Band of Nomlaki Indians Tribal Court 2014); *Ducheneaux v. Clown et. al.*, R-231-98 (Cheyenne River Sioux Superior Court 1998).

The purpose of a preliminary injunction is to maintain the respective positions of the parties until a trial can be heard on the merits. "A preliminary injunction is granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas et al. v Camenisch*, 451 U.S. 390 at 395 (1981). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter, supra*, at 22.

Irreparable Harm/Balance of Harms/Public Interest

The Plaintiffs seek an injunction of the continuation of the recall election, which they argue has been subject to illegal practices and may later be ruled invalid. The harm to the Plaintiffs in not granting the injunction of the election is that they *may* be removed from office, depending on the outcome of the election, and that they have no other remedy to address this outcome. However, any time a recall candidate seeks to enjoin a recall election, such a harm is a potential outcome. If this were the only factor to consider, a preliminary injunction would necessarily have to be ordered in every circumstance that an official subject to a recall election files a request for a preliminary injunction. Accordingly, the court must further weigh the remaining factors.

The Defendants argue that if ordered to disclose the recall petition, they will comply and that such action would mitigate the majority of the Plaintiffs' concerns surrounding the election. The actual harm to the Defendants they identify is that the time and expense of conducting an election already underway will be lost and that the credibility of the election process and the Election Board will be permanently tainted if the election is preliminarily enjoined. Each party presents valid concerns and potential harms surrounding the Court's ruling on a preliminary injunction as to the election. The Court then further must consider the public interest in this matter.

Given that the fundamental rights of citizens of a democratic form of government centers around their rights to vote, the Court gives substantial weight to the public interest factor in this instance. There is a public interest in the citizens of the Little Traverse Bay Bands of Odawa Indians having the right to know that the political process is proceeding without judicial

interference, except in the most extreme of circumstances. However, it is also in the public interest to know that the recall election process is happening with unquestionable integrity and in accordance with the law. Therefore, the public has an interest in transparency and permitting the disclosure of the recall petition. Defendants have alleged that fears of retribution by the Plaintiffs against signatories were part of the basis for the October 4 motion and would use the same basis to argue that the public has an interest in the signature pages remaining exempt. However, as Plaintiff correctly points out, Tribal laws already provides remedies for such retribution and retaliation. As such, these factors collectively weigh in favor of allowing the recall election to continue unimpeded, but allowing the Plaintiffs to view the recall petition signature pages as requested.

Likelihood of Success on the Merits

The Court has the authority to interpret the Constitution and laws of the Little Traverse Bay Bands of Odawa Indians. CONST., ART. IX, § C(2). The Court's judicial power "shall extend to all civil and criminal cases arising under [the] Tribal Constitution, statutes, regulations or judicial decisions of the Little Traverse Bay Bands of Odawa Indians. *Id.*, ART. IX, § C(1). In this instance, the Plaintiffs allege that the Election Board's October 4 motion denied them the equal protection of the laws, by denying them the opportunity to inspect the recall petition signatures and determine whether the petition complied with applicable law.

Counsel for the Defendants admitted on the record that no previous recall petitions had been deemed exempt from public disclosure and that the October 4 motion was passed while after this recall petition had been issued. Previous Tribal officials who have been subject to recall petitions have therefore had the opportunity to access and review the recall petitions and address any concerns as a result thereof. *See, e.g., McNamara v. LTBB Election Board*, C-085-

0310 (2010). As such, the Plaintiff is likely to succeed on its deprivation of constitutional rights claim as to the October 4 motion.

Moreover, the Plaintiff is likely to succeed in establishing that the motion violates Tribal law. The Constitution provides that the Tribal Council:

Shall establish rules and procedures to provide access for review by any Tribal member...of the records of the Little Traverse Bay Bands of Odawa Indians. Such review shall be conducted during normal office hours, in accordance with the rules and procedures established by the Tribal Council, and not inconsistent with any other provisions of this Constitution. All Tribal records are subject to this review by the membership unless specifically excluded by this Constitution or applicable law;

CONSTITUTION, ART. VII, § (D)(7). The Council has complied with this Constitutionally-imposed duty by enacting the Public Documents Statute, WOTCL §6.1901 et seq.

The statute reinforces the Constitutional mandate that Tribal Citizens have a legally-protected right to access to official tribal records and defines Public Documents as: “a writing prepared, owned, used, in the possession of, or retained by a governmental branch or division, department, agency, commission, board, committee, entity, enterprise or office in the performance of an official function, from the time it was created.” *Id.* at § 6.1903 D. A recall petition necessarily meets this definition upon its being turned in to the Election Committee to be certified. At the time, then, that Plaintiff Kiogima filed his Public Documents Request on October 31, 2014, the recall petition was a public document subject to disclosure unless specifically exempted by law. CONSTITUTION, ART. VII, § (D)(7); WOTCL § 6.1906. Neither the Public Documents Statute nor the Public Documents Regulations specifically exempt recall petitions. However, the Defendants argue that recall petitions fall into the category of documents exempt from public disclosure as “records that rise significant privacy or confidentiality concerns for the Tribe or a Tribal Citizen.” See *Pl. 's Second Mot. for Prelim. Inj.*, Ex. B, citing

WOS 2010-009 § VI (B)(3). As Plaintiffs correctly point out, however, signatories of recall petitions have no legitimate expectation of privacy in the signature sheets, as previous LTBB recall petitions had been subject to public disclosure and the Court is not aware of any other governmental entity, Tribal or otherwise, that exempts recall petitions from public disclosure. Accordingly, the Election Board's motion is based on an incorrect interpretation of the law, and the Election Board does not have the authority to supersede the legislative authority which rests with the Tribal Council. CONSTITUTION, ART. VI, § D. Therefore, weighing the evidence at hand and the respective legal arguments of the parties, the Plaintiffs would have a likelihood of succeeding on the merits of their claims related to the denial of their public documents request.

In order for the Plaintiffs to succeed on the breach of neutrality claim, however, the Plaintiffs would have to establish that the Secretary/Treasurer's actions, even if determined to be in violation of applicable law, had an actual effect and changed the outcome of the election. Plaintiffs would be hard-pressed to meet this burden of showing an actual adverse effect impacting the outcome of the election. While certainly the actions of the Secretary/Treasurer may be in violation of the Constitutionally Mandated Rules of Conduct, and the Election Code, both the Rules and the Election Board statute provide the remedies for such violations. Therefore, the Plaintiffs are not likely to succeed on the merits of their claims relative to the Secretary/Treasurer's alleged breach of neutrality.

CONCLUSION

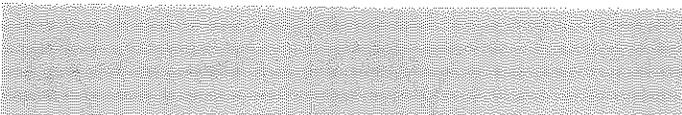
The Court finds, then, that the balancing of the above factors warrants a resolution that permits the Plaintiffs to review the recall petition signature sheets, but that does not further interfere with the recall election process.

IT IS THEREFORE ORDERED that the grant of a preliminary injunction enjoining the continuation of the recall election and collection and tallying of the votes as scheduled on November 17, 2014 is not warranted for the reasons stated above.

IT IS FURTHER ORDERED that the grant of a preliminary injunction enjoining the Defendants from relying on their October 4 motion as a basis to deny Plaintiff Kiogima's public documents request is warranted. The Little Traverse Baby Bands of Odawa Indians Election Board, its members, agents, servants, attorneys and employees, and any and all persons acting in active concert or participation with them and who receive actual notice of this Order, are hereby temporarily restrained from denying Plaintiff Kiogima's public document request during the pendency of this action and until further order of the court. No security for costs is required to be filed prior to the issuance of this Order.

IT IS FURTHER ORDERED THAT the Election Board shall immediately disclose the petition and all signature pages to the Plaintiffs as public documents. This disclosure shall occur no later than 12:00 p.m. on Friday, November 14, 2014, in order to permit the Plaintiffs sufficient time to review the signature pages to determine whether they are in compliance in applicable whether they need to immediately seek further relief before the Court.

IT IS SO ORDERED this 13th day of November 2014.



Honorable Jocelyn K. Fabry
Pro Tempore Judge

Certification of Service

I certify that a copy of the Order Following Hearing on Preliminary Injunction was served upon the following parties:

-By First Class Mail

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On 11/13/2014 4:45:40 PM

Chloie Stead, Court Clerk