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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREGORY F. MULLALLY,)
Plaintiff,)

v.)

HAVASU LANDING CASINO,)
AN ENTERPRISE OF THE)
CHEMEHUEVI INDIAN TRIBE,)
JACKIE GORDON,)
PERSONALLY AND AS)
GENERAL MANAGER OF THE)
HAVASU LANDING CASINO,)
MANUAL JACQUES,)
PERSONALLY, AND MARY)
PETERSON, PERSONALLY,)
DOES 1-10,)

Defendants.)

Case No. EDCV 07-1626-VAP
(JCRx)

**[Motion filed on January 18,
2008]**

**ORDER (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION AND (2)
STAYING REMAINING CLAIMS**

Defendants' Motion to Dismiss for Lack of Subject
Matter Jurisdiction or in the Alternative for Summary
Judgment came before the Court for hearing on February
25, 2008. After reviewing and considering all papers
filed in support of, and in opposition to, the Motion, as
well as the arguments advanced by defense counsel at the

1 hearing, the Court GRANTS the Motion in part, DENIES it
2 in part, and STAYS the remaining claims.¹

3
4 **I. BACKGROUND**

5 **A. Procedural Background**

6 Plaintiff Gregory F. Mullally filed a Complaint on
7 December 6, 2007, against Defendants Havasu Landing
8 Casino, Jackie Gordon, Manuel Jacques, Mary Peterson, and
9 ten Doe Defendants. The Complaint asserts the following
10 claims:

- 11
- 12 (1) violation of the Family and Medical Leave Act,
13 against Defendant Gordon;
 - 14 (2) violation of the Family and Medical Leave Act,
15 against Defendant Havasu Landing Casino;
 - 16 (3) defamation, against Defendant Jacques
 - 17 (4) intentional interference with contractual
18 relations, against Defendants Peterson and Does
19 1-5; and
 - 20 (5) conversion, against Does 6-10.
- 21

22 On January 18, 2008, Defendants filed a Motion to
23 Dismiss for Lack of Subject Matter Jurisdiction or in the
24

25 ¹Plaintiff filed an ex parte application seeking to
26 waive oral argument, appear for the Motion hearing
27 telephonically, or continue the hearing date. The Court
28 construed the application as a request for Plaintiff to
waive his appearance and granted that request by Minute
Order dated February 19, 2008.

1 Alternative for Summary Judgment ("Motion" or "Mot."),
2 along with a Statement of Uncontroverted Facts and
3 Conclusions of Law and the declarations of Ronald Escobar
4 ("Escobar Decl."), Jacqueline Gordon, and Lester J.
5 Marston. On February 11, 2008, Plaintiff filed
6 Opposition ("Opp'n"), along with his own declaration
7 ("Mullally Decl.") and the declarations of Nancy
8 Bertolone ("Bertolone Decl.") and Jay Hill ("Hill
9 Decl.")).² Defendants filed a Reply and an additional
10 declaration of Lester J. Marston on February 18, 2008.
11

12 **B. Factual Background**

13 Plaintiff was employed as a shift manager and slot
14 manager at the Havasu Landing Casino (the "Casino"),
15 which is owned by the Chemehuevi Indian Tribe and located
16 in San Bernardino County. (Compl. ¶¶ 8-9.) On September
17 16, 2007, Plaintiff was informed that his gaming license
18 had expired. (Compl. ¶¶ 10-11.) Defendant Jacques, the
19 Casino security manager, "ordered" Plaintiff to leave the
20 Casino, and Plaintiff understood that he could not return
21 to work until he had renewed his gaming license with the
22 Chemehuevi Gaming Commission. (Compl. ¶¶ 12-13.)
23 Further, Jacques is alleged to have "maliciously created
24
25

26 ²Plaintiff attached unauthenticated exhibits to his
27 Opposition, and the Court grants Defendants' request to
28 strike those exhibits. Plaintiff also lodged his own
Statement of Uncontroverted Facts and Conclusions of Law,
which is unneeded for resolution of this Motion.

1 and circulated a Memo about Plaintiff that [Jacques] knew
2 to be false." (Compl. ¶ 28.)

3
4 The next day, September 17, 2007, Plaintiff's
5 physician diagnosed him with a medical condition and
6 placed him on a two-week leave of absence. (Compl. ¶
7 13.) On October 1, 2007, the physician recommended that
8 Plaintiff continue his disability leave for six months.
9 (Compl. ¶ 14.) Plaintiff requested the documents
10 necessary to apply for medical leave, including leave
11 under the Family and Medical Leave Act from the Casino's
12 human resources director, Defendant Peterson. (Id.)
13 Plaintiff and his physician completed the medical leave
14 request form. (Compl. ¶ 16.)

15
16 On October 29, 2007, Defendant Gordon, the Casino
17 general manager, told Plaintiff she had not approved his
18 request for leave under the Family and Medical Leave Act
19 ("FMLA"). (Compl. ¶ 19.) On November 1, 2007, Defendant
20 Gordon terminated Plaintiff's employment with the Casino.
21 (Compl. ¶ 20.)

22
23 Plaintiff alleges that Gordon and the Casino violated
24 his rights under the FMLA by refusing to grant him leave.
25 (Compl. ¶¶ 20-25.) He further alleges that he has
26 suffered damages as a result of Defendant Jacques's
27 circulation of a defamatory memorandum. (Compl. ¶ 29.)

1 Defendant Peterson is alleged to have intentionally
2 interfered with Plaintiff's contractual relations,
3 because she refused to complete forms necessary for
4 Plaintiff to obtain disability benefits from the state of
5 California and a private insurance policy. (Compl. ¶¶
6 31-32.) Finally, Plaintiff alleges that certain unnamed
7 persons, including the Casino's attorney, have refused to
8 return his personal property to him. (Compl. ¶¶ 35-37.)
9

10 II. LEGAL STANDARD

11 A district court must dismiss an action if the court
12 lacks jurisdiction over the subject matter of the suit.
13 Fed. R. Civ. P. 12(b)(1). The party seeking to invoke
14 federal jurisdiction bears the burden of establishing
15 that jurisdiction exists. Scott v. Breeland, 792 F.2d
16 925, 927 (9th Cir. 1986). In deciding a motion brought
17 pursuant to Rule 12(b)(1), a court may consider extrinsic
18 evidence on whether jurisdiction exists and may resolve
19 factual disputes if necessary. Thornhill Publ'g Co. v.
20 General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.
21 1979).³

22 ///

23 ///

24
25 ³Defendants have brought their Motion under Rule
26 12(b)(1) but also seek, in the alternative, summary
27 judgment. Since the Court may consider Defendants'
28 extrinsic evidence on a motion to dismiss under Rule
12(b)(1), Thornhill Publ'g Co., 594 F.2d at 733, there is
no need to convert the Motion to one for summary
judgment.

III. DISCUSSION

A. Sovereign Immunity Applies to the Casino and Gordon

1. Tribes and their business activities enjoy broad immunity from suit

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Lineen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. 2002) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)). The immunity extends to an entity established by a tribe to conduct certain activities, if that entity "functions as an arm of the tribe." Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). The Ninth Circuit has held that a casino owned and operated by an Indian tribe pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., "enjoys the Tribe's immunity from suit." Id. at 1047. A tribe nevertheless may be subject to suit "where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998).

Here, Plaintiff has brought a claim against the Casino for a violation of the FMLA. The Chemehuevi Indian Tribe owns and operates the Casino under the fictitious business name "Havasus Landing Resort." (Escobar Decl. ¶¶ 4-5.) The Casino functions as an arm

1 of the Chemehuevi Tribe, and its activities promote
2 "tribal economic development, self-sufficiency, and
3 strong tribal governments," as set forth in the IGRA.
4 See Allen, 464 F.3d at 1046. Congress has not abrogated
5 tribal sovereign immunity for violations of the Family
6 and Medical Leave Act, Chayoon v. Chao, 355 F.3d 141, 143
7 (2d Cir. 2004), nor has Plaintiff presented any evidence
8 that the Chemehuevi Tribe has waived its immunity in this
9 regard. The Casino is immune from suit, and this Court
10 therefore lacks subject matter jurisdiction over
11 Plaintiff's claim against the Casino.⁴

12
13 **2. Tribal immunity extends to tribal officials**
14 **acting within the scope of their duties**

15 Tribal immunity "extends to tribal officials when
16 acting in their official capacity and within the scope of
17 their authority." Lineen, 276 F.3d at 492 (quoting
18 United States v. Oregon, 657 F.2d 1009, 1013 n.8 (9th

20
21 ⁴Plaintiff's assertion that the FMLA applies to
22 Indian tribes is beside the point. (Opp'n at 8-9.) Even
23 if the provisions of a particular federal statute apply
24 to an Indian tribe, sovereign immunity may preclude a
25 plaintiff from enforcing the requirements of that statute
26 via private suit. Plaintiff's citation to a case finding
27 the National Labor Relations Act applicable to an Indian
28 tribe is therefore inapposite. See San Manuel Indian
Bingo and Casino v. Nat'l Labor Relations Bd., 475 F.3d
1306, 1312-13 (D.C. Cir. 2007) (noting that a "primary
qualification" to the application of federal statutes to
Indian tribes "is that the tribal government may be
immune from suit"). As resolution of the issue is not
necessary to decide the Motion, the Court expresses no
opinion on Defendants' competing contention that the FMLA
does not apply to Indian tribes. (Mot. at 11.)

1 Cir. 1981)). A different rule would allow plaintiffs to
2 circumvent tribal immunity by suing the tribal officials
3 who, acting in their official capacities, carried out the
4 tribe's actions. See Chayoon, 355 F.3d at 143. Here,
5 Plaintiff has sued Gordon, the Casino's general manager,
6 for violating the FMLA "by refusing to grant FMLA leave
7 to Plaintiff." (Compl. ¶ 21.) As the Casino's general
8 manager, Gordon "was delegated authority to manage and
9 operate the Casino, including but not limited to the
10 hiring and firing of employees." (Escobar Decl. ¶ 13.)
11 Plaintiff's allegation that Gordon denied her FMLA leave
12 involves an action she would have taken in her official
13 capacity as the Casino general manager. Accordingly,
14 Gordon also enjoys immunity from suit and the Court lacks
15 subject matter jurisdiction over Plaintiff's claim
16 against her.⁵

17
18 **3. Any inequities resulting from tribal immunity**
19 **must be addressed by Congress**

20 The Court recognizes that the application of
21 sovereign immunity may have inequitable consequences.

22
23

24 ⁵At the Motion hearing, Defendants' counsel argued
25 that the Court, having dismissed the only federal claims
26 in the Complaint, should decline to exercise subject
27 matter jurisdiction over Plaintiff's remaining state law
28 claims. The Complaint invokes the Court's diversity
jurisdiction, [Compl. ¶ 6 (citing 28 U.S.C. § 1332)], and
Plaintiff's state law claims request damages in amounts
exceeding the jurisdictional minimum. (Compl. ¶¶ 29,
33.) The Court thus has subject matter jurisdiction over
the remaining claims.

1 Here, for example, Plaintiff has submitted evidence that
2 other Casino employees have been granted leave under the
3 FMLA, or were led to believe they could take such leave.
4 (Bertolone Decl. ¶ 6; Hill Decl. ¶ 7.) Posters on
5 display in an employee break room provided information
6 about employees' rights under the FMLA, implying that
7 FMLA leave was available. (Marston Decl. ¶ 14; Bertolone
8 Decl. ¶¶ 4-5; Hill Decl. ¶¶ 4-5.) Without the
9 enforcement mechanism provided by a private lawsuit,
10 however, the employees' rights arguably were illusory.
11

12 "Clearly, tribal sovereignty has the potential to
13 deny many Americans employment benefits and rights that
14 Congress has seen fit to extend to the private sector."
15 Chayoon, 355 F.3d at 143. As the Supreme Court has
16 recognized: "Tribal enterprises now include ski resorts,
17 gambling, and sales of cigarettes to non-Indians. In
18 this economic context, immunity can harm those who are
19 unaware that they are dealing with a tribe, who do not
20 know of tribal immunity, or who have no choice in the
21 matter, as in the case of tort victims." Kiowa Tribe of
22 Oklahoma, 523 U.S. at 758. Plaintiff's avenue of
23 recourse, however, is with Congress, rather than the
24 courts.

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1 **B. The Tribe Has Waived Immunity for Plaintiff's**
2 **Remaining Claims**

3 Though Defendants claim Jacques and Peterson are also
4 entitled to immunity from suit, the Tribe has waived
5 immunity with respect to the claims against them. A
6 Chemehuevi tribal ordinance provides for the liability of
7 a "Tribal Official, Officer, or Employee" for

8
9 any act or omission which constitutes an intentional
10 tort including, but not limited to, ... defamation
11 ..., even if the act or omission constituting the
12 intentional tort arose from and was directly related
13 to the Tribal Official's, Officer's, or Employee's
14 performance of his or her official duties or within
15 the course and scope of their employment.⁶

16
17 (Escobar Decl. Ex. A at ¶ 2.100.) The statement is an
18 explicit waiver "clearly contemplating suits" against
19 employees such as Jacques and Peterson for intentional
20 torts. Allen, 464 F.3d at 1047. Plaintiff's claims for
21 defamation and intentional interference with contractual
22 relations fall within the boundaries of this waiver.

23 ///

24 ///

25
26 ⁶The tribal ordinance defines "Tribal Employee" as "a
27 person employed by the Tribe, its agencies, departments,
28 or economic enterprises for the purpose of providing
Tribal governmental services, programs or employment."
(Escobar Decl. Ex. A at ¶ 2.060.)

1 Accordingly, the Court denies Defendants' Motion to
2 dismiss the claims against Jacques and Peterson on the
3 basis of sovereign immunity.⁷

4
5 **C. As a Matter of Comity, the Remaining Claims Are**
6 **Stayed in Favor of Tribal Court Litigation**

7 Where a plaintiff has failed to exhaust his tribal
8 remedies, the appropriate response is to stay the federal
9 action pending such exhaustion. Sharber v. Spirit
10 Mountain Gaming Inc., 343 F.3d 974, 976 (9th Cir. 2003)
11 (finding that district court erred by dismissing for lack
12 of jurisdiction rather than staying action); Iowa Mut.
13 Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987)
14 ("considerations of comity direct that tribal remedies be
15 exhausted"). A stay of a federal court action is
16 appropriate even where no litigation is concurrently
17 pending in a tribal court. Sharber, 343 F.3d at 976.

18
19 Here, Defendants cite a Chemehuevi tribal ordinance
20 that established a tribal court. (Escobar Decl. Ex. E.)
21 It is unclear, however, whether Plaintiff's claims
22 against Jacques and Peterson may be heard in the tribal
23

24 ⁷Plaintiff also asserts a claim for conversion
25 against unnamed Doe Defendants. This claim cannot be
26 analyzed without further information concerning the
27 identities of the Doe Defendants. In light of the
28 Court's decision to stay Plaintiff's remaining claims, as
set forth below, the Court declines to address the
conversion claim until Plaintiff amends his pleading to
identify the persons against whom it is brought.

1 court, because although the ordinance states that the
2 tribal court "shall have civil jurisdiction over all
3 matters in law or in equity which the Tribal Council
4 expressly authorizes by ordinance," Defendants have
5 failed to demonstrate or explain which matters have been
6 authorized for hearing by the tribal court. (Escobar
7 Decl. Ex. E at 3.)

8
9 Furthermore, it is unclear whether the tribal court
10 would have jurisdiction over Defendants Jacques and
11 Peterson under the "Personal Jurisdiction" provision of
12 the ordinance. (Escobar Decl. Ex. E at 3.) These
13 determinations concerning the tribal court's jurisdiction
14 should be made in the first instance by the tribal court
15 itself. The Court therefore stays Plaintiff's remaining
16 claims until he has exhausted his tribal remedies.⁸

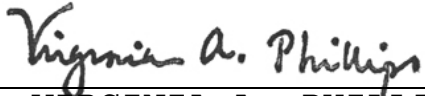
17 18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court GRANTS the
20 Motion in part and DISMISSES the claims against
21 Defendants Havasu Landing Casino and Jackie Gordon for
22 lack of subject matter jurisdiction.

23 _____
24 ⁸Defendants make a separate argument that Plaintiff
25 has not exhausted his administrative remedies under a
26 tribal ordinance requiring presentation of claims for
27 money damages to the Tribal Council before filing a
28 lawsuit. (Mot. at 8; Escobar Decl. Ex. D.) The
ordinance applies to "claims against the Tribe or any of
its business enterprises for money or damages," and thus
does not apply to Plaintiff's remaining claims against
Jacques and Peterson in their individual capacities.

1 The Court DENIES the Motion in part, with respect to
2 the claims for defamation, intentional interference with
3 economic relations, and conversion alleged against
4 Defendants Manuel Jacques, Mary Peterson, and unnamed Doe
5 Defendants. Based on considerations of comity, however,
6 the Court STAYS those claims so that Plaintiff may
7 exhaust his tribal remedies.

8
9 Dated: March 3, 2008



VIRGINIA A. PHILLIPS
United States District Judge