UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BELVA ANN NAHNO-LOPEZ, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 08-CIV- 01147 F**
	)	
JEFF HOUSER, et al.	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' BRIEF IN REPLY TO RESPONSE
BRIEF OF PLAINTIFFS TO MOTION TO DISMISS/STRIKE

The Response Brief of Plaintiffs to Motion to Dismiss/Strike ("Response Brief") warrants only brief reply. Defendants moved to dismiss the Complaint on grounds the Plaintiffs have asserted no applicable basis for invoking federal question jurisdiction against the Fort Sill Apache Casino, or against Tribal officials and employees in their individual capacities on the basis of the Ex parte Young doctrine[1], and failed to join the Tribe and the United States, despite their status as "required" parties within the meaning of Rule 19 of the Federal Rules of Civil Procedure.

Defendants moved separately to strike that portion of the Complaint for Declaratory Judgment, Permanent Injunction, Ejectment and Damages (or "Complaint") in which Plaintiffs seek "treble damages, in an amount to be proven at trial, but believed to exceed $15,000,000 ...." Id., Prayer for Relief, ¶ 6. See Defendants' Motion to Strike Claim for Relief Pursuant to Rule 12(f) of the Federal Rules ("Defendants' Motion to Strike") at 2 (Ex parte Young "in some

[1]Ex parte Young, 209 U.S. 123, 28 S.Ct. 2224, 52 L.2d 714 (1908).

circumstances may apply to permit suit against Tribal officials in their individual capacities, but only where "the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md. Inc. v. Pub. Serv. Comm'n., 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed. 2d 871 (2002)"). See also Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (Eleventh Amendment immunity bars award of money damages payable from State treasury, even though state official named as defendant); Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (same).

Plaintiffs have not troubled to respond separately to Defendants' Motion to Strike, all but conceding the absence of any warrant in the Ex parte Young doctrine or otherwise for awards of monetary damages against Tribal officials and Tribal employees in their individual capacities. See Response Brief at 8. There Plaintiffs cite Bassett v. Mashantucket Pequot Museum and Research Center, Inc., 221 F.Supp.2d 271 (D.Conn. 2002) for the very proposition **Defendants** have invoked in support of the motion to strike the claim for money damages, namely, that "[u]nder the doctrine of Ex Parte Young, prospective injunctive relief and declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact." Id., 221 F.Supp.2d at 278-79.[2]

[2]Plaintiffs cite several cases to the effect an "allottee who had received land under ... [25 U.S.C. §348] had legal title ... and were entitled to damages from those occupying such land." Response Brief at 18. Haymond v. Scheer, 543 P.2d 541 (Ok. 1975) involved an action by an heir to an Indian allottee against private parties. Id. at 543. Appleton v. Kennedy, 268 F.Supp. 22 (N.D.Ok. 1967) was not an action for damages at all, involving rather an "action [by a private party] ... to restrain and enjoin the [private party] defendants from interfering with the construction of [a] pipeline across [defendants] lands ...." Id. at 23.

Plaintiffs have cited but failed to explain the jurisdictional or remedial significance of a decision holding the requirements of the National Labor Relations Act applicable to union organizing efforts at a casino located on a Tribe's reservation, notwithstanding the doctrine of sovereign immunity. San Manuel Indian Bingo and Casino v. National Labor Relations Board, 475 F.3d 1306 (D.C. Cir. 2007), reh'g. denied, 2007 U.S.App. LEXIS 13747 (D.C. Cir. June 8, 2007).

In any case, however, "[t]he analysis of ... San Manuel ... concerned the applicability of a federal ... statute to an Indian tribe, and is thus inapplicable where the issue presented is whether a private party may maintain a suit against the Tribe .... [and] [t]here is no indication that the Tribe has waived its immunity from suit or of congressional abrogation [of tribal immunity]." (emphasis added). Louis v. Stockbridge-Munsee Community, 2008 U.S. Dist. LEXIS 70485, *8 (E.D. WI. 2008). See also Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006), cert. denied, 549 U.S. 1231, 127 S.Ct. 1307, 167 L.Ed.2d 19 (2007). There the court upheld dismissal based on the district court's finding that sovereign immunity barred discrimination and civil rights claims brought by a former employee against a Tribe and its casino, setting forth the rationale in terms equally relevant here:

> With the Tribe owning and operating the Casino, there is no question that ... economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. Cf. Alden v. Maine, 527 U.S. 706, 750, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (noting that sovereign immunity protects the financial integrity of the States, many of which "could have been forced into insolvency but for their immunity from private suits for money damages"). In light of the purposes for which the Tribe founded this Casino ["tribal economic development, self-sufficiency, and strong tribal government[]" pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2702(1)] and the Tribe's ownership and control of its operations, there can be little doubt that the

> Casino functions as an arm of the Tribe. It accordingly enjoys Tribal immunity from suit... (citations omitted),

Id., 464 F.3d at 1047.

Thus, even if Plaintiffs had squarely made the argument, D.C. Circuit's San Manuel decision furnishes no basis for denying the protection of sovereign immunity to the critically important "arm of the Tribe", ibid., called the Fort Sill Apache Casino. It is disingenuous for the Plaintiffs to assert that "a holding in favor of the Plaintiffs will not negatively affect the tribal sovereignty of the Ft. Sill Apache Tribe, nor their gaming facility, and if so, such an effect will be only negligible," Response Brief at 15, for reasons Plaintiffs themselves proceed to set forth: "The ...action that will be required is either the Defendant's [sic] remove their fixtures and other property ... from the lands of the Plaintiffs or enter into some form of settlement agreement for their continued trespass, encroachment and destruction of the Plaintiff's [sic] property." Yet either remedy, whether against the Tribe directly, or against the Fort Sill Apache Casino owned and operated by the Tribe, would obviously impinge on a "sovereign Tribe's treasury", Allen, supra, 464 F.3d at 1047, and thereby undermine "one of the historic purposes of sovereign immunity in general." Ibid.

Plaintiffs' responses to the other jurisdictional objections at issue are no more persuasive than their response to Defendants' Motion to Strike. They assert that one alleged jurisdictional predicate, 25 U.S.C. §202, "is not a criminal statute, but purely a penalty statute that holds individuals liable ...." Response Brief at 16. Even assuming the point is somehow relevant, §202 says in part that "[a]ny person violating this provision shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed $500 for the first offense, and if

convicted for a second offense by a fine not exceeding $500 or imprisonment not exceeding one year or both such fine and imprisonment." The venerable Mr. Black defines "misdemeanor" as "offense[] lower than felony and generally those punishable by fine or imprisonment ...." Black's Law Dictionary (4th Ed. 1951); and "conviction" as "[t]he result of ... a criminal trial which ends in a judgment or sentence that the prisoner is guilty ...." Ibid. §202 is plainly a criminal statute.

As for the Indian Trade and Non-Intercourse Act, 25 U.S.C. §177, Plaintiffs invoke no legal authority contrary to the settled principle that "claims on the part of individual Indians or their representatives are not cognizable in federal courts under the Indian Trade and Non-Intercourse Act." Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979). Instead they simply argue that "even though the Plaintiffs are individual Indians they should be allowed to utilize the Act to protect their individual allotments and leases of Indian lands from illegal actions by the Defendants," Response Brief at 16, and that "[t]his is purely a matter of trespass and damage to allotted and leased lands, that the Act was legislative [sic] intended to hinder." Ibid. The last sentence is not altogether clear, but, if intended as an argument for finding a private right of action deriving from the Indian Trade and Non-Intercourse Act, it is plainly inadequate.[3]

So too is the bare assertion that "[t]he American Indian Agricultural Resource Management Act, 25 U.S.C. §3713, allows for civil penalties for commission of trespass on Indian agricultural

[3]See Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). We note that "Cort's four factors have been effectively condensed into one - whether Congress, expressly or by implication, intended to create a private cause of action," Sonnenfeld v. City and County of Denver, 100 F.3d 744, 747 (10th Cir. 1996), cert. denied, 520 U.S. 1228 (1997), and regret overlooking this simplification of the test in the first instance. However, we submit that in any case Plaintiffs have not begun to meet this "inten[t] to create a private cause of action" standard with respect to 25 U.S.C. §§ 177, 202 and 3713.

lands ... [but] does not prohibit and individual and private right of action." Response Brief at 18.

As for the remaining jurisdictional predicates alleged, §§ 345, 348 and 415 of Title 25 of the United States Code, Plaintiffs have failed to cite a single instance in which a court has held any one of them a basis for jurisdiction with respect to an action against Tribal officials and Tribal employees pursuant to the Ex parte Young doctrine.

As for joinder of parties "required" within the meaning of Rule 19 of the Federal Rules of Civil Procedure, Plaintiffs misapprehend Defendants' position with respect to joinder of the Tribe and the United States. They argue, not that the sovereign immunity of the Tribe mandates dismissal on failure of joinder grounds, but rather that tribal immunity is a factor that should weigh heavily in the determination "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed.R.Civ.P. 19(b). See Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999) ("strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity").

Plaintiffs recently attempted a filing styled "Motion to Amend Complaint and Stay Proceedings." ("Motion to Amend Complaint"). Though stricken for failure of compliance with Local Rule, the attached Motion to Amend Complaint nonetheless indicates Plaintiffs are in agreement the United States should be joined as a "required" party, and, if there exists the impediment to joinder suggested by the ongoing failure simply to join the United States as a party Defendant, that dismissal is indeed warranted by to Rule 19. See Imperial Granite Co. v. Pala Band of Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (United States an indispensable party in any suit to establish an interest in Indian trust lands).

Though the Court struck the Motion to Amend Complaint, representations made there nonetheless constitute admissions by a party opponent within the meaning of Rule 801(d)(2)(A) ("the party's own statement, in either an individual or a representative capacity ..."), which in this instance help establish both that the United States is a "required" party within the meaning of Rule 19, and that dismissal of the action is warranted in the absence of joinder. See Motion to Amend Complaint, ¶ 4 ("The Plaintiffs believe that the United States of America should be named as a party defendant as a matter of law"); ¶ 5 ("The Plaintiffs have in good faith attempted to allow the United States adequate time to ... rectify certain requirements of federal law"); ¶ 6 ("The United States has not acted, [and] consequently, the Plaintiffs now are required to name said party as a party defendant ...." (emphasis added)).

The latter formulation indicates Plaintiffs are fully aware that, if an action is somehow warranted to redress their alleged grievances, the action should lie, not against Fort Sill Apache officials, Tribal employees and Tribal commercial operations, but against the United States of America; and are aware further, that in the absence of joinder of the United States, dismissal is warranted pursuant to Rule 19 of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, and for such reasons as have already been asserted, Defendants respectfully request that this Court grant dismissal of the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure; and alternatively, that it grant dismissal for inability to join the Fort Sill Apache Tribe and the United States as required parties pursuant to Rule 19 of the Federal Rules. If any claim(s) survive their Motion to Dismiss, Defendants respectfully request that Court grant Defendants' Motion to Strike Claim

for Relief Pursuant to Rule 12(f) of the Federal Rules, namely, the claim for relief shown in the Complaint, Prayer for Relief, ¶ 6 ("[a]n order requiring the Defendant(s) to pay treble damages, in an amount to be proven at trial, but believed to exceed $15,000,000 including any consequential damages, plus interest, attorney fees and costs associated with the bringing of this action").

Respectfully submitted this 11th day March, 2009.

/s/ Robert E. Prince
Robert E. Prince, OBA No. 7316
Carter & Prince
632 "D" Avenue
Lawton, Oklahoma 73501
Telephone: 580.248.8015
Facsimile: 580.353.6888
Email: lawyers2@sbcglobal.net

/s/ Richard J. Grellner
Richard J. Grellner, OBA No. 15521
Law Office of Richard J. Grellner
439 NW 18th St
Oklahoma City, OK 73103
Telephone: 405-602-0384
Facsimile: 405-602-0990
Email: rjgrellner@hotmail.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2009 I caused Defendants' Brief in Reply to Response Brief of Plaintiffs to Motion to Dismiss/Strike to be transmitted to the Clerk of Court using the ECF system for filing, thereby serving the documents on:

Jon Velie, Esq.
VELIE & VELIE
210 East Main Street, Suite 222
Norman, OK 73069

Gary J. Montana, Esq.
N. 12923 N. Prairie Road
Osseo, WI 54758

/s/ Richard J. Grellner
Richard J. Grellner, OBA No. 15521