

1 MICHELLE A. CARR (SBN 231904)
2 AGUA CALIENTE BAND OF CAHUILLA INDIANS
3 5401 Dinah Shore Drive
4 Palm Springs, California 92264
5 Telephone: (760) 699-6800 x6862
6 Facsimile: (760) 699-6863

7
8 Attorney for Specially Appearing Defendant
9 AGUA CALIENTE BAND OF CAHUILLA
10 INDIANS

11
12 UNITED STATES DISTRICT COURT
13
14 SOUTHERN DISTRICT OF CALIFORNIA
15

16 ARMAND SAROLI, an individual

17 Plaintiff,

18 v.

19 AGUA CALIENTE BAND OF CAHUILLA
20 INDIANS, and DOES 1 to 50,

21 Defendants.

CASE NO. 10-CV-01748-BEN (NLS)

SPECIALY APPEARING DEFENDANT'S
REPLY TO PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS COMPLAINT FOR
LACK OF JURISDICTION [F.R.C.P. 12(B)(1)
& (2)]

Date: November 15, 2010

Time: 10:30 a.m.

Judge: Honorable Roger T. Benitez

Location: Courtroom 3 (4th Floor)
U.S. Courthouse
940 Front Street, San Diego, CA

INTRODUCTION

Nothing in Plaintiff's Opposition to the Agua Caliente Band of Cahuilla Indians' ("Tribe") Motion to Dismiss establishes any basis for federal jurisdiction over this suit against the Tribe nor overcomes the Tribe's sovereign immunity. Because Plaintiff fails to meet its burden of proving to this Court that personal jurisdiction exists over the specially appearing defendant Tribe or that the Court may exercise subject matter jurisdiction over Plaintiff's claims asserted against the Tribe, the Tribe's Motion to Dismiss, filed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (2), should be granted and this action against the Tribe dismissed with prejudice.

ARGUMENT AND AUTHORITY

I. Plaintiff Fails To Demonstrate Either an Express Waiver of the Tribe's Sovereign Immunity From Suit, or a Jurisdictional Basis For this Court to Compel Arbitration.

It is axiomatic that, absent a clearly and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state or federal tribunal. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Any waiver of a tribe's sovereign immunity "cannot be implied but must be unequivocally expressed." *Id.* The question as to whether a tribe's sovereign immunity bars suit against a tribe is jurisdictional in nature. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 173 (1977).

In the instant action, in order for the Court to consider the merits of the claims against the Tribe, Plaintiff must first demonstrate a waiver of the Tribe's immunity from suit. *Puyallup Tribe, Inc.*, 433 U.S. at 173. Although Plaintiff's Opposition urges this Court to retain jurisdiction for purposes of discovery, asserts the Tribe has waived its immunity as to this action, and requests the Court order the parties to arbitration, it fails to establish this Court's jurisdiction over the Tribe or the instant causes of action.

///

A. Contrary to Plaintiff's Assertion, This Court Should Not Retain Jurisdiction for Purposes of Discovery.

Despite Plaintiff's assertion that the Tribe has waived its immunity from suit as to the present action, Plaintiff requests this Court retain jurisdiction to permit discovery as to whether the Tribe waived its immunity. (Pl's. Opp'n p. 6 ¶¶ 15-17). In support of this request, Plaintiff relies upon language in *Great Western Casinos v. Morongo Band of Mission Indians*, examining the trial court's use of facts and evidence outside the face of the complaint to determine whether a tribe had waived its immunity. 74 Cal.App.4th 1407 (1999). However, this reliance is misplaced.

The issue in *Great Western* was not whether the trial court was required to permit discovery in the face of a motion to quash based on tribal sovereign immunity, but whether, under the circumstances, deviation from the well pleaded complaint rule was permissible. *Id.* at 1418. In *Great Western*, the trial court permitted the introduction of not only a management agreement between the parties, containing a limited waiver of the tribe's sovereign immunity, but also additional evidence and testimony, concerning the satisfaction of conditions precedent to invoking the waiver of immunity. *Id.* at 1415. On appeal, that court determined the lower court properly considered matters outside the complaint. *Id.* at 1418. The appeal court, determining it could properly consider all matters considered by the trial court, found the tribe did not waive its immunity for purposes of the suit. *Id.* at 1418, 1421.

Unlike, *Great Western*, Plaintiff does not allege and the Tribe does not assert that there exists, subject to conditions precedent, an express, unequivocal waiver of the Tribe's sovereign immunity as to tort claims in federal court. What Plaintiff does assert is that the Tribe has waived its immunity as to this instant action, citing no conditions precedent which could be established through additional discovery. Accordingly, the Court should find *Great Western's* reasoning inapplicable to the instant matter, and grant the Tribe's Motion to Dismiss.

1 Plaintiff bases its claim that the Tribe waived its sovereign immunity as to the
 2 instant action on language in the First Amendment to the Tribal-State Gaming Compact
 3 between the Agua Caliente Band of Cahuilla Indians and the State of California
 4 (“Amended Compact”). Contrary to Plaintiff’s assertion, however, the Amended Compact
 5 does not provide a waiver of the Tribe’s sovereign immunity from this suit in tort.

6 **B. Contrary to Plaintiff’s Assertion, Section 10.2 of the**
 7 **Amended Compact Does Not Provide An Express,**
 8 **Unequivocal Waiver of the Tribe’s Immunity From This**
 9 **Suit.**

10 In support of the assertion that the Tribe has waived its immunity and consented to
 11 this suit, Plaintiff cites and attaches as an exhibit to the Opposition that section of the
 12 Amended Compact, requiring the creation of a Tribal tort liability ordinance. (Pl’s. Opp’n
 13 Ex. 1). Specifically, Plaintiff invokes the requirement that, within such ordinance, the
 14 Tribe provide a limited waiver of its sovereign immunity for the resolution of tort claims.
 15 (Pl’s. Opp’n p. 3 ¶¶ 7-10). As asserted by Plaintiff throughout the Opposition, under this
 16 provision of the Compact, the Tribe agreed to waive its sovereign immunity to suit “in
 17 either federal court, or state court in Riverside.” (*Id.* p. 3 ¶¶ 7-10; p. 7 ¶¶ 16-19; p. 8 ¶¶ 16-
 18 17; p. 10 ¶¶ 6-8; p. 11 ¶¶ 10-11). However, the citation to Section 10.2(d) used by
 19 Plaintiff is the product of careful editing and does not reflect the actual language of the
 20 Amended Compact.

21 Section 10.2(d)(i) of the Amended Compact provides that the Tribe secure and
 22 maintain insurance for claims of bodily injury, property damage or personal injury, arising
 23 at its gaming facilities. (Pl’s. Opp’n Ex. 1 Sec. 10.2(d)(i)). In order to resolve any dispute,
 24 regarding the validity of said claims, the Tribe agreed to a limited waiver of its sovereign
 25 immunity, as to *arbitration* of tort claims. (*Id.* Sec. 10.2(d)(ii)(C)(emphasis added)).
 26 Additionally, the Tribe agreed to waive its sovereign immunity as to actions “brought in
 27 federal court or, if the federal court declines to hear the action, in any action brought in the
 28 courts of the State of California that are located in Riverside Country, including courts of

1 appeal,” to 1) enforce the parties’ obligation to arbitrate; 2) confirm, correct, modify, or
 2 vacate an arbitration award; or 3) enforce an arbitration award. (*Id.*). Nowhere in Section
 3 10.2 does the Tribe otherwise waive its sovereign immunity.

4 Because Plaintiff’s Complaint does not assert causes of action for which the Tribe
 5 has waived its sovereign immunity, he cannot demonstrate that this Court has jurisdiction
 6 over his claims or the Tribe. Furthermore, the Tribe’s limited waiver of its immunity as to
 7 arbitration proceedings, which it does not deny, does not automatically confer this Court
 8 with jurisdiction to compel arbitration.

9
 10 **C. Plaintiff Fails to Assert Any Jurisdictional Basis For This**
 11 **Court to Order the Parties to Arbitration.**

12 Federal courts possess jurisdiction over civil actions “arising under the
 13 Constitution, laws, or treaties of the United States” or where there exists diversity of
 14 citizenship. 28 U.S.C. §§ 1331-31. To invoke a federal court’s jurisdiction, the Complaint
 15 must contain “a short plain statement of the grounds for the court’s jurisdiction.”
 16 Fed.R.Civ.P. 8(a)(1).

17 Plaintiff’s Opposition states that this Court “may order the case to arbitration as a
 18 matter of law.” (Pl’s. Opp’n p. 3 ¶¶ 22-23). However, the Complaint fails to assert any
 19 grounds for this Court’s jurisdiction over Plaintiff’s request for an order to arbitrate.
 20 Instead, the Complaint asserts causes of action in premises liability, negligence, negligent
 21 hiring, training, supervision and retention. (Compl. pp. 4-8). It is only within the prayer
 22 for relief that Plaintiff requests the Court to “order the case to arbitration.” (*Id.* p. 8 ¶¶ 18-
 23 19). Plaintiff provides no federal law under which the Court may consider the request for
 24 an order to arbitrate.

25 Section 10.2(d)(ii)(C) of the Amended Compact provides a limited express waiver
 26 of the Tribe’s immunity as to actions “brought in federal court or, if the federal court
 27 declines to hear the action, in any action brought in the courts of the State of California
 28 that are located in Riverside Country, including courts of appeal,” to enforce the parties’

obligation to arbitrate. (Pl's. Opp'n Ex. 1 Sec. 10.2(d)(ii)(C)). Although the Amended Compact provides for federal court jurisdiction over certain actions related to arbitration, it also contemplates that federal courts may decline to hear such claims, providing, in such case, for California State court jurisdiction in Riverside County. (*Id.*). In determining whether this Court may hear actions, regarding arbitration, the Amended Compact is inapplicable as "[p]arties may not agree to invest this Court with subject matter jurisdiction" where none otherwise exists. *Harris v. Sycuan Band of Diegueno Mission Indians*, 2009 WL 528799 (S.D. Cal.). Despite the Amended Compact, because the Complaint, on its face, fails to allege any federal law under which the request to order arbitration arises, the Court is without jurisdiction to order the parties to arbitration.

Last, because an Indian tribe is not a citizen of any state and is not a foreign state for diversity jurisdiction purposes, Plaintiff cannot invoke this Court's jurisdiction over its request for arbitration on this basis. *American Vantage Companies, Inc. v. Table Mountain Rancheria* 292 F.3d 1091 (9th Cir. 2002).

II. Plaintiff Fails to Meet the Burden of Proving This Court Has Jurisdiction Over the Tribe and its Claims Against the Tribe, or to Compel Arbitration.

On a motion to dismiss for lack of subject matter jurisdiction, Plaintiff bears the burden of establishing the court's jurisdiction. *In re Dynamic Random Access Memory Antitrust Litig. v. Micron Tech., Inc.*, 546 F.3d 981, 985 (9th Cir. 2008). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *Id.* The question as to whether a tribe's sovereign immunity bars suit against a tribe is jurisdictional in nature. *Puyallup Tribe, Inc.*, 433 U.S. at 173. A Tribe's immunity may only be waived by Congress or the tribe and must be clear and unequivocal. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

The Agua Caliente Band of Cahuilla Indians is a federally recognized Indian tribe. 74 Fed. Reg. 40,218 (August 11, 2009). As a sovereign Indian nation, unless its immunity

1 is expressly waived, the Agua Caliente Tribe is immune from suit. *C & L Enter., Inc. v.*
 2 *Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Here, Plaintiff fails
 3 to allege facts sufficient to enable the court to find as a matter of law that the tribe has
 4 expressly waived its immunity or that Congress has abrogated that immunity. *Puyallup*
 5 *Tribe, Inc.*, 433 U.S. at 173. Consequently, Plaintiff fails to meet its burden of establishing
 6 this Court's jurisdiction over the Tribe or the subject matter of the action against the Tribe.

7 Regarding, Plaintiff's request that this Court order the parties to arbitration, the
 8 Complaint, on its face, fails to allege the dispute arose under federal law or that diversity of
 9 citizenship exists. 28 U.S.C. §§ 1331-31. Accordingly, Plaintiff fails to meet the burden
 10 of establishing this Court's jurisdiction over the request to order the parties to arbitration.

11 CONCLUSION

12
 13 Plaintiff's Complaint failed to demonstrate an express, unequivocal waiver of the
 14 Tribe's immunity from suit. Plaintiff's Opposition does nothing to disturb the Tribe's
 15 sovereign immunity from suit. Further, Plaintiff's request for an order for arbitration fails
 16 to establish a jurisdictional basis for this Court to make such an order. For all the reasons
 17 set forth above, the Court lacks jurisdiction over the Tribe and subject matter jurisdiction
 18 over Plaintiff's claims against the Tribe should therefore dismiss this action pursuant to
 19 FRCP 12(b)(1) & (2).

20
 21 Dated: November 8, 2010

Respectfully submitted,

22
 23 By: s/ Michelle A. Carr

24 Attorney for Specially Appearing Defendant
 25 AGUA CALIENTE BAND OF CAHUILLA INDIANS
 26 Email: mcarr@aguacaliente.net
 27
 28