

The National Indian Gaming Commission, ignoring this Court's requirement of consultation with opposing counsel (L.R. CV-7(h)), filed an over length single motion raising at least four different issues, three of which are jurisdictional and one of which goes to the heart of the case. (Dkt. 18). The clerk of the Court rejected the over length motion, pending this Court's ruling on NIGC's motion for leave to exceed applicable page limitations. (Notice of correction, entered 9/14/10). This Court should not permit the defendant to file its over length, merits based motion to dismiss. If this Court has no jurisdiction, then it has no power to rule on the merits and need not address the final four pages in NIGC's sixteen page motion. Forcing the plaintiff to address three jurisdictional arguments and the merits of the case in a single response to a Rule 12(b) motion to dismiss is unnecessary and improper.

ARGUMENT

I. NIGC's request to be excused from complying with page limitations should be denied.

NIGC asks to avoid specific page limitations imposed by this Court. Yet the only reason NIGC identifies supporting its request to do so is that, in making its multiple arguments both as to subject matter jurisdiction and the unrelated argument on the merits, “NIGC has tried to be as succinct as possible; we believe that further efforts to compress the motion would ill serve the Court.” Def.’s Mot. at 1. Other than this one sentence in the motion itself, without citation of a single case in support of its request, and contrary to this Court’s local rules requiring that the “specific legal authorities supporting any motion shall be cited in the motion,” NIGC offers nothing to explain why page limits should be ignored in these proceedings. L.R. CV-7(c); *accord Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 149-150 (4th Cir. 2009) (affirming district court’s sanctions for exceeding page limitations); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 452 (6th Cir. 2008) (holding “the district court did not abuse its discretion in denying [party’s] request for an increase in the page limit”); *United States v. Mahdi*, 2007 U.S. App. LEXIS 9002 (D.C. Cir. 2007) (“Appellant has provided no additional information to justify this renewed request” to exceed word limitations).

Indeed, even when the parties agree that page limits should be exceeded, courts in this Circuit do not hesitate to deny such requests. For example, in *Eolas Technologies, Inc. v. Adobe Systems, Inc., et al.*, Case No. 6:09-CV-446, Docket No. 402, Order (E.D. Tex. September 2, 2010) the district court denied the parties’ joint motion for leave to exceed page limits, reasoning:

The Local Rules’ page limits ease the burden of motion practice on both the Court and the parties. This Court has hundreds of complex cases and deals with a large number of motions each year. It has become common

practice for parties to regularly expect to exceed the District's page limits on nearly all briefs filed in this Court, which has placed an increased burden on the Court. Even small extensions combine to greatly increase the number of pages of briefing the Court must digest, as well as ruling on all of the motions to exceed page limits.

Id. See Order attached as Exhibit A. See also *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.* 233 F.R.D. 492, 493 (E.D. Tex. 2005) ("The court is not inclined, especially at the beginning of the case, to invite a paper war, with briefs, responses, replies, and sur-replies of geometrically increasing length").

II. NIGC's motion to dismiss based on "Issue Preclusion" should be addressed separately once jurisdiction is established.

Beginning two pages beyond its ten page limit, and consuming an additional four pages, NIGC seeks to argue that "issue preclusion" requires dismissal of the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. See *Barber v. Motor Vessel "Blue Cat"*, 372 F.2d 626, 627 (5th Cir. 1967) ("the Trial Court forgot the lesson so often brought home by us that at this day and time dismissal of a claim . . . on the basis of the barebones pleadings is a precarious one with a high mortality rate"). Issue preclusion is an affirmative defense that need not be included in this motion at all, which will not be reached until this Court confirms its subject matter jurisdiction, and which will require a lengthy response on the merits. *Kee v. City of Garland*, 1999 U.S. Dist. LEXIS 6271 (N.D. Tex. 1999) ("Defendants' reliance on the defense of issue preclusion--collateral estoppel--may be well taken . . . [b]ut the court cannot confidently determine from the pleadings alone that this defense is valid , and . . . concludes that dismissal based on the pleadings alone is unwarranted").

Moreover, it is less than certain that a motion to dismiss based on issue preclusion is appropriate under rule 12(b)(6). Compare 18 Moore's Federal Practice § 132.05[6][a]-[b] (Supp. 2010) (stating that issue preclusion may be raised on a motion to dismiss but not under Rule

12(b)(6)) *with* 18 Alan Wright et al., Federal Practice & Procedure § 4405, at 103 & nn.32-33 (2d ed. & Supp. 2009) ("In various circumstances, preclusion defenses have been entertained on motions to dismiss. This procedure is most appropriate if the defense appears on the face of the complaint, but it has also been indulged when the parties have acquiesced and there is no apparent harm. If matters outside the pleadings are considered, it is better to treat the motion as one for summary judgment." (footnotes omitted)).

As a result, NIGC should not be allowed to exceed page limits set by this Court simply so that NIGC can include at this early stage of the proceedings its "issues preclusion" affirmative defense.

CONCLUSION

Court's establish page limitations for a reason. Leave to exceed those limits should be denied where, as here, early in litigation a defendant attempts to include unrelated, expansive arguments addressing both jurisdictional issues and the merits of the case.

September 15, 2010

Respectfully submitted,

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Admitted Western Dist. of Texas Nov. 4, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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/s/ Randolph Barnhouse
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