

1 ROBERT B. ZARO (#83078)
STEPHEN L. RAMAZZINI (#173501)
2 JOHN J. SILLIS (#135556)
ZARO SILLIS & RAMAZZINI, LLP
3 1315 I Street, Suite 200
Sacramento, CA 95814
4 Telephone: (916) 442-4840
Facsimile: (916) 442-2625
5

6 Attorneys for Defendants Rolling Hills Casino,
Art Felix (sued in error as Eric Felix), and
7 Jon Pata (sued in error as Jon Pada).
8

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 ROGER CLARK,)
12 Plaintiff, In Pro Se,)
13 v.)
14 ROLLING HILLS CASINO, COUNTY)
OF TEHAMA, TEHAMA COUNTY)
15 SHERIFF'S DEPARTMENT, CLAY)
PARKER, OFFICER BENNETT,)
16 OFFICER BENSON, ERIC FELIX, JON)
PADA, DOES 1 - 25,)
17 Defendants.)
18

Case No. CIV S-09-1948-JAM-CMK

**MOTION TO DISMISS PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(1) & (6)**

Date: April 7, 2011
Time: 10:00 a.m.
Dept: REDDING
Trial Date: None
Complaint Filed: July 16, 2009

TABLE OF CONTENTS

1		
2	I. INTRODUCTION	1
3	II. STATEMENT OF FACTS	1
4	A. Background	1
5	B. Incident	2
6	C. Plaintiff Improperly Files in Federal Court	2
7	III. LEGAL ARGUMENT	4
8	A. Motion to Dismiss	4
9	1. Subject Matter Jurisdiction	4
10	a) Facial Attack	5
11	b) Factual Attack	6
12	B. Sovereign Immunity	7
13	1. Immunity of Rolling Hills Casino	7
14	2. Immunity of Art Felix and Jon Pata	8
15	a) Scope of Employment	10
16	3. Limited Waiver of Immunity	12
17	4. The Tort Claims Act	12
18	C. Failure to State a Claim	13
19	1. Negligence	13
20	a) Rolling Hills Casino	13
21	i. <i>Respondeat Superior</i>	14
22	ii. Negligent Supervision	14
23	b) Art Felix and Jon Pata	15
24	i. <i>Respondeat Superior</i>	15
25	ii. Negligent Supervision	15
26	D. Claims Against "Doe" Defendants	15
27	E. Punitive Damages and Attorney's Fees	16
28	IV. CONCLUSION	17

1 **TABLE OF AUTHORITIES**

2 **United States Supreme Court Cases**

3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) 13

4 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) 13

5 *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) . 6-8

6 *Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165 (1977) 5

7 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) 12

8 *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) 11

9 **United States Court of Appeals Cases**

10 *Allen v. Gold Country Casino*, 464 F. 3d 1044 (9th Cir. 2006) 7-8

11 *Alvarado v. Table Mountain Rancheria*, 509 F. 3d 1008 (9th Cir. 2007) 7

12 *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F. 3d 1198 (9th Cir. 2003) . 16

13 *Colwell v. Department of Health and Human Services*, 558 F. 3d 1112 (9th Cir. 2009) 4

14 *Cook v. AVI Casino Enterprises, Inc.*, 548 F. 3d 718 (9th Cir. 2008) 5, 8, 10-11, 16

15 *Cooper v. Pickett*, 137 F. 3d 449 (9th Cir. 1998) 13

16 *Demontiney v. United States*, 255 F. 3d 801 (9th Cir. 2001) 12

17 *Kescoli v. Babbitt*, 101 F. 3d 1304 (9th Cir. 1996) 12

18 *Lee v. City of Los Angeles*, 250 F. 3d 668 (9th Cir. 2001) 13

19 *Lineen v. Gila River Indian Community*, 276 F. 3d 489 (9th Cir. 2002) 8

20 *Marceau v. Blackfeet Hous. Auth.*, 455 F. 3d 974 (9th Cir. 2006) 5

21 *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F. 3d 768 (9th Cir. 2002) 10

22 *Randolph v. Budget Rent-A-Car*, 97 F. 3d 319 (9th Cir. 1996) 10

23 *Safe Air for Everyone v. Meyer*, 373 F. 3d 1035 (9th Cir. 2004) 4

24 *Savage v. Glendale Union High School*, 434 F. 3d 1036 (9th Cir. 2003) 4

25 *Snow v. Quinault Indian Nation*, 709 F. 2d 1319 (9th Cir. 1983) 11

26 *Stock West Corp. v. Lujan*, 982 F. 2d 1389 (9th Cir. 1993) 7

27 *Wolfe v. Strankman*, 392 F. 3d 358 (9th Cir. 2004) 4

28 *United States v. Oregon*, 657 F. 2d 1009 (9th Cir. 1981) 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Other Federal Cases

Allen v. Mayhew, No. CIV S-04-0322-LKK-CMK, slip op. (E.D. Cal. Feb. 20, 2009)
(2009 WL 426091 (E.D.Cal.)) 8-11, 13, 16

Allen v. Mayhew, No. CIV S-04-0322-LKK-CMK, slip op. (E.D. Cal. Mar. 27, 2009)
(2009 WL 805786 (E.D.Cal.)) 9

California Cases

Ameriloan v. Superior Court, 169 Cal. App. 4th 81 (2008) 5

Bowers v. Olch, 120 Cal. App. 2d 108 (1953) 15

Doe v. Capital Cities, 50 Cal. App. 4th 1038 (1996) 14

In re Dormio, 127 Cal. App. 3d 788 (1981) 17

John B. v. Superior Court, 38 Cal. 4th 1177 (2006) 13

Lathrop v. Healthcare Partners Medical Group, 114 Cal. App. 4th 1412 (2004) 14

Lawrence v. Barona Valley Ranch Resort and Casino, 153 Cal. App. 4th 1364 (2007) 17

Juarez v. Boy Scouts of America, Inc., 81 Cal. App. 4th 377 (2000) 14

Malloy v. Fong, 37 Cal. 2d 356 (1951) 15

Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632 (1999) 7, 11

Federal Statutes

25 U.S.C. § 2701, *et seq.* (Indian Gaming Regulatory Act ("IGRA")) 1, 12

Federal Rules

Fed. R. Civ. P. 12(b) 4

California Statutes

Civil Code § 3295(e) 17

Government Code § 12012.25(a)(30) 1, 4, 12

Other Authorities

Restatement (Second) of Agency § 219 10

Restatement (Second) of Agency § 228 10

I

INTRODUCTION

Plaintiff Roger Clark ("Plaintiff") has filed a First Amended Complaint in this court alleging that on July 19, 2008, he suffered personal injury while a patron at Defendant Rolling Hills Casino ("Rolling Hills"). Defendants Rolling Hills, Art Felix (sued in error as Eric Felix), and Jon Pata (sued in error as Jon Pada) (collectively, "Defendants"), hereby move to dismiss this pleading for lack of subject matter jurisdiction due to sovereign immunity. Defendants also move to dismiss this pleading on the grounds of failure to state a claim upon which relief can be granted.

II

STATEMENT OF FACTS

A. Background

The Paskenta Band of Nomlaki Indians ("the Tribe") is a federally recognized Indian tribe and, as such, maintains tribal sovereign immunity over activities on its land. Pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. section 2710 *et seq.* ("IGRA"), the Tribe entered into the Tribal-State Compact Between The State of California And The Paskenta Band of Nomlaki Indians ("Compact") with the State of California on September 10, 1999, to allow it to operate gambling facilities within the State. See *Compact*, attached as Exhibit A to the Declaration of Jon Pata ("Pata Dec."), filed herewith, pp. 1-3.

The terms and conditions of the Compact are formally adopted by the State of California under Government Code § 12012.25(a)(30) ("Ratification of Tribal-State Gaming Compacts"). In accordance with Sec. 10.2(d) of the Compact, Defendant adopted a Tribal Tort Claims Act ("TCA"), which provides in part as follows:

Section 4-101. Purpose

- (a) This Chapter establishes the comprehensive tort claims process and to provides an exclusive remedy for all actions arising in tort against the Band or its chartered corporations.
- (b) The Band waives its sovereignty, only to the extent granted by this Chapter and enforceable only in tribal court, in order to provide a means of redress.

Section 4-203

Any waiver of sovereign immunity and any claim cognizable under this Chapter shall only be enforceable in Tribal Court.

Section 4-506 Exclusiveness of remedy

(b) The remedy against the Band provided by this Chapter for injury or loss of property, or personal injury or death, civil or administrative actions arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any Other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

See Exhibit B to the Pata Dec., pp. 1-2, 7.

B. Incident

Plaintiff alleges that the incident giving rise to his claim for monetary damages occurred on July 19, 2008, at Rolling Hills Casino. See Plaintiff's *First Amended Complaint* ("FAC"), attached as Exhibit C to the Declaration of Robert B. Zaro ("Zaro Dec."), ¶ 5. On that date, he began to feel ill after drinking a diet Coke in the "lounge called Carlino's." Exhibit C to the Zaro Dec., 3:31-4:2. He alleges that, subsequently, he was not allowed to leave or seek medical attention. Exhibit C to the Zaro Dec., 4:2-24. As a result, Plaintiff alleges he suffered "emotional and physical and medical[] damage[s]." Exhibit C to the Zaro Dec., 5:17-18.

C. Plaintiff Improperly Files in Federal Court

On July 16, 2009, Plaintiff filed a Complaint in this Court, naming Rolling Hills Casino ("Rolling Hills") among the various defendants. See Plaintiff's *Complaint*, attached to the Zaro Dec. as Exhibit D, p. 1. The Complaint alleged various actions by "Doe" defendants, purported to be employees of Rolling Hills. Exhibit D to the Zaro Dec., ¶ 5.

On May 5, 2010, United States Magistrate Judge, Craig M. Kellison, following a screening of the Complaint, issued an Order finding, *inter alia*, that the Complaint "fail[ed] to state a cause of action upon which relief can be granted against Rolling Hills Casino." See *Order* dated May 5, 2010, attached to the Zaro Dec. as Exhibit E, 6:22-23. Specifically, Judge Kellison found that

1 Rolling Hills enjoyed sovereign immunity from suit. Exhibit E to the Zaro Dec., 3:8-25.
2 Furthermore, as Plaintiff had alleged that the "Doe" employees were acting within the scope of their
3 employment, such employees were immune as well. Exhibit E to the Zaro Dec., 3:8-25.
4 Nevertheless, Plaintiff was granted leave to amend. Exhibit E to the Zaro Dec., 8:6-7.

5 On June 2, 2010, Plaintiff filed his First Amended Complaint ("FAC") in this Court, naming
6 as defendants, *inter alia*, Rolling Hills Casino, Eric Felix and Jon Pada, the latter two alleged to be
7 employees of Rolling Hills. Exhibit C to the Zaro Dec., pp. 1, 4. Once again, the FAC alleges
8 various actions by "Doe" defendants, also purported to be employees of Rolling Hills. Exhibit C to
9 the Zaro Dec., ¶ 5.

10 Specifically, Plaintiff once again alleges he was a patron of Rolling Hills Casino on July 19,
11 2008. Exhibit C to the Zaro Dec., 3:26-29. On that date, he began to feel ill after drinking a diet
12 Coke in the "lounge called Carlino's." Exhibit C to the Zaro Dec., 3:31-4:2. Plaintiff further alleges
13 as follows:

14 "Roger Clark then attempted to leave that facility and seek immediate
15 medical attention. Three employees of defendant Does 1-3 of Rolling
16 Hills Casino took plaintiff by the arm and held on to him against his
17 will. Roger Clark then told these employees that he was ill and
18 needed medical attention. These employees while acting in their
19 official capacity as agent servants and employees in the course of
20 their employment refused to get Roger Clark medical attention."
21 Exhibit C to the Zaro Dec., 4:2-11.

22 "Roger Clark then attempted to leave that facility and get medical
23 attention however these three employees known as does 1-3, while
24 acting under the control and supervision of defendant Eric Felix and
25 Jon Pada, and acting in the official capacity of defendant Rolling
26 Hills Casino, refused to allow plaintiff to leave the premises and get
27 that medical attention." Exhibit C to the Zaro Dec., 4:12-18.

28 Subsequently, Judge Kellison screened the FAC. Despite the previous findings of sovereign
immunity, this Court declined to screen the "pendent" state law claims against the above-named
defendants, and on October 29, 2010 ordered issuance of a Summons for each of these defendants.
See *Order* dated October 29, 2010, attached to the Zaro Dec. as Exhibit F, 3:3-4.

On December 13, 2010, Plaintiff sent to Defendants, by way of U.S. Marshal, requests for
waiver of service pursuant to Federal Rule of Civil Procedure 4(d). In turn, Defendants filed this

1 Motion to Dismiss.

2 **III**

3 **LEGAL ARGUMENT**

4 As a matter of law, this Court is without jurisdiction to adjudicate the claims set forth in
 5 Plaintiff's FAC. This lack of jurisdiction is based on the well-settled doctrine of tribal sovereign
 6 immunity as set forth in the Compact between the Tribe and the State of California and formally
 7 adopted under Government Code § 12012.25(a)(30). The categorization of claims as "pendent" or
 8 "supplemental" has no bearing on Defendants' immunity.

9 Furthermore, Plaintiff has failed to state a claim against Defendants upon which relief can
 10 be granted. Accordingly, Defendants respectfully request the Court grant their Motion to Dismiss.

11 **A. Motion to Dismiss**

12 Under Federal Rule of Civil Procedure ("FRCP") 12(b), a defendant may move to dismiss
 13 a complaint on, *inter alia*, the following grounds:

- 14 (1) lack of subject-matter jurisdiction
- 15 (6) failure to state a claim upon which relief can be granted

16 **1. Subject Matter Jurisdiction**

17 Motions contesting subject matter jurisdiction may be either facial or factual. See *Wolfe v.*
 18 *Strankman*, 392 F. 3d 358, 362 (9th Cir. 2004). In a "facial attack," challenging the sufficiency of
 19 the complaint itself, the court accepts the plaintiff's allegations as true. Conversely, in a "factual
 20 attack," challenging the truthfulness of the factual allegations in the complaint upon which subject
 21 matter jurisdiction is based, the presumption that the plaintiff's allegations are true disappears, and
 22 the court may look beyond the complaint and consider extrinsic evidence in order to satisfy itself of
 23 its power to hear the case. See *Id.*; see also *Safe Air for Everyone v. Meyer*, 373 F. 3d 1035, 1036
 24 (9th Cir. 2004) and *Savage v. Glendale Union High School*, 434 F. 3d 1036, 1040, n. 2 (9th Cir.
 25 2003).

26 Where the moving party presents admissible evidence, it becomes necessary for the opposing
 27 party to present evidence to satisfy its burden that the court has subject matter jurisdiction. *Colwell*
 28 *v. Department of Health and Human Services* (9th Cir. 2009) 558 F. 3d 1112, 1121.

a) **Facial Attack**

On its face, Plaintiff's FAC demonstrates this Court lacks subject matter jurisdiction as all claims against these moving defendants arise entirely out of the operation of Rolling Hills Casino ("Rolling Hills"), a gaming facility owned by the Paskenta Band of Nomlaki Indians ("the Tribe"), a federally-recognized, sovereign Indian tribe. Exhibit C to the Zaro Dec., 2:9-12. Both state and federal law recognize that all courts lack jurisdiction over such matters absent waiver or congressional abrogation of immunity. *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81, 93 (2008); *Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165, 173 (1977).

Rather than address this issue, Plaintiff's FAC simply states, "[t]he court has jurisdiction over Rolling Hills Casino as they are a Tribal organization and the acts or failure to act committed by the defendants were acts committed on an Indian Reservation." Exhibit C to the Zaro Dec., 2:14-17. However, this unsupported allegation serves only to *disprove* jurisdiction. By expressly acknowledging both the identity of the Tribe and the that the alleged incident occurred on an Indian Reservation, Plaintiff has demonstrated this court lacks jurisdiction over Defendant Rolling Hills. Indeed, essentially the same assertion was found insufficient by Magistrate Judge Kellison. Exhibit E to the Zaro Dec., 3:20-22.

Plaintiff further admits that "[t]he defendant Rolling Hills Casino, [Art] Felix, Jon [Pata] and does 4 are defendant located on an Indian Reservation in the County of Tehama, State of California, Eastern District of California, United States District Court." Exhibit C to the Zaro Dec., 2:29-32. By doing so, Plaintiff demonstrates that this court also lacks jurisdiction over Defendants Felix and Pata.

As more thoroughly discussed, *infra*, Indian tribes enjoy immunity from suit in both state and federal court. *United States v. Oregon*, 657 F. 2d 1009, 1012 (9th Cir. 1981). This protection extends to businesses functioning as an arm of the tribe, *Marceau v. Blackfeet Hous. Auth.*, 455 F. 3d 974, 978 (9th Cir. 2006), as well as tribal employees acting in their official capacity, *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726-727 (9th Cir. 2008).

Plaintiff further acknowledges his claim is in fact a patron tort claim governed by the Compact and the TCA. Indeed, Plaintiff alleges that on July 19, 2008, Defendant Rolling Hills

1 "invited [him] to come onto their gaming facility to participate in a raffle." Exhibit C to the Zaro
 2 Dec., 3:26-29. Furthermore, each of the alleged acts or omissions occurred while Plaintiff was still
 3 a patron of Rolling Hills on that date. Exhibit C to the Zaro Dec., ¶ 5.

4 As a patron, Plaintiff's avenue of redress for his claim is governed by the Tribe's Compact
 5 and TCA. Notably, Plaintiff's FAC makes no mention whatsoever of any attempts to exhaust such
 6 administrative remedies. Regardless, as set forth in the TCA and discussed, *infra*, the Tribe's
 7 administrative remedies represent Plaintiff's sole avenue for redress. As such, this Court lacks
 8 jurisdiction over patron claims arising out of the operation of Rolling Hills.

9 **b) Factual Attack**

10 Plaintiff purports to assert jurisdiction over Defendants based upon the following:

11 "The defendant Rolling Hills Casino and its co defendants are not
 12 only conspirators but are an Indian Tribe and the acts committed by
 13 these defendants are on an Indian Tribal land and Reservation." Exhibit C to the Zaro Dec., 2:9-12.

14 "The court has jurisdiction over Rolling Hills Casino as they are a
 15 Tribal organization and the acts or failure to act committed by the
 16 defendants were acts committed on an Indian Reservation." Exhibit C to the Zaro Dec., 2:14-17.

17 However, the above assertions are factually untrue in that the court does not have jurisdiction
 18 over Defendants. The fact that any alleged act or omission occurred on tribal land does not establish
 19 jurisdiction. Indeed, absent waiver or congressional abrogation of immunity, this court lacks
 20 jurisdiction over any Indian tribe. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*,
 21 498 U.S. 505, 509 (1991). Furthermore, Defendants have submitted admissible evidence in the form
 22 of the Compact and TCA establishing the limited waiver of sovereign immunity does not extend to
 23 this Court's jurisdiction. See Exhibits A and B to the Pata Dec.

24 Moreover, Plaintiff may not simply claim "pendent jurisdiction" based upon state law claims
 25 in order to establish subject matter jurisdiction. Tribal sovereign immunity operates to bar all claims
 26 in all courts, regardless of any jurisdictional "hook."

27 Finally, as discussed, *infra*, Defendants Art Felix and Jon Pata are officials and/or employees
 28 of the Tribe. While, as noted, *supra*, Plaintiff has already acknowledged that these defendants were
 acting within the scope of their authority, Defendants have submitted admissible evidence in the

1 form of declarations explaining these defendants' positions with the Tribe and/or its gaming facility,
2 Rolling Hills.

3 Accordingly, Defendants Felix and Pata are covered by the Tribe's immunity from suit. As
4 such, this court lacks subject matter jurisdiction over Plaintiff's claims against these individuals.

5 **B. Sovereign Immunity**

6 "Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought
7 against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action
8 against an Indian tribe." *Alvarado v. Table Mountain Rancheria*, 509 F. 3d 1008, 1015-1016 (9th
9 Cir. 2007). "Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver
10 by the tribe or congressional abrogation." *Oklahoma Tax Comm'n*, 498 U.S. at 509; *Stock West*
11 *Corp. v. Lujan*, 982 F. 2d 1389, 1398 (9th Cir. 1993).

12 A tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies
13 which act as an arm of the tribe. *Allen v. Gold Country Casino*, 464 F. 3d 1044, 1046 (9th Cir.
14 2006). "When the tribe establishes an entity to conduct certain activities, the entity is immune if it
15 functions as an arm of the tribe." *Id.*; see also *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App.
16 4th 632, 642 (1999).

17 **1. Immunity of Rolling Hills Casino**

18 Numerous federal and state courts have made clear that tribal sovereign immunity extends
19 to tribal casinos. Accordingly, Rolling Hills Casino is protected by sovereign immunity as well.

20 In *Allen*, the Ninth Circuit Court of Appeals examined the issue of whether the sovereign
21 immunity enjoyed by the Tyme Maidu Tribe extended to their gaming facility, Gold Country Casino.
22 464 F. 3d at 1046-1047. The court found as follows:

23 "With the tribe owning and operating the Casino, there is no question
24 that these economic and other advantages inure to the benefit of the
25 Tribe. Immunity of the Casino directly protects the sovereign Tribe's
26 treasury, which is one of the historical purposes of sovereign
27 immunity in general. In light of the purposes for which the Tribe
28 founded this Casino 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 the Tribe's immunity from
suit." *Id.*, at 1047, citations omitted.

Accordingly, the Ninth Circuit affirmed the District Court's dismissal of the plaintiff's claims

1 against the tribe and casino on the ground of sovereign immunity. *Id.*, at 1048.

2 Here, it is undisputed that the Paskenta Band of Nomlaki Indians ("the Tribe") is a federally-
3 recognized, sovereign Indian tribe. As set forth in the Compact, and as mandated by federal law
4 under IGRA, the Tribe owns and operates its gaming facility, Rolling Hills Casino ("Rolling Hills").

5 In *Allen*, the Ninth Circuit noted that an Indian casino "is not a mere revenue-producing tribal
6 business." *Id.*, at 1046. Rather, tribal casinos have a far greater purpose:

7 "The IGRA provides for the creation and operation of Indian casinos
8 to promote "tribal economic development, self-sufficiency, and strong
9 tribal governments. One of the principal purposes of the IGRA is to
ensure that the Indian tribe is the primary beneficiary of the gaming
operation." *Id.*, internal quotations and citations omitted.

10 In this case, the Tribe's Compact reflects the same federally-mandated purpose for creating
11 its gaming facility, Rolling Hills Casino. Exhibit A to the Pata Dec., pp. 1-3. Accordingly, just as
12 in *Allen*, there can be no question that Defendant, Rolling Hills, enjoys the same sovereign immunity
13 as the Tribe, which owns and operates it. Therefore, sovereign immunity precludes this court's
14 subject matter jurisdiction as to Defendant, Rolling Hills, unless Plaintiff can show it has been
15 expressly waived. *Oklahoma Tax Comm'n*, 498 U.S. at 509.

16 2. Immunity of Art Felix and Jon Pata

17 It is undisputed that a tribe's immunity "extends to tribal officials when acting in their official
18 capacity and within the scope of their authority." *Cook*, 548 F. 3d at p. 727, quoting *Linneen v. Gila*
19 *River Indian Community*, 276 F. 3d 489, 492 (9th Cir. 2002).

20 In *Cook*, the Ninth Circuit addressed the issue of whether tribal immunity applied to tribal
21 employees acting within the scope of their authority. *Id.*, at 726-727. Furthermore, the Ninth Circuit
22 held that tribal employees are no different than tribal officials acting in their official capacity and
23 within the scope of their authority, and are thus covered by sovereign immunity. *Id.*, at 727. As a
24 result, the plaintiff could not bypass sovereign immunity by merely naming a tribal official or
25 employee when they are sued in their official capacity. *Id.*

26 That holding was cited the following year by Judge Kellison in his findings and
27 recommendations regarding *Allen v. Mayhew*, No. CIV S-04-0322-LKK-CMK, slip op. at p. 6 (E.D.
28 Cal. Feb. 20, 2009) (hereafter, "*Mayhew*, 2009 WL 426091 (E.D. Cal.)"). Furthermore, as noted by

1 Judge Kellison, "the important question becomes not whether [the defendants] are officials, but
 2 whether they were acting within the scope of their employment." *Id.* Judge Kellison's findings and
 3 recommendations were adopted in full by Senior District Judge, Lawrence K. Karlton. *Allen v.*
 4 *Mayhew*, No. CIV S-04-0322-LKK-CMK, slip op. at p. 3 (E.D. Cal. Mar. 27, 2009) (hereafter,
 5 "*Mayhew*, 2009 WL 805786 (E.D. Cal.)").

6 In *Mayhew*, the plaintiff named as defendants several members of the Tribal Gaming
 7 Commission for Gold Country Casino, the gaming facility owned by the Berry Creek Rancheria of
 8 Tyme Maidu Indians. *Mayhew*, 2009 WL 426091 at 1, 4. The defendants submitted evidence that
 9 these members were all "elected by the general membership of the Tribe, answer[ed] directly to the
 10 tribal members, and [were] responsible for the Casino's compliance with the law." *Id.*, at 6. As such,
 11 the court found those defendants "are not only employees of the Tribe or Casino, but they are
 12 actually officials of the Tribe." *Id.*

13 The *Mayhew* plaintiff also named as a defendant the casino's Security Manager. *Id.*, at 5.
 14 The defendants submitted evidence that the Security Manager was "responsible for assuring the
 15 safety of persons and property at the Casino" and "report[ed] directly to the Casino's General
 16 Manager." *Id.*

17 Accordingly, the court found that, while the Security Manager may not be an "official" of the
 18 Tribe, he was undoubtedly an employee. *Id.*, at 6. Therefore, the only relevant question became
 19 whether the employees were acting within the scope of their employment. *Id.*

20 In this case, Defendant Jon Pata is the Vice-Chairman of the Tribal Gaming Commission.
 21 Pata Dec., ¶ 1. He was appointed to this position by the Tribal Council. Pata Dec., ¶ 2. As Vice-
 22 Chairman, he answers directly to the Tribal Council. Pata Dec., ¶ 3. The Tribal Gaming
 23 Commission is primarily responsible for carrying out the Tribe's regulatory responsibilities under
 24 the IGRA and the TCA. Pata Dec., ¶ 4. Accordingly, just as in *Mayhew*, it is undisputed that
 25 Defendant Pata is an official of the Tribe.

26 Defendant Art Felix is the Security Manager for Rolling Hills. Felix Dec., ¶ 1. As Security
 27 Manager, Mr. Felix is responsible for assuring the safety of persons and property at the Casino.
 28 Felix Dec., ¶ 3. He reports directly to the Casino's General Manager. Felix Dec., ¶ 4. Accordingly,

1 just as in *Mayhew*, it is undisputed that Defendant Felix is a tribal employee, if not an official in his
2 own right.

3 In this case, Plaintiff has not clearly specified whether he is suing Defendants Pata and Felix
4 in their official or individual capacities. Accordingly, the relevant question is whether they were
5 acting within the scope of their employment. *Cook*, 548 F.3d at 727; *Mayhew*, 2009 WL 426091,
6 at 6.

7 **a) Scope of Employment**

8 In defining "scope of employment," the Ninth Circuit has followed the approach of the
9 Restatement (Second) of Agency, §§ 219, 228:

10 "Within the course and scope of employment means: (1) the conduct
11 occurred substantially within the time and space limits authorized by
12 the employment; (2) the employee was motivated, at least in part, by
13 a purpose to serve the employer; and (3) the act was of a kind that the
employee was hired to perform." *Mayhew*, 2009 WL 426091, at 7,
citing *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F. 3d 768,
776-776 (9th Cir. 2002).

14 Under California law, the determination is made as follows:

15 "An employee is acting within the scope of his or her employment if
16 either one of two conditions is met: (1) the act performed was either
17 required or incident to her duties, or (2) the employee's misconduct
could be reasonably foreseen by the employer." *Id.*, citing *Randolph*
v. Budget Rent-A-Car, 97 F. 3d 319, 327 (9th Cir. 1996).

18 Under either definition, Defendants Pata and Felix were acting within the scope of their
19 employment and are thus covered by the Tribe's immunity. The only allegation regarding these
20 defendants is that "three [Casino] employees known as does 1-3" (of whose actions Plaintiff
21 complains) were "acting under the control and supervision of defendant[s] [Art] Felix and Jon [Pata],
22 and acting in the official capacity of defendant Rolling Hills Casino." Exhibit C to the Zaro Dec.,
23 4:14-17.

24 Plaintiff further alleges that these employees (does 1-3), were "acting in their official capacity
25 as agents servants and employees in the course of their employment." Exhibit C to the Zaro Dec.,
26 4:3-11. Accordingly, Plaintiff's own allegations make clear that Defendants, "does 1-3" are not only
27 tribal employees, but are covered by the Tribe's immunity.

28 The only logical conclusion, particularly in light of Plaintiff's complete lack of allegations,

1 is that Defendants Felix and Pata, must have been acting within the scope of their employment at the
2 time of the alleged incident. If Does 1-3 were both (1) acting within the scope of their employment
3 and (2) acting under the control and supervision of Defendants Felix and Pata, then Defendants Felix
4 and Pata themselves must have been acting within the scope of their employment.

5 In *Mayhew*, the plaintiff alleged numerous actions by, *inter alia*, Tribal Gaming
6 Commissioners and the Casino Security Manager. *Mayhew*, 2009 WL 426091, at 7-8. As noted
7 above, the court found each of these defendants to be tribal officials and/or employees. *Id.*, at 6.
8 Furthermore, all the allegations against the Tribal Gaming Commissioners arose from their "actions
9 as employees or officials of the Tribe and/or Casino." *Id.*, at 8. There were no allegations that those
10 defendants "acted in any manner other than in their official capacity with the Tribe." *Id.*

11 Similarly, as to the Security Manager, there were no allegations of acting outside the scope
12 of employment. *Id.*, at 9. Accordingly, tribal immunity applied to the Tribal Gaming
13 Commissioners as well as the Security Manager. *Id.*

14 In this case, Plaintiff has not alleged any acts or omissions whatsoever regarding
15 Defendants Felix and Pata. Rather, Plaintiff has only alleged that Defendants "Does 1-3" were acting
16 in their official capacity and were *under the control and supervision of* Defendants Felix and Pata.
17 Exhibit C to the Zaro Dec., 4:14-17.

18 Accordingly, it is undisputed that Defendants Felix and Pata were acting in their official
19 capacities and within the scope of their authority. As the allegations of the FAC do not suggest any
20 individual actions by the named defendants outside of an official capacity and/or outside the scope
21 of authority, the allegations demonstrate this action is in substance against the tribe itself. *Trudgeon*,
22 71 Cal. App. 4th at 643.

23 Plaintiff "cannot circumvent tribal immunity through 'a mere pleading device.'" *Cook*, 548
24 F. 3d at 727, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989); see also
25 *Snow v. Quinault Indian Nation*, 709 F. 2d 1319, 1322 (9th Cir. 1983). Accordingly, absent
26 evidence of a clear and express waiver of immunity, Plaintiff's claims against Defendants Felix and
27 Pata must be dismissed.

3. Limited Waiver of Immunity

A waiver by a tribe of its immunity cannot be implied but must be unequivocally expressed. *Kescoli v. Babbitt*, 101 F. 3d 1304, 1310 (9th Cir. 1996); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F. 3d 801, 811 (9th Cir. 2001).

Based on the principles of tribal sovereign immunity, and pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.* ("IGRA") the State of California and the Paskenta Band of Nomlaki Indians ("the Tribe") entered into a Tribal-State Compact ("Compact") that sets forth the Tribe's limited waiver of tribal sovereign immunity against lawsuits by patrons of its gaming facility, Rolling Hills Casino ("Rolling Hills"). See Exhibit A to the Pata Dec. The existence of this Compact is statutorily recognized under California Government Code § 12012.25(a)(30) ("Ratification of Tribal-State Gaming Compacts"). The Compact expressly declares that personal injury claims made by patrons of the Tribe's gaming facility will be exclusively adjudicated by an administrative process determined by the Tribe. Exhibit A to the Pata Dec., § 10.2(d).

4. The Tort Claims Act

Pursuant to Section 10.2(d) of the Compact, the Tribe enacted a Tort Claims Act ("TCA") in order to address patron tort claims. The TCA outlines the procedure in which a claim is heard.

The TCA plainly limits the Tribe's waiver of sovereign immunity, and provides the sole mechanism for remedies available to patrons of the Casino. See Exhibit B to the Pata Dec., § 4-101. Notably, Plaintiff has not made any cogent allegation regarding waiver of immunity.

To the contrary, he simply concludes: "When the does 1-4 acted in a negligence (sic) manner toward the plaintiff they then lost their immunity form (sic) any cause of action including their employer Rolling Hills Casino." Exhibit C to the Zaro Dec., 5:14-17.

However, sovereign immunity cannot be overcome by mere allegations. To hold otherwise would have the absurd effect of abolishing all immunity. Rather, a waiver of immunity must be clear and express. *Kescoli*, 101 F. 3d at 1310; *Santa Clara Pueblo*, 436 U.S. at 58. As the only evidence of waiver is the Tribe's TCA, this court lacks jurisdiction to hear this case, and Plaintiff's FAC must

1 be dismissed as to each of the moving defendants.

2 C. Failure to State a Claim

3 In order to survive dismissal for failure to state a claim, a complaint must contain more than
4 "a formulaic recitation of the elements of a cause of action;" it must contain factual allegations
5 sufficient "to raise a right to relief above the speculative level." *Mayhew*, 2009 WL 426091, at 3,
6 citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In making such a determination,
7 the court generally may not consider materials outside the pleadings. See *Cooper v. Pickett*, 137 F.
8 3d 449, 453 (9th Cir. 1998). However, the court may consider documents alleged to, alleged in, or
9 relied upon by the pleadings, provided their authenticity is not in question, as well as those judicially
10 noticeable. See *Lee v. City of Los Angeles*, 250 F. 3d 668, 688 (9th Cir. 2001).

11 Here, Plaintiff's FAC fails to set forth even a formulaic recitation of the elements.
12 Defendants Rolling Hills Casino, Jon Pata, and Art Felix are only mentioned in the First Cause of
13 Action for Negligence. Furthermore, only the First Cause of Action includes allegations relating to
14 "Doe" defendant employees of Rolling Hills. However, this cause of action fails to set forth a claim
15 of negligence, or any other viable claim, against any of these defendants, and should be dismissed.

16 1. Negligence

17 Plaintiff's cause of action for negligence is governed by California state law. *Erie R. Co. v.*
18 *Tompkins*, 304 U.S. 64, 78 (1938). Under California law, the elements of any negligence claim
19 consist of the defendant's legal duty to the plaintiff, breach of that duty, and an injury to the plaintiff
20 proximately caused by the breach. *John B. v. Superior Court*, 38 Cal. 4th 1177, 1188 (2006).

21 a) Rolling Hills Casino

22 The only allegation against Defendant Rolling Hills is that they invited Plaintiff onto their
23 premises. Exhibit C to the Zaro Dec., 3:27-29. Plaintiff's FAC contains no allegations whatsoever
24 regarding acts or omissions by Rolling Hills. Rather, Plaintiff only alleges that various "Doe"
25 defendants were "acting in the official capacity of defendant Rolling Hills Casino." Exhibit C to the
26 Zaro Dec., 4:12-18, 4:26-30. As such, Plaintiff ostensibly attempts to proceed against Rolling Hills
27 on the theory of *respondeat superior*.
28

i. *Respondeat Superior*

Under the doctrine of *respondeat superior*, "[t]he employer's liability is wholly derived from the liability of the employee," and "[t]he employer cannot be held vicariously liable unless the employee is found responsible." *Lathrop v. Healthcare Partners Medical Group*, 114 Cal. App. 4th 1412, 1423 (2004). Under this doctrine, the employer's liability extends beyond the employer's actual or possible control of the employee to include risks inherent in or created by the enterprise, and thus, "a plaintiff seeking to impose liability on a theory of respondeat superior must show that the employee's tortious conduct was committed within the course and scope of employment." *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377, 394 (2000).

As such, Plaintiff has created a "Catch-22." The very means by which he hopes to pin vicarious liability upon Rolling Hills - that various employees were working within the scope of their employment - proves the sovereign immunity of said employees.

Because Plaintiff has alleged that Defendants Felix and Pata, as well as "Doe" defendants 1-4 were all acting within the scope of their employment, he has established their immunity and any tortious claims arising out of that employment are barred. Because *respondeat superior* is entirely dependent upon the tortious act of the employee, *Lathrop*, 114 Cal. App. 4th at 1423, Plaintiff is barred from asserting such a claim against Rolling Hills.

ii. *Negligent Supervision*

To the extent Plaintiff's FAC may be interpreted to allege negligent supervision by Defendant Rolling Hills Casino, it again must fail. The cornerstone of negligent supervision is that an employee causes injury to another by acting in a foreseeable risk-creating manner. *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1055 (1996).

Liability for negligent supervision cannot exist absent the employer's knowledge of the risk posed by the employee. *Juarez*, 81 Cal. App. 4th at 395. Thus, to support a cause of action for negligent supervision, a plaintiff must demonstrate the employer knew or should have known of the risk posed by its employee and failed to take action to prevent such risk. *Id.*

Plaintiff's FAC contains no allegations that Rolling Hills had notice of any prior tortious conduct on the part of its employees. Absent notice that its employees posed a foreseeable risk to

patrons, Defendant cannot have breached its duty to supervise in response to a known risk. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted.

b) Art Felix and Jon Pata

Similar to Defendant Rolling Hills, Plaintiff's FAC contains no allegations whatsoever regarding any acts or omissions by Defendants Art Felix or Jon Pata. Rather, Plaintiff alleges that "...employees known as does 1-3, while acting under the control and supervision of defendant [Art] Felix and Jon [Pata], and acting in the official capacity of defendant Rolling Hills Casino, refused to allow plaintiff to leave the premises and get that medical attention." Exhibit C to the Zaro Dec., 4:14-17.

i. *Respondeat Superior*

To the extent Plaintiff attempts to state a claim that Defendants Felix and Pata are vicariously liable for the acts or omissions of any "Doe" defendants, such claim must also fail. The *respondeat superior* doctrine is inapplicable to the relationship between an employer's supervising employee and his or her subordinate employees. *Bowers v. Olch*, 120 Cal. App. 2d 108, 116 (1953). This is because the supervisor neither performs the work in question nor shares the profits produced by the conduct, and is usually less able than the employer to respond in damages. *Malloy v. Fong*, 37 Cal. 2d 356, 378 (1951).

ii. Negligent Supervision

To the extent Plaintiff attempts to state a claim for negligent supervision against Defendants Felix and Pata, this claim must fail. Just as with Defendant Rolling Hills, above, Plaintiff has not alleged that Defendants had notice of any prior tortious conduct on the part of the "Doe" defendants. Absent notice that its employees posed a foreseeable risk to patrons, Defendants cannot have breached their duty to supervise in response to a known risk. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted.

D. Claims Against "Doe" Defendants

Although largely irrelevant for purposes of these moving defendants, it should be noted that, as alleged, any claims against Defendants "Does 1-4" are barred by sovereign immunity. Such claims suffer from the same "Catch-22" noted above.

1 Plaintiff has alleged that Defendants "Does 1-3" were "acting under the control and
2 supervision of defendant [Art] Felix and Jon [Pata], and acting in the official capacity of defendant
3 Rolling Hills Casino." As employees acting within the scope of their employment with the Tribe
4 and/or Casino, they are protected by the Tribe's sovereign immunity. *Cook*, 548 F.3d at 727;
5 *Mayhew*, 2009 WL 426091, at 6.

6 Similarly, Plaintiff has alleged that Defendant "Doe 4," a bartender at Rolling Hills, "while
7 working for the defendant Rolling Hills Casino was negligence (sic) by making sure plaintiff's glass
8 was clean and free from (sic) any other substance which made Roger Clark ill." Exhibit C to the
9 Zaro Dec., 5:3-6. As best as can be determined, Plaintiff alleges that an employee bartender was
10 working in such capacity at the time of the alleged negligent conduct.

11 Because the act and/or omission in question related to the service of a beverage, this "Doe"
12 defendant employee bartender must have been acting within the scope of his employment with
13 Rolling Hills. As such, any claim based upon such act or omission is barred by sovereign immunity.

14 Finally, to the extent Plaintiff has attempted to allege false imprisonment against Defendants
15 "Does 1-3," that claim must also fail. Plaintiff asserts "[t]here is strict liability for that negligence
16 and also false imprisonment by holding Roger Clark against his will on the property of Rolling Hills
17 Casino." Exhibit C to the Zaro Dec., 4:33-5:1. Plaintiff further asserts "these does were then
18 negligence (sic) by holding him against his will and not getting plaintiff medical attention." Exhibit
19 C to the Zaro Dec., 5:9-10.

20 Construing these confusing allegations liberally, Plaintiff appears to have alleged false
21 imprisonment by way of negligence. However, under California law, false imprisonment requires
22 **intentional** confinement. *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F. 3d
23 1198, 1205 (9th Cir. 2003). Accordingly, Plaintiff has not stated a claim for false imprisonment.

24 **E. Punitive Damages and Attorney's Fees**

25 Plaintiff's FAC "demands judgment" for, *inter alia*, "punitive damages in the amount of
26 \$25,000" and "attorney costs and fees incurred in this action." Exhibit C to the Zaro Dec., p. 13:25-
27 26. However, such demands are entirely improper.

28 The Compact signed by the Paskenta Band of Nomlaki Indians ("the Tribe") and the State

1 of California makes clear that the Tribe's waiver of immunity need not extend to punitive damages
 2 or attorney's fees. Exhibit A to the Pata Dec., § 10.2(d). Furthermore, the Tribe's Tort Claims Act
 3 ("TCA") clearly states that the Tribe does not waive its immunity for punitive damages or attorney's
 4 fees. Exhibit B to the Pata Dec., § 4-204.

5 As set forth above, each of these moving Defendants (as well as any "Doe" defendant
 6 employees) is covered by the Tribe's sovereign immunity. Because such immunity has not been
 7 waived, none of these defendants are subject to an award of either punitive damages or attorney's
 8 fees. See *Lawrence v. Barona Valley Ranch Resort and Casino*, 153 Cal. App. 4th 1364, 1368
 9 (2007) [as a sovereign entity, a tribe is immune from both suit *and* liability].

10 Furthermore, Plaintiff's specification of \$25,000 in punitive damages is improper. Under
 11 California Civil Code § 3295(e), "[n]o claim for exemplary damages shall state an amount or
 12 amounts." Moreover, because Plaintiff is acting *in propria persona*, he is not entitled to attorney's
 13 fees. *In re Dormio*, 127 Cal. App. 3d 788, 793-794 (1981). Accordingly, Plaintiff's "demands" for
 14 punitive damages and attorney's fees are improper on multiple grounds and, to the extent these
 15 claims are construed to apply to these moving Defendants, must be dismissed.

16 IV

17 CONCLUSION

18 Plaintiff's claims all arise out of an incident that took place while he was a patron at Rolling
 19 Hills Casino, a gaming facility wholly-owned by a sovereign Indian tribe. The federally-mandated
 20 Compact between the Paskenta Band of Nomlaki Indians ("the Tribe") and the State of California,
 21 as well as the Tribe's Tort Claims Act ("Act") mandated by the Compact expressly recognize that
 22 the Tribe's administrative process and/or remedies are the exclusive forum for resolution of personal
 23 injury claims by casino patrons.

24 Rather than pursue his proper administrative remedies, Plaintiff Roger Clark has filed a First
 25 Amended Complaint in this Court without establishing a waiver of immunity on the part of
 26 Defendants Rolling Hills, Art Felix, or Jon Pata. Furthermore, Plaintiff's attempts to name various
 27 tribal employees and/or officials as a proxy for the Tribe serve only to establish immunity, not
 28 jurisdiction. Finally, Plaintiff has failed to properly state a claim against any of these moving

1 defendants upon which relief can be granted. Accordingly, Defendants respectfully request the Court
2 grant their Motion to Dismiss.

3
4 Dated: February 18, 2011

Respectfully submitted,

5 ZARO SILLIS & RAMAZZINI, LLP

6
7 

8 ROBERT B. ZARO