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VIEJAS ENTERPRISES AND
VIEJAS BAND OF KUMEYAAY INDIANS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GLORIA MORRISON,

Plaintiff,

vs.

VIEJAS ENTERPRISES, an entity; VIEJAS BAND OF KUMEYAAY INDIANS, an entity; VIEJAS CASINO, an entity, and DOES 1-20, inclusive

Defendants.

Case No. 11-CV-00097-WQH-BGS

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [F.R. CIV. P. 12(b)(1)]

Hearing Date: **April 18, 2011**

Time: **11:00 a.m.**

Place: **Courtroom 4**

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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Defendants Viejas Band of Kumeyaay Indians and Viejas Enterprises (collectively the "Tribe") reply to Plaintiff's Opposition to their Motion to Dismiss for Lack of Subject Matter Jurisdiction, as follows:

I. Summary of Reply

The Opposition fails to establish that this Court has subject matter jurisdiction over either of the two counts in the Complaint. The Opposition fails to address or even mention the two reported opinions which hold that there is no abrogation of tribal immunity in the Family and Medical Leave Act, 29 U.S.C. Section 2601 et seq. ("FMLA"). The Opposition instead cites inapposite "authority" which does not stand for the proposition cited. It also falsely claims that "factual issues" exist regarding the status of the Tribe as a federally recognized tribe. In fact, there is no factual dispute: The Viejas Band of Kumeyaay Indians is a federally recognized Indian tribe. Absent Congressional abrogation of tribal immunity, or a clear waiver by the Tribe itself, there is no jurisdiction over Plaintiff's claims. The Opposition does not assert that the Tribe has waived its immunity. The only issue, then, is whether Congress, in the FMLA, abrogated tribal immunity. The two reported decisions on point hold that the answer to that question is "no." No contrary authority is cited by the Opposition.

II. Plaintiff has the Burden to Establish Federal Jurisdiction and She Failed to Do So.

The Opposition argues that motions under Rule 12(b)(1) require only a "non-frivolous assertion of a federal claim" (Opposition at p. 3 [citations omitted]). However, the Opposition fails to acknowledge that the Plaintiff bears the burden of establishing federal jurisdiction and that the Court can look to facts outside the four corners of the Complaint in making that determination. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (noting that "[o]nce challenged, the party asserting subject matter jurisdiction has the burden of proving its existence") (internal citations omitted); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence"). Further, federal jurisdiction is never presumed and the facts alleged in the Complaint are not presumed to be true. *Kokken v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [a

federal court's] limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction") (internal citations omitted); *Robinson,* 586 F.3d at 685 (noting that "[n]o presumptive truthfulness attaches [to] plaintiff's allegations [of jurisdiction]") (internal citations omitted).

III. There Are No Material Facts in Dispute.

The Viejas Band of Kumeyaay Indians is a federally recognized Indian tribe, as established by the declaration of the current Tribal Chair, Anthony Pico, and the Federal Register excerpt attached to Chairman Pico's Declaration (the "Pico Declaration"). The Opposition attempts to argue that the description of the Tribe in the Federal Register actually does not refer to the Tribe. This is directly contradicted by Mr. Pico's Declaration, which states:

> The Viejas Band is a federally recognized Indian Tribe which is identified on the Federal Register listing of federally recognized tribes as the Capitan Grande Band of Diegueno Mission Indians of California: Viejas (Barron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California." Pico Declaration ¶ 2.

Plaintiff did not present any evidence to the contrary. Quibbling with Chairman Pico's Declaration does not create a factual issue.

Similarly, the Opposition makes the meritless claim that there is a factual issue whether the Viejas Casino or Viejas Enterprises are actually tribal businesses and therefore covered by the same tribal immunity as the Tribe itself. (Opposition, p. 6). But in fact, the Pico Declaration establishes that the Viejas Casino is a business owned entirely by the Tribe, existing on the Tribe's reservation, and no entity or person other than the Tribe has any ownership interest in Viejas Enterprises or the Viejas Casino. Pico Declaration ¶¶ 4, 5. Again, no facts are established in the Opposition to controvert the Pico Declaration.

IV. Tribal Enterprises, such as The Viejas Casino, Enjoy the Same Sovereign Immunity as the Tribe Itself.

The Opposition fails to discuss the cases cited in the moving papers, all of which hold that a casino such as the Viejas Casino "enjoys the tribe's immunity from suit." *Allen v. Gold*

Country Casino, 464 F.3d 1044, 1046-1047 (9th Cir. 2006). *See also Trudgen v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 640 (1999) (noting "the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country"). Nor does the Opposition mention the opinion of District Judge Virginia Phillips of the District Court for the Central District of California, in *Mulally v. Havasu Landing Casino*, 2008 U.S. Dist. Lexis 40565 (C.D. Cal. 2008), in which Judge Phillips held that a casino operated by an Indian Tribe was immune from a claim under the FMLA.

The cases cited by the Opposition are either not on point or actually support the Tribe's position that immunity extends to tribal enterprises. As an initial matter, they all predate the Ninth Circuit's holding in *Allen v. Gold Country Casino*, and, unlike *Allen*, are not binding on this Court. In addition, all but two predate the United State's Supreme Court's Opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, which rejected the contention that tribal sovereign immunity should be confined to "non-commercial activities." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-755, 757-759 (1998). Those cases which held the entity at issue should not be accorded immunity are easily distinguishable on their facts. In *Dixon v. Pipoca Construction Company*, the Arizona Supreme Court declined to extend tribal immunity to a separate corporate entity engaged in off-reservation activity. *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 259 (1989). Similar facts informed the Supreme Court of New Mexico's decision in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 179 (1989) (explaining the Court was unaware of controlling law that would divest it of jurisdiction over Tribes for "off-reservation business conduct").[1] In *Johnson v. Harrah's Kansas Casino Corporation*, the District Court's decision not to extend tribal immunity to the subject casino rested in large part on "the lack of control over [the casino's] corporate structure by the Tribe." *Johnson v. Harrah's Kan. Casino Corp.*, 2006 WL 463138, at *7 (D. Kan. Feb. 23, 2006).[2]

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[1] The continued validity of *Dixon* and *Padilla* is doubtful. In *Kiowa Tribe of Oklahoma* the Supreme Court rejected the contention that sovereign immunity should be limited to the reservation. *Kiowa Tribe of Okla.*, 532 U.S. at 760; *see also Gallegos v. Pueblo of Tesuque*, 132 N.M. 207, 217 (2002) (noting that *Kiowa Tribe of Oklahoma* had "implicitly overruled" *Padilla*).

[2] The plaintiff in *Johnson* did "not contend that Congress abrogated the Tribe's immunity under the FMLA." *Johnson,* 2006 WL 463138, at *3..

Two of the cases Plaintiff cites actually support the conclusion that immunity must be extended to the Viejas Casino. In *Gavle v. Little Six, Inc.*, the Supreme Court of Minnesota held that a wholly owned gaming business entity had sovereign immunity from suit. *Gavle v. Little Six, Inc.*, 555 N.W. 2d 284, 296 (Minn. 1996). In so holding, the Court noted "the close link between the [Tribe] and the [entity]." *Id.* It further reasoned as follows:

> We also note that federal statutory law supports the notion that gaming activity is closely linked to the well-being of the tribe. All Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994). Under the provisions of IGRA, only tribal entities can engage in Indian gaming and gaming by Indian tribes is recognized as a "means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2701 (1994). Thus, as a matter of federal law, LSI must be a tribal entity in order to conduct gaming authorized by the statute. A mere commercial activity, incorporated by Indian individuals for the ostensible purpose of conducting gaming in Indian country, would be prohibited from doing so under federal law. This seems to us a strong recognition of the close link between the tribe itself and LSI, the gaming business entity, and also of the federal policy encouraging tribal economic well-being through the operation of such gaming businesses.

Id. at 295. The California Court of Appeal reached a similar conclusion in *Trudgeon*, applying the "factors" noted in Plaintiff's Opposition to hold that tribal sovereign immunity applied to a gaming complex located on tribal land. The Court relied on the tribe's control over the "composition and operations [of the casino]," and the policies underpinning the IGRA. *Trudgeon*, 71 Cal. App. 4th at 639-43.

The Viejas Casino is owned and operated by the Tribe. No person or entity other than the Tribe has any ownership interest in the Casino or in Viejas Enterprises. Pico Declaration ¶ 4, 5. The Viejas Casino is located on the Viejas reservation. *Id.* As such, Plaintiff has failed to establish that Viejas Enterprises is not an entity that "functions as an arm of the Tribe." *Allen*, 464 F.3d at 1046-1047. In fact, Plaintiff's own authority strongly suggests the contrary.

V. This Court Lacks Jurisdiction Over the Claim Under the Family Medical Leave Act.

The Opposition is completely silent with respect to the two cases cited by the Tribe, each of which holds that there is no Congressional abrogation of tribal immunity in the FMLA. *Chayoon v. Chao*, 355 F.3d 141 (2nd Cir. 2004) and *Mulally*, 2008 U.S. Dist. Lexis 40565, at *6 ("Congress has not abrogated tribal sovereign immunity for violations of the Family and Medical Leave Act . . ." (internal citations omitted)).

Instead, the Opposition makes the completely unfounded claim that the Ninth Circuit "has taken the approach that the FMLA may apply to tribes." (Opposition, p. 5). In support of this statement, the Opposition cites *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F. 3d. 974 (9th Cir. 2003). However, in *Sharber*, a *per curiam* opinion, the issue had nothing to do with whether FMLA abrogates tribal immunity. Instead, the issue was whether a District Court should have "stayed its hand until after the ... tribal courts have the opportunity to resolve a question." *Id.* at 976. The Ninth Circuit panel held that "the district court did not err in concluding that Tribal Courts should have the first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act." *Id.* There is absolutely no holding in the *Sharber* opinion concerning whether Congress abrogated trial immunity in the FMLA.

The Opposition also cites comments by the United States Department of Labor ("DOL") in regulations adopted under the FMLA in 1995. Significantly, however, the FMLA regulations themselves do not address whether there was an abrogation of tribal immunity in the FMLA. *See* 29 CFR § 825.104. Statements made by the DOL in its summary of comments on the regulations are not regulations themselves. Further, DOL in the comments never actually state that Congress abrogated tribal immunity when enacting the FMLA ("It is the Department's view that Indian tribes *may* be covered by the legislation where the statutory prerequisites are met. . .") 60 Fed. Reg. 2180, 2181 (1995) (italics added). The DOL could have adopted a regulation purporting to subject tribes to the FMLA, but it did not. The reason is obvious: the DOL does not have authority to abrogate tribal immunity; only Congress can do that.

Further, the DOL's comment (namely, whether the FLMA "may" apply to Indian Tribes) lacks the force of law. *Christensen v. Harris*, 529 U.S. 576, 587 (2000) (noting that

"[i]nterpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines" all "lack the force of law"). Accordingly, the comments are "entitled to respect" "only to the extent they have the "power to persuade." *Id.* (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The DOL's ipse dixit comment is unpersuasive. This is especially true given that the comment itself states only that Tribes "may" be subject to the FMLA and acknowledges conflicting legal precedent. 60 Fed. Reg. 2180, 2181.

The DOL comment is further undermined by Congress's recognition that gaming is an inherently governmental function for Indian Tribes. In the landmark Indian Gaming Regulatory Act ("IGRA"), adopted in 1988, Congress specifically found:

> Numerous Indian Tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue.

25 U.S.C. § 2701(1).

Congress' Declaration of National Policy in IGRA included the purpose to:

> (1) provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments.

25 U.S.C. § 2702; *see also Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003) (noting that Congress's state purpose in enacting IGRA was: "[E]ncouranging tribal autonomy and economic development") (emphasis added). Gaming for the Viejas Tribe and numerous other tribes is inherently a governmental function, operated by the tribal government pursuant to IGRA. FMLA dictates when an employer must provide medical leave, who is entitled to take and return from medical leave, the duration of the leave, the documentation or information that can be obtained or requested by an employer, and imposes numerous other regulatory obligations. As applied to a tribal government operating a casino, FMLA clearly would materially interfere with the Tribe's right of self government. *See EEOC v. Cherokee*

Nation, 871 F.2d 937, 938 (10th Cir. 1989) (Age Discrimination Act does not apply to tribes because its enforcement would interfere with Tribe's right of self government).

This Court should follow the opinion of the Second Circuit in *Chayoon*, in which the court found no abrogation of tribal immunity in the FLMA (in a case to which the Department of Labor was a party). *Chayoon*, 335 F.3d at 153. That decision has stood for almost seven years without any contrary Circuit Court authority, and was cited with approval by Judge Phillips of the Central District in *Mulally, supra*.

VI. This Court Lacks Jurisdiction Over the State Law "Tort" Claim.

The Opposition puts the cart before the horse in claiming that there is "supplemental subject matter jurisdiction" over the state law tort claim (Opposition, p. 5-6). First, for there to be any "supplemental" jurisdiction, there has to be federal jurisdiction over at least one claim in the Complaint. Here, there is no such cognizable federal claim. Further, even if there were a cognizable federal claim, as a matter of law there can be no state law tort claim against an Indian tribe in the absence of Congressional abrogation of tribal immunity. *See Kiowa Tribe of Okla.*, 523 U.S. at 755-756 ("Tribal immunity is a matter of federal law and is not subject to diminution by states"). The Opposition cites no case holding that Congress has abrogated tribal immunity to create a state law tort claim against an Indian tribe based on the employment practices alleged.

The Opposition claims that there is insufficient evidence that the Viejas Band of Kumeyaay Indians is the same Indian tribe as the "Capitan Grande Band of the Diegueno Mission Indians of California: Viejas (Baron Long) Group of Capitan Grande of Mission Indians of the Viejas Reservation, California" listed in the Federal Register (Opposition, p. 6). But in fact, Chairman Pico's Declaration specifically identifies the Viejas Band as the tribe identified in the Federal Register except attached to his Declaration. Pico Declaration ¶ 2. The Opposition on this point simply is wrong: there is no factual dispute that the Viejas Tribe is a federally recognized Indian tribe.

The Opposition also erroneously claims or at least suggests that the Viejas Casino is not operating as a "arm of the tribe" so as to be subject to tribal immunity. That argument has been addressed in Section IV, above. The Pico Declaration establishes, without dispute, that Viejas

Enterprises operates the Casino on the Viejas Reservation and that no person or entity other than the Tribe has any ownership in the tribal businesses. Pico Declaration, ¶¶ 4,5. That is all that is required to bring tribal businesses within the scope of tribal immunity.

VII. Conclusion.

Plaintiff has not established any facts which would permit this Court to adjudicate the claims she alleges. It is undisputed that the Tribe is a federally recognized Indian tribe, that the casino where Plaintiff was employed exists on the reservation and is owned entirely by the Tribe. The Opposition completely ignores the two cases on point and instead grossly misstates the holding of the Ninth Circuit decision it purports to rely upon. There is no state tort claim as a matter of law. The Complaint should be dismissed with prejudice.

Dated: April 11, 2011

JONES DAY

By: /s/ George S. Howard, Jr.
George S. Howard, Jr.

Attorneys for Defendants
VIEJAS ENTERPRISES AND
VIEJAS BAND OF KUMEYAAY INDIANS

CERTIFICATE OF SERVICE

I, George S. Howard Jr., declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12265 El Camino Real, Suite 200, San Diego, California 92130. On April 11, 2011, I served a copy of the following:

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [FED.R.CIV.P. 12(b)(1)]

by electronic transmission.

I am familiar with the United States District Court, Southern District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the court. The court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the court's transmission facilities. Under said practice, the following CM/ECF users were served:

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Executed on April 11, 2011, at San Diego, California.

/s/ George S. Howard Jr.
George S. Howard Jr.