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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LORNA BUTLER

Plaintiff,

vs.
FORTUNES ASIAN CUISINE, d/b/a
FORTUNES A NOODLE BAR; and
CAESARS ENTERTAINMENT
OPERATING COMPANY INC., d/b/a
HARRAH'S RINCON CASINO AND
RESORT,

Defendants.

CASE NO. 12cv2409 WQH (BLM)
ORDER

HAYES: Judge:

The matter before the Court is the Motion to Dismiss filed by Defendants Fortunes Asian Cuisine and Caesars Entertainment Operating Company Inc. (ECF No. 4).

PROCEDURAL BACKGROUND

On June 28, 2012, Plaintiff Lorna Butler filed a Complaint in San Diego Superior Court against Defendant Fortunes Asian Cuisine. Plaintiff alleges that she suffered personal injuries as a result of eating food at Defendant's establishment. (ECF No. 1-1). On August 28, 2012, Plaintiff amended her Complaint to add Defendant Caesars Entertainment Operating Company Inc. *Id.*

On October 4, 2012, Defendants removed the Complaint to this Court pursuant to 28 U.S.C. §§ 1331 and 1441(a). (ECF No. 1). Defendants assert that Plaintiff's claims "are

1 completely pre-empted by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*” *Id.*
2 at 2.

3 On October 11, 2012, Defendants filed the Motion to Dismiss pursuant to Federal Rules
4 of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6) and 12(b)(7). (ECF No. 4). On November 8,
5 2012, Defendants filed a Supplemental Declaration in support of the Motion to Dismiss. (ECF
6 No. 5). The record reflects that Plaintiff has not filed an opposition.¹

7 STANDARD OF REVIEW

8 Generally, “the inherent sovereign powers of an Indian tribe do not extend to the
9 activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981).
10 The Supreme Court described two exceptions to that general rule: first, a “tribe may regulate,
11 through taxation, licensing, or other means, the activities of nonmembers who enter consensual
12 relationships with the tribe or its members, through commercial dealing, contracts, leases, or
13 other arrangements”; second, a “tribe may also retain inherent power to exercise civil authority
14 over the conduct of non-Indians on fee lands within its reservation when that conduct threatens
15 or has some direct effect on the political integrity, the economic security, or the health or
16 welfare of the tribe.” *Id.* at 565-66. Where one of the *Montana* exceptions applies, “civil
17 jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.”
18 *Strate v. A–I Contractors*, 520 U.S. 438, 453 (1997) (quoting *Iowa Mut. Ins. Co. v. LaPlante*,
19 480 U.S. 9, 18 (1987)).

20 “Principles of comity require federal courts to dismiss or to abstain from deciding
21 claims over which tribal court jurisdiction is ‘colorable,’ provided that there is no evidence of
22 bad faith or harassment.” *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008)

23 _____
24 ¹Local Rule 7.1(e)(2) requires a party opposing a motion to file an opposition or
25 statement of nonopposition no later than fourteen days prior to the noticed hearing, unless
26 otherwise provided by court order. The hearing date for the Motion to Dismiss was November
19, 2012; as indicated, Plaintiff has failed to file an opposition as of the date of this Order.

27 Local Rule 7.1(f)(3)(c) provides that if a party fails to file an opposition in accordance
28 with Rule 7(1)(e)(2), “...that failure may constitute a consent to the granting of a motion or
other request for ruling by the court.” Civ. L.R. 7.1(f)(3)(c)d. Nevertheless, having reviewed
the Complaint, the Court will rule of Defendants’ Motion to Dismiss on the merits.

1 (citing *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008)); *see*
2 also *Stock West Corp. v. Taylor*, 964 F.2d 912, 919-920 (9th Cir.1992) (“The district court
3 properly abstained from exercising its diversity jurisdiction in this matter because colorable
4 questions are presented in this civil action regarding whether the Colville Tribal Courts have
5 concurrent jurisdiction over alleged tortious conduct that may have commenced on the
6 reservation. Under such circumstances, the district court is required to abstain.”). “Exhaustion
7 is required as a matter of comity, not as a jurisdictional prerequisite.” *Iowa Mut. Ins. Co.*, 480
8 U.S. at 16 n.8.

9 DISCUSSION

10 Defendants assert that Plaintiff, “a patron of [Harrah’s Rincon Casino and Resort], is
11 a non-Indian who engaged in a consensual relationship with the Rincon Tribe on the
12 reservation by voluntarily entering” Harrah’s Rincon Casino and Resort. (ECF No. 4-1 at 12).
13 Defendants assert that the Casino is located “on the Rincon Tribe’s land...” *Id.* Defendants
14 assert:

15 The Casino is owned, controlled, and its operations are managed by the Rincon
16 Tribe pursuant to the Indian Gaming Regulatory Act (‘IGRA’) ... between the
17 Rincon Tribe and the State of California. ... [P]ursuant to the IGRA, the creation
18 and operation of Indian casinos is designed to promote ‘tribal economic
19 development, self-sufficiency, and strong tribal governments.’ (25 U.S.C. §§
20 2701(4); 2702(1)).

21 *Id.* at 9. Defendants contend that the Complaint must be dismissed because Plaintiff’s claim
22 “necessarily affects the political integrity, economic security, and health and welfare of the
23 Rincon Tribe as a finding of liability against the Rincon Tribe would certainly trigger a host
24 of financial and legal consequences.” *Id.* at 12.

25 Plaintiff alleges that Defendants, on July 2, 2010, “negligently, recklessly, willfully and
26 wantonly misrepresented the food contents of a meal served to plaintiff after plaintiff specified
27 her allergies to mushrooms which caused plaintiff to become seriously ill.” (ECF No. 1-1 at
28 2). Plaintiff seeks \$7,500.00 in damages from Defendants for “[m]edical bills [that] are over
\$3,000.00 plus pain & suffering.” *Id.* at 3.

Based upon these allegations, the Court finds that “colorable questions” exist as to: (1)
whether Plaintiff “enter[ed] [into a] consensual relationship[] with the tribe or its members,

1 through commercial dealing, contracts, leases, or other arrangements” when she purchased
2 food at Fortunes Asian Cuisine on the Rincon Indian Reservation; and (2) whether Plaintiff’s
3 Complaint “has some direct effect on the political integrity, the economic security, or the
4 health or welfare of the tribe.” *Marceau*, 540 F.3d at 920; *Montana*, 450 U.S. at 566. The
5 Court finds no evidence of bad faith or harassment. Accordingly, the Court will dismiss this
6 action to “permit a tribal court to determine in the first instance whether it has the power to
7 exercise subject-matter jurisdiction” over the dispute. *Stock West Corp.*, 964 F.2d at 919; *see*
8 *also Girmai v. Rincon Band of Luiseno Indians*, 11CV2567 JLS POR, 2012 WL 540549 (S.D.
9 Cal. Feb. 16, 2012) (“Although the Court may stay or dismiss the action where tribal
10 exhaustion is required, because Plaintiff failed to oppose Defendants’ motion, the Court finds
11 dismissal appropriate.”); *Jaramillo v. Harrah’s Entm’t, Inc.*, 09CV2559 JM (POR), 2010 WL
12 653733 (S.D. Cal. Feb. 16, 2010) (“When a court finds, as here, that tribal exhaustion is
13 required, the court can stay or dismiss the action, although it is error to dismiss for lack of
14 subject matter jurisdiction. As Jaramillo failed to file an opposition to the motion to dismiss,
15 the court finds dismissal appropriate.”).

16 **CONCLUSION**

17 The Motion to Dismiss (ECF No. 4) filed by Defendants is GRANTED.

18 DATED: March 6, 2013

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20 **WILLIAM Q. HAYES**
21 United States District Judge
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