IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-16121

BETH A. BODI,

Plaintiff-Appellee,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al.,

Defendants-Appellants.

From the United States District Court,
Eastern District of California
Case No. 2:13-cv-01044-LKK-CKD
(Honorable Lawrence K. Karlton)

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Other State Cases

Federal Statutes & Regulations

Other Authorities

Preliminary Statement

Because Indian tribes are sovereigns preexisting the United States and its Constitution, they may be sued only where the tribe or Congress unequivocally expresses consent to suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58-59 (1978). Recently, the U.S. Supreme Court has admonished that the federal courts may not "carv[e] out exceptions" to the broad protections sovereign immunity provides federally recognized tribal governments. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014). In this case, the district court did precisely that. The Shingle Springs Band of Miwok Indians (the "Tribe"), a federally recognized Indian tribe, was sued in state court for allegedly violating federal law in an internal tribal dispute. Because the lawsuit against the Tribe included federal claims, the Tribe promptly removed the action to federal court. Then, as a defense to the lawsuit, the Tribe immediately invoked its sovereign immunity under well established principles of federal Indian law. The district court below identified no express waiver on the part of the Tribe, and no congressional abrogation of the Tribe's immunity. Nonetheless, rather than reaching the merits of the Tribe's sovereign immunity defense, and in contravention of the Supreme Court's admonition, the district court "carv[ed] out" an exception to the doctrine of tribal sovereign immunity. Specifically, the court reasoned that, because the Tribe *could have* chosen to raise its tribal sovereign

immunity defense in state court, the Tribe's choice to raise the defense in federal court waived it. Specifically, the court concluded the Tribe had "no principled reason" to remove the federal claims filed against it to federal court, and that, by virtue of the removal, the Tribe lost its right to assert its sovereign immunity to the lawsuit, at all. (E.R. 21:12-23.) No law authorized the district court to imply a waiver on this basis, and in fact, the very notion that a Tribe can waive its immunity by implication contradicts well established principles of federal Indian law governing sovereign immunity. It also contradicts the only federal appellate court decision to address the issue of whether an Indian tribe's removal of a case to federal court waives the Tribe's immunity to suit. In that case, the Eleventh Circuit Court of Appeal specifically held it does not. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012). Unlike the district court's decision in this case, the Eleventh Circuit's analysis and holding in *Contour Spa* are consistent with longstanding precedent governing tribal sovereign immunity and its effective waiver. Accordingly, this Court should reverse the district court's erroneous conclusion that a tribe waives its immunity by removing a state court lawsuit raising federal claims to federal court and direct the district court to dismiss this action on the basis of tribal sovereign immunity.

Jurisdictional Statement

The district court had federal question jurisdiction under 28 U.S.C. § 1331, which warranted removal pursuant to 28 U.S.C. §§ 1441 and 1446.

This Court has appellate jurisdiction to review the district court's order denying defendants' motion to dismiss on sovereign immunity grounds. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007). This Court also has jurisdiction to review the district court's refusal to consider Tribal Defendants' alternative argument that the Tribe's exclusive right of self-governance separately bars Plaintiff's suit on jurisdictional grounds, because the federal statute Plaintiff invokes fails to apply to this intramural dispute between an Indian tribe and its member (discussed below in Section III of the Argument). This Court has jurisdiction to address that aspect of the district court's ruling, which "raise[d] the same issues, used the same legal reasoning and reached the same conclusions" for both defenses. *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001). In particular, the district court concluded the Tribe's removal of the case to federal court waived the Tribe's immunity to suit and thereby barred both defenses. (*See* E.R. 22:14-24:10.)

The district court's order denying Tribal Defendants' motion to dismiss was entered on May 14, 2014 (E.R. 5), and Tribal Defendants timely filed their Notice of Appeal under Fed. R. App. P. 4(a)(1)(A) on June 10, 2014. (E.R. 1.)

Statement Of The Issues Presented For Review

1. Does a federally recognized Indian tribe, which possesses tribal sovereign immunity from suit absent the express and unequivocal consent of Congress or the tribe, waive its immunity by (a) exercising its congressionally authorized right to remove federal claims to federal court and (b) then immediately seeking a federal court ruling that its immunity bars the suit?

2. Does an Indian tribe's removal of federal claims from state court to federal court foreclose the tribe from demonstrating the plaintiff's claims are barred by the tribe's exclusive rights of self-governance in intramural matters, a jurisdictional defense independent of the tribe's immunity defense?

Statement Of The Case

I. Factual Background And Plaintiff's Allegations

A. The Tribe Operates A Health Clinic On Its Reservation Under Its Sovereign Authority.

The Shingle Springs Band of Miwok Indians is a federally recognized Indian tribal nation maintaining a government-to-government relationship with the United States. (E.R. 271, 281, 322:7-8, 324:16-17.) *See* 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). The Tribe exercises jurisdiction over federally owned trust land, the Shingle Springs Rancheria, which is located within the exterior boundaries of El Dorado County, California, and approximately 100 of its several hundred members reside

on the Tribe's reservation. (E.R. 322:8-10.) Pursuant to its sovereign authority, the Tribe, since approximately 1995, has operated a full-service health clinic on its Rancheria, which is land the United States holds in trust for the Tribe's sovereign use and benefit. (E.R. 42:14-18, 322:27-323:16.) The Tribe operates the clinic under the name "Shingle Springs Tribal Health Program." (E.R. 42:14-15, 43:14-18, 269-271.) The clinic is wholly owned by the Tribe's government, and it has no legal (*e.g.*, corporate) existence separate from the Tribe under federal, state, or tribal law. (*Id.*) The Tribe funds its clinic with money from its sovereign treasury, which the Tribe acquires in part from grants and other arrangements the Tribe enters with federal and state governmental entities. (E.R. 43:3-5.) For the five years before this litigation, the clinic has operated at a deficit, with its expenditures exceeding its revenue. (E.R. 43:19-27.) A priority of the Tribe's health program is to provide health care to the Tribe's citizens and families living on and near the Tribe's sovereign trust lands, as well as other Indian persons residing on and near the Reservation. (E.R. 43:5-8.)

The Tribe runs the health clinic through the Shingle Springs Tribal Health Board, a governmental agency comprised of nine directors selected from the Tribe's membership and staffed and controlled by the Tribal Council, the Tribe's governing body. (E.R. 37:3-18, 43:9-13, 56-57 (Shingle Springs Tribal Health Board By-Laws ("Health Board By-Laws"), Arts. III, V).) At its sole discretion,

the Tribal Council appoints Health Board directors and may remove them, with or without cause. (*Id.*) The Health Board elects a Chairperson to preside at all Board meetings. (E.R. 37:15-18, 43:13, 56 (Health Board By-Laws, Art. III, § 2).) Brenda Adams is Chairperson of the Shingle Springs Tribal Health Board, and Plaintiff sues her in that official capacity only. (E.R. 324:10-12.)

B. Plaintiff Challenges Her Tribe's Decisions Governing Her Employment With The Tribe On Its Sovereign Trust Land.

Plaintiff is a member of the Tribe and resides on its sovereign trust land. (E.R. 42:14-20.) According to Plaintiff,[1] at various times she has worked for her Tribe as an independent contractor, an administrative assistant, interim executive director of the Tribe's health program, and as executive director of the Tribe's health program. (E.R. 326:11-19.) She further alleges she was terminated from the health clinic's executive director position in 2006, later rehired by the Tribe as a Billings Manager, and eventually transferred back to her executive director position. (E.R. 327:10-14.)

Plaintiff alleges that, in June 2011, she was diagnosed with Subcutaneous T-cell Lymphoma and began chemotherapy treatments (E.R. 327:25-328:1), requesting leave under the Family and Medical Leave Act of 1993 ("FMLA"),

[1] Tribal Defendants summarize in this section the allegations from Plaintiff's operative Second Amended Complaint without conceding their accuracy for purposes of this appeal, or any for other purpose.

29 U.S.C. §§ 2601-2645. (E.R. 328:9-11.) If the FMLA had applied to her employment with her Tribe, the Tribe would be required to offer her 12 weeks of leave without pay. (E.R. 335:9-11.) Instead, the Tribe allowed her to continue to serve as executive director of its health clinic for more than a year, with full pay, even though she was regularly absent from work and, in her words, "frequently felt fatigued and mentally confused." (E.R. 328:17-28.)

In August 2012, after Plaintiff suffered additional heath problems, the Tribe determined Plaintiff was no longer able to run the Tribe's then-struggling health clinic and removed her from her position as its executive director. E.R. 331:13-17; *see* E.R. 43:19-27.) Subsequently, the Tribe employed her as the executive assistant to the Chairman of the Tribe's governing body, the Tribal Council. (E.R. 334:5-7.) While working as the Chairman's assistant, Plaintiff sent the Tribe a letter threatening to sue the Tribe in California Superior Court based on the loss of her executive director position with the Tribe's health clinic, and demanding a monetary settlement to avoid litigation. (E.R. 334:12-14.) After she threatened to sue the Tribe, despite the Tribe's decision to provide her a new position within the Tribe's government, the Tribe decided she could no longer serve as the executive assistant to, and work alongside, the Chairman, the highest elected official of the Tribe. (E.R. 334:9-14.)

II. Relevant Procedural History

On April 22, 2013, Plaintiff sued the Tribe for damages in El Dorado Superior Court. (E.R. 355.) On May 28, 2013, the Tribe timely removed the action to this Court on the ground that Plaintiff's claims arose under federal law, namely, the FMLA. (E.R. 347.) On June 4, 2013, days after removing Plaintiff's lawsuit to federal court, the Tribe moved to dismiss on the basis of its sovereign immunity to suit. (E.R. 345.) In response, Plaintiff filed a First Amended Complaint, adding new defendants, and in particular, allegations against the Tribe's health program, the Tribe's Health Board, and the chairperson of the Health Board. (E.R. 380 (District Court Docket Number ("Doc.") 7).) The Tribe then withdrew its motion so it could move to dismiss the superseding amended complaint against the Tribe and the additional Tribal Defendants. (E.R. 381 (Doc. 13).) In the meantime, because Plaintiff erroneously failed to include the Health Board in the caption of her First Amended Complaint, the Court granted the parties' stipulation permitting Plaintiff to file a Second Amended Complaint adding the Health Board to the caption, and agreeing to a briefing schedule for the Tribe's forthcoming motion to dismiss. (E.R. 381 (Doc. 16).)

Plaintiff filed her Second Amended Complaint on July 12, 2013. (E.R. 321.) The Tribal Defendants moved to dismiss the Second Amended Complaint based on (1) the Tribe's sovereign immunity, and (2) on the separate basis that the FMLA is

inapplicable to this internal tribal dispute. (E.R. 381-382 (Docs. 18-21); E.R. 297:6-302:10, 314:1-316:17.) After the parties briefed the motion to dismiss, the district court on its own motion requested supplemental briefing to address an issue Plaintiff had not raised when opposing the motion: whether "an Indian tribe's removal of an action to federal court constitute[s] a waiver of sovereign immunity." (E.R. 384 (Doc. 40).) After this supplemental briefing (E.R. 384 (Docs. 44-47)), the district court held a hearing on the motion to dismiss on March 3, 2014. (E.R. 27, 384 (Doc. 48).)

On May 13, 2014, the district court denied Tribal Defendants' motion on the basis that the Tribe's removal of the action to federal court, followed by a motion to dismiss on the basis of sovereign immunity, waived the Tribe's immunity from suit (along with the immunity of its Health Board and official). (E.R. 21:12-23.) The district court did not find that the Tribe or Congress had expressly authorized Plaintiff's suit, but rather, the court deduced that, because "Defendants invoked the jurisdiction of the federal courts to raise a jurisdictional defense that could equally have been raised in the state court," it could discern "no principled reason for defendants to have removed the action before asserting immunity." (E.R. 21:12-16.) The district court also declined to consider Tribal Defendants' additional and alternative jurisdictional argument that the Tribe's exclusive right of self-governance bars Plaintiff's suit, concluding that the Tribe's removal of the case to

federal court waived the Tribe's immunity to suit and thereby precluded this defense. (E.R. 22:14-24:10.)[2] The district court expressed its "hope that the defendants appeal this ruling so that a higher court may definitively resolve the issue." (E.R. 21:24-26.)[3]

On June 10, 2014, Tribal Defendants timely filed their notice of this appeal. (E.R. 1.)

Standard of Review

This court reviews *de novo* questions of tribal sovereign immunity and questions of law raised in motions to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013), *cert. denied*, 133 S. Ct. 2829 (2013); *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 741 (9th Cir. 2009).

[2] The district court correctly dismissed all claims against the Shingle Springs Tribal Health Program—which Plaintiff named separately from the Tribe and Shingle Springs Health Board—because the Tribal Health Program has no independent legal existence from the Tribe. (E.R. 24:22-26:6.) No party has appealed the dismissal of the Health Program.

[3] On May 20, 2014, the district court issued an order that "corrected" a heading in its order of May 13, 2014, but which did not change the substance of its order denying Tribal Defendants' motion to dismiss. (E.R. 3.)

Summary of Argument

As a federally recognized Indian tribal government, the Tribe is subject to suit only where it (or Congress) has unequivocally expressed consent to suit. *Santa Clara Pueblo*, 436 U.S. at 56, 58-59. As a corollary to the rule that an Indian tribe may only waive its immunity expressly, the Supreme Court has ruled, and this Court has recognized, that a tribe's voluntary invocation of a federal forum does not waive its immunity to suit in that forum. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). The Supreme Court recently reaffirmed the strength and breadth of the tribal sovereign immunity doctrine, confirming the requirement of express consent and emphasizing that federal courts may not "carv[e] out exceptions" to tribal immunity's protections. *Bay Mills*, 134 S. Ct. at 2028, 2031, 2039.

Here, neither Congress nor the Tribe have expressed consent to Plaintiff's suit, let alone consented "unequivocally." *Santa Clara Pueblo*, 436 U.S. at 58-59. After Plaintiff sued the Tribe in state court, the Tribe exercised its congressionally authorized right to remove Plaintiff's federal claims (and her related state claims) to federal court. 28 U.S.C. §§ 1331, 1441. The Tribe then immediately asserted its sovereign immunity defense, moving to dismiss on that ground.

Neither the Supreme Court, nor any federal appellate court, has held that removal of a case from state court to federal court waives tribal sovereign immunity. However, given the Supreme Court's (and Ninth Circuit's) ruling that filing suit in a federal forum to seek affirmative relief does not expressly waive tribal sovereign immunity (*Potawatomi*, 498 U.S. at 509-10; *McClendon*, 885 F.2d at 630), it follows by even greater force that an Indian tribe sued in state court without its permission, and which then exercises its congressional right to remove federal claims to federal court to immediately assert a tribal immunity defense grounded in federal common law, has not thereby expressly waived the very defense it asserts. Indeed, the one federal appellate court to address this precise issue embraced just such reasoning, holding that when an Indian tribe removes a case to assert an immunity defense, the defense remains intact because such an act "in no way consent[s] to be sued on *any* of the claims in this case in *any* forum." *Contour Spa*, 692 F.3d at 1208 (emphasis in original).

Recognizing that some sovereigns' immunity can be waived by implication, the district court correctly distinguished tribal sovereign immunity from states' Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985) (holding that Eleventh Amendment immunity, unlike tribal sovereign immunity, may be waived by implication); *see Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002) (distinguishing *Potawatomi*, 498

U.S. 505, as inapposite to its decision that a state waives immunity by removing a case from the state's own courts to federal court). Nevertheless, without citing any authority for its ruling, and electing not to follow the Eleventh Circuit's decision in *Contour Spa*, the district court implied a waiver of the Tribe's immunity based on the district court's view that the Tribe had "no principled reason" to remove the action to federal court. (E.R. 19:21-21:26.) Because courts may never imply waivers of tribal sovereign immunity for any reason (*Santa Clara Pueblo*, 436 U.S. at 58-59), this was error.

Furthermore, and apart from implying a waiver of sovereign immunity in contravention of established law, the district court failed to give effect to the strong policies in favor of preserving tribal immunity. *Bay Mills*, 134 S. Ct. at 2030 (recognizing that tribal sovereign immunity is "'a necessary corollary to Indian sovereignty and self-governance'" (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)); *Allen*, 464 F.3d at 1047 (recognizing tribal sovereign immunity serves the "historic purpose[]" of "directly protect[ing] the sovereign Tribe's treasury" (citing *Alden v. Maine*, 527 U.S. 706, 750 (1999))). As the Tribe argued before the district court, a contrary rule would arbitrarily assign an Indian tribe's removal to federal court a different effect (*i.e.*, loss of any immunity defense) than that of a tribe's affirmative suit to vindicate its sovereign rights (*i.e.*, preservation of that sovereign immunity defense

to any affirmative claims). *Potawatomi*, 498 U.S. at 509-10; *McClendon*, 885 F.2d at 630. The district court's rule would thus require Indian tribes to race potential state court plaintiffs to the federal courthouse to preserve their right to have federal courts adjudicate immunity defenses to federal claims. An Indian tribe losing such race to the courthouse would face a cruel dilemma—either to jettison its sovereign immunity defense or to abandon its congressionally authorized right to a federal forum. As the Eleventh Circuit aptly recognized, there is "no sound basis in law or logic for forcing an Indian tribe to make this choice." *Contour Spa*, 692 F.3d at 1207-08. On the other hand, preserving a tribe's immunity defense after removal furthers congressionally recognized policies of having federal law issues—including claims arising from federal law and the federal common-law defense of tribal sovereign immunity to such claims—adjudicated in a federal forum. *Contour Spa*, 692 F.3d. at 1207; *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (recognizing "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues"); 28 U.S.C. §§ 1331, 1441; *cf.* 28 U.S.C. § 1362 (granting district courts original jurisdiction over "all civil actions" brought by any federally recognized Indian tribe "wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States"); *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566-

67 (1983) (stating there is "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights").

Because the Tribe's immunity remains intact absent express and unequivocal waiver, the Tribe's immunity also bars all claims against the other Tribal Defendants. As part of the Tribe's government, the Shingle Springs Tribal Health Board possesses the same immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F. 3d 1185, 1188-89 (9th Cir. 1998) (federal court lacks jurisdiction to adjudicate federal claims against tribal health clinic and health clinic official). Likewise, the Tribe's immunity extends to Brenda Adams, who Plaintiff sues solely in her official capacity as Chairperson of the Shingle Springs Tribal Health Board. *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).

The district court also erred in refusing to consider the separate jurisdictional argument the Tribe advanced: whether the Tribe's exclusive right of self-governance barred Plaintiff's suit, independent of the Tribe's sovereign immunity to suit and any purported waiver thereof. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080-81 (9th Cir. 2001).

For these reasons, and as explained in detail below, Tribal Defendants urge this Court to reverse the district court's order refusing to dismiss this action.

Argument

I. The Tribe's Choice Of A Federal Forum To Raise Its Immunity Defense Is Not An Express And Unequivocal Waiver Of Its Sovereign Immunity.

As "'distinct, independent political communities'" preexisting the United States Constitution, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 55, 58 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). The Supreme Court has recently confirmed that tribal sovereign immunity remains "'a necessary corollary to Indian sovereignty and self-governance.'" *Bay Mills*, 134 S. Ct. at 2030 (citation omitted); *Allen*, 464 F.3d at 1047.

Tribal sovereign immunity is distinct from, and broader than, the immunity enjoyed by foreign nations and the States. *In re Greene*, 980 F.2d 590, 594-95 (9th Cir. 1992) (noting limits on state immunity as compared to tribes); *see Bay Mills*, 134 S. Ct. at 2031 (explaining that tribes were not parties to the Constitutional Convention at which states surrendered aspects of their immunity, and distinguishing state immunity from tribal immunity on that basis); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 676-77 (2002)

(noting "more restrictive" scope of immunity enjoyed by foreign nations as compared to tribal governments' "virtually absolute" common law immunity). Consistent with "Congress' jealous regard for Indian self-governance" (*Three Affiliated Tribes*, 476 U.S. at 890), Congress has "reflected" on the Supreme Court's recognition of the strength and breadth of tribal immunity and made a "considered judgment" "to retain that form of tribal immunity." *Bay Mills*, 134 S. Ct. at 2038-39. Indeed, as this Court has recognized "the doctrine [of tribal sovereign immunity] is firmly ensconced in our law until Congress chooses to modify it." *Allen*, 464 F.3d at 1046 (citing *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-60 (1998)).

Here, the Tribe's congressionally authorized removal of federal claims to federal court, followed immediately by a motion to dismiss—seeking a ruling that the Tribe's immunity deprives any court of the power to adjudicate the merits of plaintiff's claims—in no way expresses the Tribe's unequivocal consent to the federal court's assertion of jurisdiction to adjudicate the suit's merits. Indeed, the Supreme Court's recent reaffirmation of its long-standing and well-established sovereign immunity jurisprudence confirmed that only Congress, and not any federal court, may carve out exceptions to the doctrine that tribes are immune from suit absent their express and unequivocal consent.

A. As The Supreme Court Has Recently Confirmed, Any Waiver Or Abrogation Of Tribal Sovereign Immunity Must Be Unequivocally Expressed.

It is well established that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754; *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."). The Supreme Court has held that a waiver of tribal sovereign immunity may not be implied from the tribe's actions, "but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59.

The Supreme Court has further held that even a tribe's voluntary invocation of a federal forum by initiating its own lawsuit does not waive its immunity to a countersuit in that forum. *Potawatomi*, 498 U.S. at 509-10. The *Potawatomi* Court held an Indian tribe's suit in federal court to enjoin a state from assessing a tax did not constitute a "clear waiver" of tribal immunity from the state's counterclaims. *Id.*; *see Contour Spa*, 692 F.3d at 1208 ("It is clear that the Indian tribe [in *Potawatomi*] had *voluntarily invoked* the jurisdiction of the federal courts, yet did not waive its sovereign immunity against related counterclaims by doing so." (emphasis added)).

In a recent decision, the Supreme Court reaffirmed the "long-established principles[s] of tribal sovereign immunity" set forth in its earlier cases. *Bay Mills*, 134 S. Ct. at 2039 (citing *Potawatomi*, 498 U.S. at 510). There, the Supreme Court declined to limit the doctrine of sovereign immunity or to permit implied abrogation of a sovereign tribe's immunity. *Id.* at 2028. Moreover, the Court specifically admonished federal courts from "carving out exceptions" to the "broad principle" of tribal sovereign immunity that its precedents recognize. *Id.* at 2031 (citations omitted).

In light of Supreme Court precedent, this Court employs "a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (citing *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989)). To that end, this Court's decisions have long confirmed that Indian tribes may invoke a federal forum either to seek affirmative relief, or to defend litigation on the merits, while retaining their sovereign immunity. *McClendon*, 885 F.2d at 630 (holding tribe's initiation of lawsuit does not waive immunity to "related matters, even if those matters arise from the same set of underlying facts"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (holding tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *Squaxin Island Tribe v. State of*

Washington, 781 F.2d 715, 723 (9th Cir. 1986) (holding sovereign immunity barred state's compulsory counterclaim in suit filed by tribe); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985) (same); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154-55 (9th Cir. 1979) (holding tribal sovereign immunity barred suit even after tribe invoked the jurisdiction of the district court to litigate cross-motions for summary judgment on the merits and then raised its sovereign immunity defense for the first time on appeal).

B. The Tribe Has Not Expressly And Unequivocally Waived Its Immunity To Plaintiff's Lawsuit.

Although this Court has not addressed whether an Indian tribe's choice of a federal forum over a state forum, through removal, expressly and unequivocally waives the tribe's immunity from suit, the only federal appellate court to address the issue has ruled that it does not. *Contour Spa*, 692 F.3d at 1208. Two of the three district courts in this Circuit that have addressed the issue agreed with the Eleventh Circuit. *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 959-61 (E.D. Cal. 2009); *Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians*, No. C-01-4125 VRW, 2002 U.S. Dist. LEXIS

28087, **16-19 (N.D. Cal. Dec. 26, 2002).[4] Likewise, a district court in the Tenth Circuit, while not directly addressing the effect of removal, recently dismissed on sovereign immunity grounds a suit an Indian tribe had removed to federal court, finding no "unequivocal waiver [by the tribe] or any contrary legislative intent." *Johnson v. Wyandotte Tribe*, No. 14-2117-DDC-TJJ, 2014 U.S. Dist. LEXIS 143158, **22-23 & n.5 (D. Kan. Oct. 8, 2014).

Analyzing facts and a procedural posture analogous to those presented here, the Eleventh Circuit applied Supreme Court precedent holding that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized

[4] The single decision the district court cited as "reach[ing] a different conclusion[]" (E.R. 14:1-20) is distinguishable, and cannot be squared with governing federal Indian law in any event. Specifically, the district court relied on a fifteen-year-old decision, *State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians*, 66 F. Supp. 2d 1163 (D. Nev. 1999), that involved a long and unique procedural and factual record not presented here. Specifically, in finding a waiver, the Nevada district court not only considered the tribe's joinder in removal to federal court, but it reasoned that the tribe, or the United States on its behalf, had engaged in various other conduct, including the United States' purchase of water rights for the tribe that were already subject to a court decree, as well as the tribe's payment of assessment fees required by the decree, concluding that "over fifty years of actions *demonstrating acquiescence* to the Humboldt Decree, . . . constitute[d] a multiple waiver [sic] of its tribal immunity." *Id.* at 1173 (emphasis added). Of course, the fundamental error in the *State Engineer* court's reasoning is that, absent express and unequivocal consent, waiver simply cannot be implied from an Indian tribe's "acquiescence." *Santa Clara Pueblo*, 436 U.S. at 58-59; *accord Pan Am. Co.*, 884 F.2d at 419; *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 112 (S.D. 1998) ("[I]nvolvement or purported acquiescence of certain tribal officials [in a proceeding] cannot waive the Tribe's immunity."). Nonetheless, the facts presented here are not remotely analogous to the *State Engineer* decision on which the district court relied.

the suit or the tribe has waived its immunity." *Contour Spa*, 692 F.3d at 1203-04 (citing *Kiowa*, 523 U.S. at 754). The Eleventh Circuit reasoned that, given governing federal law, it could "not lightly conclude that an Indian tribe has waived its immunity from suit." *Id.* at 1206. The court further recognized that removal protects tribes' "considerable" "interests in adjudicating tribal immunity claims in a federal forum." *Id.* at 1206-07. The Eleventh Circuit reasoned that, to imply a waiver from a tribe's removal "would effectively mean that an Indian tribe that has been sued in state court for violations of federal law must either forego its immunity from suit by removing the case or assert its immunity—itself a matter of federal law—*only* in state court. [¶] We can discern no sound basis in law or logic for forcing an Indian tribe to make this choice." *Id.* (emphasis in original.) Recognizing that the removing tribe had "in no way consented to be sued on *any* of the claims in this case in *any* forum, whether federal or state," the court concluded "the Tribe's removal of the case to federal court did not, standing alone, waive the Tribe's sovereign immunity from suit." *Id.* at 1208 (emphasis in original).

As Plaintiff acknowledged and the district court found, the Tribe, as a federally recognized Indian tribe, possesses sovereign immunity from suit. (E.R. 11:18-12:10, 322:7-8, 324:16-325:16.) *See* 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). As in *Contour Spa*, the Tribe's immunity is an absolute bar to suit because it has "in no way consented to be sued on *any* of the claims in this case in *any*

forum" (692 F.3d at 1208), let alone consented to Plaintiff's suit expressly or unequivocally. *Santa Clara Pueblo*, 436 U.S. at 58-59. The Tribe's laws reserve its sovereign immunity to all suits, except as the Tribe's governing body, its Tribal Council, expressly waives it. *See* Shingle Springs Rancheria Tribal Court Ordinance, Art. II, Ch. 4, § 1, *available at* http://www.shinglespringsrancheria.com/content/resources/downloads/ordinances/public/Tribal%20Court%20Ordinance.pdf ("The [Tribe] hereby declares that, in exercising self-determination and its sovereign powers to the fullest extent, the Tribe is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity, or as provided by this code."). Plaintiff initiated this suit by asserting claims against the sovereign Tribe, including federal claims, in the courts of another sovereign: the State of California. (E.R. 355.) The Tribe in no way consented to adjudication of Plaintiff's claims in state court, and immediately removed the case from the courts of one outside sovereign (California) to the courts of a third sovereign (the United States), as Congress expressly authorized. (E.R. 347.) *See* 28 U.S.C. § 1441(c).

In doing so, as *Contour Spa* confirms, the Tribe did not consent to adjudication of the merits of Plaintiff's claims in federal court. Rather, at every opportunity, the Tribe, and the other Tribal Defendants added to subsequently amended complaints, invoked their sovereign immunity as a bar to the district

court's adjudication of Plaintiff's substantive claims, requesting dismissal of the suit on that basis. (E.R. 318, 345.) Indeed, Tribal Defendants have yet to file an answer, and have advanced no defense to Plaintiff's claims on the merits, raising only the defense of sovereign immunity and a related (but independent) jurisdictional defense.[5] (*Id.*; *see generally* E.R. 378-385.) Given that invoking a federal forum to seek affirmative relief or defend on the merits does not amount to the express consent to suit required to effect a waiver of tribal sovereign immunity (*Potawatomi*, 498 U.S. at 509-10; *McClendon*, 885 F.2d at 630; *Quechan Tribe*, 595 F.2d at 1154-55), it necessarily follows that the Tribe's statutorily authorized choice of a federal forum over a state forum to assert its immunity defense does not expressly waive the very immunity it asserts. *Contour Spa*, 692 F.3d at 1208.[6]

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[5] As discussed below in section III, the federal courts lack jurisdiction over this dispute for the independent additional reason that the federal statute Plaintiff invokes does not apply to this intramural dispute between an Indian tribe and its member.

[6] "Entry into a suit may constitute express consent . . . , but only if, when entering into the suit, the Tribe explicitly consents to be bound by the resolution of the dispute ordered by the court." *Chemehuevi Indian Tribe*, 757 F.2d at 1053 n.7 (distinguishing *United States v. Oregon*, 657 F.2d 1009, 1014-16 (9th Cir. 1981)). Any such waiver is strictly "limited to the issues necessary to decide the action *brought by the tribe*." *McClendon*, 885 F.2d at 630 (emphasis added). Here, the Tribe has in no way consented to suit on Plaintiff's claims, has made no claims against Plaintiff, and has requested nothing from the district court, beyond dismissal of Plaintiff's claims. (E.R. 318, 345.) This case is thus distinguishable from *United States v. Oregon*, where an Indian tribe intervened as a party plaintiff to assert certain fishing rights and then asserted immunity to avoid an unfavorable ruling on those rights for which it affirmatively sought adjudication. 657 F.2d

C. Congress Has Not Expressly Or Unequivocally Abrogated The Tribe's Immunity From Suit.

Just as surely as the Tribe has not expressly waived its immunity through removal, Congress has not expressly abrogated it. As the Supreme Court recently reiterated, "[t]o abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose." *Bay Mills*, 134 S. Ct. at 2031 (quoting *C&L Enterprises v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)). There, the Supreme Court analyzed the effect of a provision of the Indian Gaming Regulatory Act that abrogates tribal immunity to suits to enjoin gaming "on Indian lands." *Id.* at 2032 (quoting 25 U.S.C. § 2710(d)(7)(A)(ii)). The State of Michigan sought to enjoin the tribe from gaming *outside* its Indian lands, on fee land within the state's jurisdiction, arguing that Congress would not have authorized a state to enjoin gaming on Indian lands "but not on lands subject to the state's own sovereign jurisdiction." *Id.* at 2032-33. The Supreme Court acknowledged that "the text as written creates an apparent anomaly," giving states greater enforcement rights over lands ordinarily outside its jurisdictional authority, but refused to expand the abrogation of immunity absent Congress' "'unequivocal' express[ion]" of its purpose to do so. *Id.* at 2033-34.

1009; *see Chemehuevi Indian Tribe*, 757 F.2d at 1053 n.7; *see also Pan Am. Co.*, 884 F.2d at 420 (distinguishing *Oregon* where the tribe asserting immunity had "steadfastly denied the jurisdiction of both the arbitrator and the federal court to rule on" the merits of the controversy).

1. The FMLA Does Not Abrogate The Tribe's Immunity.

Here, the federal statute Plaintiff invokes, the Family and Medical Leave Act (29 U.S.C. §§ 2601-2654), makes no mention of Indian tribes or tribal immunity whatsoever. *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004) (holding the tribe's sovereign immunity barred federal suit because "[t]he FMLA makes no reference to the 'amenity of Indian tribes to suit'" (quoting *Fla. Paraplegic Ass'n*, 166 F.3d at 1133)); *see also Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 169 (N.D.N.Y. 2006) ("Congress has not expressly abrogated the sovereignty of Indian Nations in the FMLA . . . [and] the only other way a Nation may be sued under the FMLA is if the Nation itself *expressly* and *clearly* waived and relinquished its immunity from suit." (emphasis in original)); *Mullally v. Havasu Landing Casino*, No. EDCV 07-1626-VAP (JCRx), 2008 U.S. Dist. LEXIS 40565, at **6-7 (C.D. Cal. Mar. 3, 2008) (finding immunity barred FMLA suit against tribal casino because "Congress has not abrogated tribal sovereign immunity for violations of the Family and Medical Leave Act" (citing *Chayoon*, 355 F.3d at 143)). Thus, the FMLA does not unequivocally express Congress' intent to abrogate the Tribe's immunity to Plaintiff's suit.

2. The Removal Statutes Do Not Abrogate The Tribe's Immunity.

The federal removal statutes permit any litigant, including an Indian tribe, to remove from state court to federal court an action "arising under" federal law.

28 U.S.C. §§ 1331, 1441. Neither statute expresses any intent to abrogate an Indian tribe's immunity.

The district court attached significance to the fact that Indian tribes, like most litigants, may remove only claims arising under federal law, whereas foreign states have a dedicated removal statute expressly permitting them to remove "[a]ny civil action brought in a State court." (E.R. 18:23-19:4 & n.2 (citing 28 U.S.C. 1441(d)).)[7] But, of course, Congress need not affirmatively *grant* Indian tribes immunity in any given situation—rather, "[a]s separate sovereigns pre-existing the Constitution," Indian tribes possess that common law immunity unless and until Congress or the tribe expressly and unequivocally limits it. *Santa Clara Pueblo*, 436 U.S. at 56-58; *Bay Mills*, 134 S. Ct. at 2031. Congress granted Indian tribes, among other litigants, the unfettered right to remove federal claims to federal court, without conditioning this choice on foregoing any defense the tribes possess, including their common law immunity from suit. 28 U.S.C. §§ 1331, 1441. Thus,

[7] Indeed, it appears the immunity of foreign sovereigns withstood removal even before Congress enacted a dedicated removal statute as part of the Foreign Sovereign Immunities Act of 1976. *Oliver Am. Trading Co. v. Gov't of the United States of Mexico*, 5 F.2d 659, 660, 667 (2nd Cir. 1924) (affirming dismissal of action on sovereign immunity grounds following Mexico's removal of the action); *see also Bergman v. De Sieyes*, 170 F.2d 360, 360-61, 363 (2nd Cir. 1948) (upholding dismissal on diplomatic immunity grounds following defendant's removal of the action).

Indian tribes exercising this right of removal retain their immunity unless and until they expressly and unequivocally waive it. *Quileute Indian Tribe*, 18 F.3d at 1460.

D. The District Court Was Correct That Eleventh Amendment Immunity And Its Waiver Are Not Analogous To Tribal Sovereign Immunity.

The district court correctly distinguished tribal immunity from state immunity on the basis that, unlike states, "Native American tribes did not voluntarily enter the Union." (E.R. 19:15-17.) Concluding that tribal sovereign immunity is "*sui generis*," the district court properly declined to analogize tribal immunity to the immunity of states. (E.R. 18:1-19:20.) In this respect, the district court's reasoning was in accord with that of the only federal appellate court to reach the issue. *Contour Spa*, 692 F.3d at 1206. In *Contour Spa*, the Eleventh Circuit refused to extend the Supreme Court's limited ruling in *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002), to strip immunity from an Indian tribe removing federal claims to federal court. *Contour Spa*, 692 F.3d at 1204-06.

In *Lapides*, the U.S. Supreme Court held that a state removing a case from the state's own courts, where it had legislatively waived its Eleventh Amendment immunity, to a federal forum where the state's legislative waiver did not apply, had impliedly waived its immunity to suit in the federal forum, as well. 535 U.S. at 616-18. Distinguishing Eleventh Amendment immunity from tribal sovereign

immunity, the Supreme Court in *Lapides* implied a waiver of the state's immunity based on "problems of inconsistency and unfairness" engendered by the state's removal from its own court system to the federal court to circumvent its own immunity waiver. 535 U.S. at 622-23. The Supreme Court expressly limited its holding to state immunity under the Eleventh Amendment, "a specific text with a history that focuses upon the State's sovereignty vis-á-vis the Federal Government." *Id.* at 623. When the state asked the Court to apply the case law permitting an Indian tribe to enter a case voluntarily without giving up its immunity, the Court expressly distinguished the law applicable to waivers of state sovereign immunity from the "special circumstances not at issue" in *Lapides*—but controlling here—involving "protect[ion] of an Indian tribe." *Id.* (citing *Potawatomi*, 498 U.S. 505).

The Eleventh Circuit complied with the express limits of the *Lapides* holding in refusing to find an Indian tribe's removal of federal claims waived its sovereign immunity to enforcement of such claims. *Contour Spa*, 692 F.3d. at 1208. In reaching this conclusion, the Eleventh Circuit observed that the Supreme Court has "recogniz[ed] that tribal immunity implicates wholly different concerns than are raised by Eleventh Amendment immunity." *Id.* (citing *Lapides*, 535 U.S. at 623)). "Simply put, an Indian tribe's sovereign immunity is not the same thing as a state's Eleventh Amendment immunity, and *Lapides* in no way addressed

tribal sovereign immunity." *Id.* at 1206 (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890–91 (1986)).

Importantly, and in contrast to states' Eleventh Amendment immunity, any waiver of tribal sovereign immunity cannot be implied from a tribe's conduct, "but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59; *compare Atascadero State Hospital*, 473 U.S. at 239-40 ("[A] State will be deemed to have waived its immunity only where stated by the most express language *or by such overwhelming implication* from the text as [will] leave no room for any other reasonable construction." (emphasis added; citations and quotations omitted)). For instance, in sharp contrast to Indian tribes, states filing claims in federal court are deemed to have waived their Eleventh Amendment immunity to compulsory counterclaims. *See generally* 3 James Wm. Moore, Moore's Federal Practice § 13.50[4] & n.26 (3d ed. 2014) (collecting cases); *compare Montana v. Goldin* (*In re Pegasus Gold Corp.*), 394 F.3d 1189, 1195 (9th Cir. 2005) (holding that, by filing a proof of claim in bankruptcy, a state waives its Eleventh Amendment immunity to claims that meet the "logical relationship" test for compulsory counterclaims), *with Chemehuevi Indian Tribe*, 757 F.2d at 1053 (holding tribe's suit does not waive tribal sovereign immunity to compulsory counterclaims).

As the district court recognized (E.R. 18:1-19:20), the Supreme Court's ruling that a state's removal to federal court implies a waiver of Eleventh

Amendment immunity did not authorize it to find the Tribe waived its immunity absent an express and unequivocal waiver. Despite correctly distinguishing Eleventh Amendment immunity, the district court's error, as explained in the section directly below, was in concluding that the Tribe's effort to invoke its sovereign immunity defense in a federal forum, instead of the state forum in which it was sued, amounted to waiver of that defense.

E. The District Court Erred By Implying A Waiver From The Tribe's Congressionally Authorized Choice Of A Federal Forum.

Because federal courts may not "carv[e] out exceptions" to, or imply waivers of, tribal immunity (*Bay Mills*, 134 S. Ct. at 2028, 2031), the district court's conclusion that the Supreme Court's narrow *Lapides* ruling did not authorize it to imply a waiver from the Tribe's removal of this case should have been the end of its analysis. (E.R. 18:1-19:20.) While the district court did not have the benefit of the Supreme Court's most recent admonitions in *Bay Mills* (which was decided after the district court's ruling here), its decision violated settled principles of sovereign immunity jurisprudence, by concluding the Tribe waived its immunity without identifying any express waiver, let alone any "unequivocally expressed" waiver. *See Santa Clara Pueblo*, 436 U.S. 49, 58-59.

Citing no authority permitting it to do so, the district court implied a waiver of the Tribe's immunity based on its view that the Tribe had "no principled reason"

to remove the action to federal court. (E.R. 19:21-21:26.) The district court's comments at oral argument confirmed that its theory was one of removal by "implication":

> Removing to this court *suggests* that you're going to litigate, not that you're going to move to dismiss, because you could do that in state court. Therefore, *the implication*, it would seem to me, at least at this moment—*the implication of a removal* is that, no, we're not satisfied to be in state courts because we intend to litigate. And if that's the case, that's a waiver.

(E.R. 30:15-21 (emphases added).) In the district court's written ruling, the stated basis for implying a waiver remained that "Defendants invoked the jurisdiction of the federal courts to raise a jurisdictional defense that could equally have been raised in the state court." (E.R. 21:12-20.) However, the district court then expressed its "hope that the defendants appeal this ruling so that a higher court may definitively resolve the issue." (E.R. 21:24-26.)

Putting aside for a moment that Indian tribes indeed have "principled reasons" to remove to federal court cases involving a potential sovereign immunity defense—a defense grounded in federal law and with respect to which federal courts are familiar (*see* section I.F.1, below)—the presence or absence of such reasons can have no possible bearing on whether the Tribe "unequivocally expressed" its consent to Plaintiff's suit. *See Santa Clara Pueblo*, 436 U.S. at 58-59. In effect, the district court's reasoning appears to be that, because the Tribe

could have raised an *immunity* defense governed by federal law in state court, its choice of a federal forum implies its consent to the federal court's resolution of the suit's *merits*. The fallacy of this reasoning is revealed by the Tribe's immediate and repeated invocation of its sovereign immunity in federal court, confirming the Tribe did not, in fact, consent to adjudication of the merits by any court, including the federal court in which it had moved to dismiss Plaintiff's suit. (E.R. 380-381 (Docs. 5, 18).) Indeed, this Court has emphasized that "[c]onsent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*." *Pan Am. Co.*, 884 F. 2d at 419. Thus, the exception to sovereign immunity the district court carved out—an exception that, by its own words, rested on "implication" (E.R. 30:15-21)—cannot withstand the bedrock law barring suit without the Tribe's (or Congress') express and unequivocal consent.

F. Public Policy Strongly Supports Preserving Tribal Immunity, Including Upon A Tribe's Removal Of Federal Claims.

Congress has authorized an Indian tribe, like any other litigant, to seek a federal forum for adjudication of lawsuits invoking federal claims. 28 U.S.C. § 1441(c); *Mercy Hospital Ass'n v. Miccio*, 604 F. Supp. 1177, 1179-80 (E.D.N.Y. 1985) (even where state courts "have concurrent original jurisdiction," the district court "does not exercise discretion, but strictly interprets and applies the provisions governing removal"); *Colo. River Water Conserv. Dist. v. United States*, 424 U.S.

800, 813, 817-18 (1986) (federal courts have a "virtually unflagging obligation" to exercise jurisdiction Congress has bestowed on them).

While the law in no way authorizes federal courts to examine a litigant's reasons for removal, sound policy favors permitting Indian tribes to exercise this right without forfeiting the defense of sovereign immunity.

1. Tribes Have A Strong Interest In Federal Court Adjudication Of Their Sovereign Immunity Defenses To Federal Claims.

Because "tribal immunity is a matter of purely federal law," "Indian tribes have an interest in a uniform body of federal law in this area." *Contour Spa*, 692 F.3d. at 1207. The doctrine of sovereign immunity is one that, like other federal law issues, "sensibly belongs in a federal court," as its resolution benefits from the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312, 315 (characterizing Congress' intent in making cases "arising under" federal law removable under 28 U.S.C. § 1331 and § 1441). Indeed, in a related context, Congress has, for nearly fifty years, specifically guaranteed federally recognized Indian tribes a federal court forum for their federal claims. 28 U.S.C. § 1362; Pub. L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

In the face of this congressional intent, the district court's ruling suggests that the Tribe lacks a legitimate interest in having a federal court, rather than a

state court, adjudicate tribal sovereign immunity under the uniform body of federal Indian law the federal courts have developed and applied. But the choice of forum is often of critical importance to a tribe, and a lack of uniformity between state and federal application of federal Indian law can have real and serious consequences for tribal litigants. Tribal sovereign immunity is a creature of federal common law, and state court tribal immunity precedent can lag behind controlling federal appellate precedent. *Compare Turner v. Martire*, 82 Cal. App. 4th 1042, 1054 (2000) (holding, in a decision that is yet to be overturned in California's courts, that tribal sovereign immunity only extends to "tribal officials" who "perform[] discretionary or policymaking functions within or on behalf of the Tribe"), *with Cook*, 548 F.3d at 727 (holding six years ago that "tribal immunity extends beyond tribal officials to employees of a tribe acting in their official capacity and within the scope of their authority" and extending the tribe's immunity to casino employees serving alcoholic beverages); *compare Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 638 (1999) (listing as a factor for determining whether a tribal entity possesses immunity "whether the business entity is organized for a purpose that is governmental in nature, rather than commercial" (citation omitted)), *with Kiowa*, 523 U.S. at 758-60 (refusing, in a case decided a year *before* California's *Trudgeon* case, to draw a distinction between the immunity of commercial and noncommercial tribal activities). Unconditional

removal thus permits tribal defendants to have federal claims against them decided by federal courts that are both (i) experienced in applying federal common law (*Grable*, 545 U.S. at 315) and (ii) directly bound by federal common law decisions that are the backbone of federal Indian law and of Indian tribes' "'common-law immunity from suit.'" *Bay Mills*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

An additional principled reason for an Indian tribe to raise its immunity defense in federal court is that, as a matter of federal law, an Indian tribe has the right to an automatic and immediate appeal, preserving its immunity from suit should a district court deny its motion to dismiss on the basis of sovereign immunity. *Burlington N.*, 509 F.3d at 1091; *Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985) (explaining that immunity from suit "is effectively lost if a case is erroneously permitted to go to trial"). In the California state court system, by comparison, appellate review of a state court's rejection of a tribal immunity defense is available only on an extraordinary interlocutory writ, a procedure almost always resulting in summary denial. *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1189-90 (2005); *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal. 4th 1233, 1241 n.3 (noting that 94 percent of writ petitions are summarily denied).

The rule proposed by the district court would not only force Indian tribes sued without their consent in state court to have their sovereign immunity defenses to federal claims heard in state court, but it would also deprive tribes of their statutory right to choose to have the merits of federal claims heard in federal court in situations where the court ultimately rejects their immunity defense or when sovereign immunity only bars particular claims or remedies but not others.[8] *See* 28 U.S.C. §§ 1331, 1441. The Supreme Court has recognized that a justification for the tribal sovereign immunity doctrine is "protect[ing] nascent tribal governments from encroachments by States." *Kiowa Tribe*, 523 U.S. at 758; *see United States v. Kagama*, 118 U.S. 375, 384 (1886) (Indian tribes "are communities dependent on the United States. . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

In sum, the district court's position that the Tribe lacked a "principled reason" for removal cannot be squared with federal law and policy, recognizing strong tribal interests in adjudicating federal claims, and defenses to those claims,

[8] By viewing a sovereign immunity defense as an all-or-nothing proposition, the district court's ruling failed to appreciate that sovereign immunity may (in certain circumstances not present here) limit a plaintiff's remedies without requiring dismissal of the entire suit. *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 517 F.2d 508, 509-10 (8th Cir. 1975) (recognizing that courts must give effect to limitations tribes place on sovereign immunity waivers and concluding tribe waived its immunity as to particular sources of funds but not as to others).

in federal courts, not the state courts, which can be "inhospitable to Indian rights." *San Carlos Apache Tribe*, 463 U.S. at 566-67.

2. Arbitrarily Treating Removal To Federal Court Differently From An Affirmative Federal Suit For Declaratory Relief Would Set Up A Race For The Courthouse That Would Unduly Burden Tribes And Federal Courts.

Because a Tribe's filing of a federal court suit for a declaration of its sovereign rights does not waive its immunity to any related claims for affirmative relief (*Potawatomi*, 498 U.S. at 509-10), the district court's proposed rule would create an asymmetry requiring Indian tribes to race prospective plaintiffs to the courthouse. Under bedrock law, an affirmative suit to vindicate an Indian tribe's sovereign rights in no way permits another party to sue the tribe for damages, whether by way of counterclaims or a separate suit. *Id.*; *Chemehuevi Indian Tribe*, 757 F.2d at 1053; *McClendon*, 885 F.2d at 630. Yet the district court's ruling suggests that, notwithstanding the law that would preserve its immunity had the Tribe affirmatively filed its own declaratory relief complaint, the Tribe somehow abandoned its immunity by defensively removing to federal court federal claims that Plaintiff initiated.

Apart from the dissonance between a rule that finds waiver of immunity from a tribe's removal of a suit in which it is an involuntary participant, while preserving immunity where the tribe itself voluntarily files suit, the district court's

rule would incentivize litigation, unduly burdening both Indian tribes and federal courts alike. Under the district court's rule, an Indian tribe with any reason (even remotely) to anticipate suit on a federal claim would be incentivized to file preemptive suit in federal court, hoping to beat the prospective state court plaintiff to the courthouse. This would result in a groundswell of preemptive federal court litigation by Indian tribes, requiring federal courts, in many instances, to expend their limited judicial resources issuing declarations on matters that would not have otherwise coalesced into litigation. There is certainly no "principled reason" to impose this burden on Indian tribes and federal courts by manufacturing an arbitrary distinction between cases Indian tribes file in federal court seeking a declaration as to their sovereign rights, on one hand, and cases Indian tribes remove to federal court to assert a sovereign immunity defense, on the other.

* * *

In sum, forcing an Indian tribe sued without its permission to choose between its sovereign right of immunity to suit and its congressionally guaranteed right to avail itself of the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues" (*Grable*, 545 U.S. at 312) simply has "no sound basis in law or logic." *Contour Spa*, 692 F.3d at 1207. In addition, a contrary rule would arbitrarily treat a tribe's removal to federal court (to

defensively assert a tribal immunity defense) differently from a federal suit initiated by a tribe (to affirmatively protect tribal sovereignty).

II. The Tribe's Health Board And Employee Possess The Tribe's Immunity From Suit.

The district court recognized that the Health Board's and Brenda Adams's "assertions of sovereign immunity derive from the Tribe's sovereign immunity." (E.R. 21:20-23.) Because the Tribe's immunity remains intact absent express waiver, and because its removal of federal claims, followed by assertion of its sovereign immunity, did not waive that immunity, Plaintiff's claims against the Health Board and Brenda Adams, sued in her official capacity, are also barred by the Tribe's immunity.

A. The Tribe's Health Board Possesses The Tribe's Immunity.

The Tribe's immunity extends to all of its agencies and entities, including tribally government health clinics. *See Kiowa Tribe*, 523 U.S. 751 (1998) (holding that sovereign immunity applies to governmental activities as well as commercial activities); *Modoc Indian Health Project, Inc.*, 157 F.3d at 1187-89 (holding district court lacked jurisdiction over organization formed by two tribes to provide tribal health services); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176-77 (D.S.D. 2012) (finding tribal health program immune).

The Health Board is a part of the Tribe's government, possessing its immunity. It is governed by bylaws promulgated by the Tribe's governing body (the Tribal Council), and serves as the policy board for the Tribe's health program. (E.R. 37:15-18, 44:1-3, 54 (Health Board By-Laws, Art. II, § 1(A)), 60-61.) The Tribal Council has complete discretion to appoint and remove members of the Health Board, all of whom must be members of the Tribe. (E.R. 37:15-18, 56-57 (Arts. III, V).) Because the Health Board is completely funded with money from the Tribe's treasury, any judgment against the Health Board would deplete the Tribe's sovereign treasury. (E.R. 43:19-24.) Accordingly, as part of the Tribe's government, the Health Board possesses the Tribe's immunity.

B. The Tribal Official Sued In Her Official Capacity Also Possesses The Tribe's Sovereign Immunity.

Consistent with the immunity doctrine's protective purpose, tribal sovereign immunity likewise "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Cook*, 548 F.3d at 727 (citation omitted). It follows that "a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Id.* (citation and quotations omitted); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (upholding dismissal on basis of immunity despite claims against officials, since "it is difficult

to view the suit against the officials as anything other than a suit against the Band"). Thus, an Indian tribe's immunity bars a suit to enjoin a tribal official's ongoing violation of federal law where "the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign . . . ." *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (citation and quotation omitted); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1159-61 (9th Cir. 2001) (refusing to permit employee of tribally regulated employer to amend racial discrimination complaint to name Navajo Nation officials because plaintiff's "real claim is against the Nation itself" and relief "would operate against the Nation"); *Allen v. Smith*, No. 12-cv-1668-WQH-KSC, 2013 U.S. Dist. LEXIS 35046, at **34-36 (S.D. Cal. Mar. 11, 2013) (holding tribal immunity barred a suit by disenrolled tribal members seeking reinstatement of their membership because "the relief sought in this Complaint would 'require affirmative action by the sovereign,' *i.e.*, the Pala Tribe's re-enrollment of Plaintiffs" and "[s]uch a remedy would operate against the Pala Tribe, impermissibly infringing upon its sovereign immunity" (citations omitted)).

Plaintiff expressly sues Brenda Adams in her official capacity as Chairperson of the Shingle Springs Tribal Health Board (E.R. 324:11-12.), alleging Ms. Adams injured her through actions Ms. Adams supposedly took in the course

of carrying out her official tribal duties. (*See, e.g.*, E.R. 339:1-3.) Furthermore, the Tribe—not Ms. Adams personally—employed Plaintiff (E.R. 37:15-18, 42:24-43:2, 43:9-13, 56-57 (Arts. III, V), 265-268.), so only an affirmative action by the Tribe (through its Health Board) can grant Plaintiff the relief she seeks: reinstatement as Executive Director of the Shingle Springs Tribal Health Program. (E.R. 343:18-23.) In short, Ms. Adams possesses the Tribe's immunity to Plaintiff's claims.

III. The District Court Erroneously Conflated Immunity With The Inapplicability Of The FMLA To An Intramural Tribal Dispute, Which Was An Independent Jurisdictional Defense To Plaintiff's Claims.

In its motion to dismiss, the Tribe argued that the district court lacked jurisdiction over Plaintiff's claim for reinstatement as Executive Director of her Tribe's health program because the application of FMLA to this dispute impinges on the Tribe's right to govern itself in this intramural matter. (E.R. 314:1-316:17.) *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1080-81. The genesis of this defense is the established rule that a federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if the law touches "exclusive rights of self-governance in purely intramural matters." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citations omitted). This defense is independent of the Tribe's sovereign immunity, and indeed, applies even where an Indian tribe's sovereign immunity has been pierced.

Karuk Tribe Hous. Auth., 260 F.3d at 1075, 1080-81 (refusing to apply ADEA to tribal housing authority based on *Coeur d'Alene* rule even though the tribal entity did not possess immunity to suit by federal agency).

Tribal Defendants demonstrated before the district court that applying the FMLA here would interfere with the Tribe's "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene*, 751 F.2d at 1116. (E.R. 314:1-316:17; *see, e.g.*, E.R. 42:14-18, 43:3-8, 43:19-27, 44:26-45:20.) The district court recited the *Coeur d'Alene* rule, and cited certain cases applying it (E.R. 22:14-24:10), but failed to address the fact that the *Coeur d'Alene* rule bars suit even where an Indian tribe lacks immunity. *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1075, 1080-81 (applying rule to bar action by EEOC, a federal entity against whom tribal entities lack immunity); *Coeur d'Alene*, 751 F.2d at 1114 (applying rule to suit by United States Department of Labor); *U.S. Department of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182 (9th Cir. 1991) (same). Because the Tribe's defense based on *Coeur d'Alene* is independent of the Tribe's immunity, the district court erred in declining to decide whether the FMLA's application to this dispute interfered with the Tribe's self governance in violation of *Coeur d'Alene* and its progeny on the basis that "the court has found that the Tribe waived its sovereign immunity through removal . . . ." (E.R. 23:12-24:10.) Thus, for the sake of argument, even if the Court were to somehow

conclude the Tribe's immunity defense does not dispose of Plaintiff's claims, Tribal Defendants request that this Court direct the district court to decide on remand whether Plaintiff's claims are barred because they touch "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene*, 751 F.2d at 1116.

Conclusion

As the Supreme Court has repeatedly confirmed, Indian tribes may only be sued where they (or Congress) expressly and unequivocally authorize suit. *Santa Clara Pueblo*, 436 U.S. at 56-58; *Bay Mills*, 134 S. Ct. at 2031. This strict standard for waiver of tribal sovereign immunity means that an Indian tribe may go so far as to invoke a federal court to sue for protection against another's incursion on its sovereignty without waiving its immunity to the other's claims for affirmative relief. *Potawatomi*, 498 U.S. at 509-10; *Chemehuevi Indian Tribe*, 757 F.2d at 1053. The district court's ruling upended this bedrock law by implying a waiver of immunity simply because the Tribe's availed itself of its congressionally authorized prerogative to remove an unconsented state court suit containing federal claims to federal court, and then immediately sought dismissal on the basis of its sovereign immunity. Because there was no express and unequivocal consent by the Tribe to be sued by Plaintiff, a member of the Tribe (*see Santa Clara Pueblo*, 436 U.S. at 58-59), and because the district court lacked power to "carv[e] out [an]

exception[]" to tribal sovereign immunity (*Bay Mills*, 134 S. Ct. at 2031), Tribal Defendants respectfully request that this Court reverse the district court's denial of their motion to dismiss, and direct the district court to dismiss the action with prejudice.

Respectfully submitted,

DATED: October 20, 2014 DENTONS US LLP

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Statement Of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, the Tribal Defendants state that they are aware of no related cases pending before this Court.

Certificate Of Compliance

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 10,867 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

/s/ Paula M. Yost

Certificate Of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 20, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on October 20, 2014, at Oakland, California.

/s/ Paula M. Yost

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