

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

**KENNY PAYNE, on behalf of the Estate
of BETTY SUE HAMBRICK and all
Wrongful Death Beneficiaries
of BETTY SUE HAMRICK**

PLAINTIFF

v.

CIVIL ACTION NO.: 3:15-cv-105-TSL-RHW

**MISSISSIPPI BAND OF CHOCTAW
INDIANS, MISSISSIPPI BAND OF
CHOCTAW INDIANS d/b/a
CHOCTAW RESORT
DEVELOPMENT ENTERPRISE,
CHOCTAW RESORT
DEVELOPMENT ENTERPRISE, INC.,
PEARL RIVER RESORT, SILVER
STAR CASINO RESORT
and JOHN DOES 1 through 10**

DEFENDANTS

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Defendant, Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise, the Owner and Operator of the Silver Star Hotel & Casino (hereinafter, the “Tribe”), has moved for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The legal and factual basis for that motion is set forth below.

I. INTRODUCTION

It is well settled that “[f]ederal courts are courts of limited jurisdiction.” *Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 257 (5th Cir. 2014) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Thus, federal courts only possess the power to hear cases as authorized by the Constitution or laws of the United States. See

Kokkonen, 511 U.S. at 377. Federal Courts properly exercise jurisdiction over claims based upon diversity of citizenship, pursuant to Title 28 U.S.C. § 1332; and federal questions, pursuant to Title 28 U.S.C. § 1331, where the claims are founded on the United States Constitution, federal statutes or regulations. Diversity of citizenship and federal question claims comprise the court's subject matter jurisdiction.

A Rule 12(b)(1) motion directly challenges the district court's subject matter jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Lack of subject matter jurisdiction may be found in any one of the three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* (citing *Barrera-Montenegro v. United States*, 74 F. 3d 657, 659 (5th Cir. 1996)). The burden of proof for a 12(b)(1) motion is on the plaintiff to allege and invoke jurisdiction. *McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975); *see also Warnock v. Pecos County, Tex.*, 88 F.3d 341, 343 (5th Cir. 1996) ("Because sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice.").

It is readily apparent that none of the allegations of the Complaint meet Plaintiff's burden to establish a basis for this Court's subject matter jurisdiction. No federal claim is pled, and the sole basis Plaintiff has identified for invoking this Court's jurisdiction is that the controversy is "in excess of \$75,000.00" and "the action is between citizens of different states." *See* Complaint, ¶ 8, attached hereto as Exhibit 1. Because the Defendant Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise (the "Tribe") is a federally

recognized Indian tribe, there does not exist any basis for the exercise of diversity jurisdiction over this case. The Tribe is not a citizen of any State for purposes of diversity jurisdiction.

II. FACTUAL PREDICATE FOR MOTION

The Mississippi Band of Choctaw Indians (the “Tribe”) is, and at all times material has been, a federally recognized Indian tribe, a status of which this court may take judicial notice. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *United States v. John*, 437 U.S. 634 (1978); “Indians Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Notice,” 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014) *see* Notice, attached as Exhibit 2) (*see also* 44 U.S.C. 1507, “The contents of the Federal Register shall be judicially noticed....”).

The Silver Star Resort and Casino is simply a gaming facility operated by the Tribe. The Tribe directly operates that facility itself by and through an unincorporated tribal enterprise known as the Choctaw Resort Development Enterprise. That enterprise was established and is operated by the Tribe per Choctaw Tribal Ordinance No. 56, and Choctaw Tribal Council Resolution 00-010. *See* Ordinance 56 and Resolution CHO 00-010, attached as Exhibits 3 and 4.

In ruling on a Rule 12(b)(1) motion asserting a factual attack on the Court’s subject matter jurisdiction, the court may consider facts and matters not contained in the complaint. *Ramming*, 281 F.3d at 161.

This Court is, therefore, requested to consider the relevant provisions of Choctaw Ordinance 56 and Resolution CHO 0010 in ruling on the Tribe’s Rule 12(b)(1) motion, and is requested to take judicial notice of the said Ordinance and Resolution as they appear in Exhibit 3 and 4 for that purpose.

Ordinance 56 provides *inter alia*:

WHEREAS, it is now and has always been the intent of the Tribal Council that these wholly owned Tribal business enterprises should operate as and be legally classified as unincorporated enterprises of the Mississippi Band of Choctaw Indians, d/b/a the particular Tribal enterprise, rather than as separate Tribally-chartered corporations; and,

WHEREAS, there is a need to clarify the organizational status of all the Tribe's wholly owned business enterprises to ensure that they receive treatment as non-taxable enterprises of the Tribe and not be confused with or mistaken for separate Tribally-chartered corporations; and,

Section 28. Special Provisions for Silver Star Resort and Casino.

(a) The Silver Star Resort and Casino is an unincorporated enterprise of the Mississippi Band of Choctaw Indians administratively located within the Tribal Government Executive Branch. The resort and casino are wholly-owned developments of the Tribe and are currently operated without a separate board pursuant to a management contract and a state-tribal compact approved by the Secretary of the Interior pursuant to 25 U.S.C., Section 2701, et. seq. Nothing in this Ordinance shall be construed to alter the management and operational requirements of the Silver Star Resort & Casino pursuant to said compact and management contract. However, after enactment of this ordinance, the Silver Star Resort and Casino shall be administratively located within the Tribal Business Enterprise Division of the Tribal Government Executive Branch.

Resolution CHO 00-010 provides *inter alia*:

1. a new tribal business enterprise is hereby established, which shall be known as the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise;
2. the Choctaw Resort Development Enterprise is hereby established for the following purposes:
 - (A) to provide budgetary and operational management, coordination and oversight over all gaming operations conducted on the Choctaw Reservation;

III. NO BASIS FOR THE EXERCISE OF DIVERSITY JURISDICTION EXISTS

28 U.S.C. § 1332 provides *inter alia*:

- (a) The district courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum of value of \$75,000, exclusive of interest and costs, and is between –
 - (1) citizens of different States;
 - (2) citizens of a State and citizens or subject of a foreign state;
 - (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
 - (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Diversity jurisdiction does not exist under § 1332 unless there is complete diversity as between the Plaintiff and the Defendant – each must be a citizen of a different State or of a State and a foreign nation. This fundamental prerequisite for the establishment of diversity jurisdiction does not exist here for two reasons.

It has long been settled law that federally recognized Indian tribes are not foreign states. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Therefore, their presence in a case filed in the United State District Courts cannot meet the requisite diversity to invoke jurisdiction under 28 U.S.C. § 1332(a)(4) or § 1332(a)(2).

Further, all United States Circuit Courts of Appeal to address the issue have ruled that federally recognized Indian tribes are not citizens of the states in which they are located for purposes of determining whether diversity jurisdiction exists. Instead, they are considered “stateless” entities whose joinder destroys complete diversity. *Ninegret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (per curiam); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80 n.1 (2d Cir. 2001); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Auto Owners Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017 (8th Cir. 2007); *Gaming World International, Ltd. V. White Earth Band of Chippewa Indians, et al.*, 317 F. 3d 840 (8th Cir. 2003); *American Vantage Companies, Inc. v. Table*

Mountain Rancheria, 292 F.3d 1091 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Mae Louise Victor v. Grand Casino-Coushatta, et al.*, 359 F.3d 782, 785 n. 1 (5th Cir. 2004) (dismissing appeal for want of jurisdiction under 28 U.S.C. §§ 1447 (c) and (d) where District Court dismissed and remanded suit after attempted removal from state court based on assertion of diversity jurisdiction but noting District Court’s ruling that joinder of the Coushatta Tribe of Louisiana as a defendant “destroyed diversity because it was a non-state entity”).

IV. NO BASIS FOR THE EXERCISE OF FEDERAL QUESTION JURISDICTION EXISTS

“The presence or absence of federal-question jurisdiction [under 28 U.S.C. § 1331] is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction only exists when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). “To bring a case within the [federal-question] statute, a right created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action.” *Gully v. First Nat’l Bank*, 299 U.S. 109, 112 (1936). Thus an aspect of a case that is not an essential part of a plaintiff’s complaint is not sufficient to create federal jurisdiction. *Id.* at 113.

Pursuant to the well-pleaded complaint rule, a case does not arise under federal law if the complaint asserts only a state law or tribal law cause of action. Thus, whether the only actionable claims plead sound in tort grounded in state or tribal law and Plaintiff has not identified any non-frivolous federal law basis for relief, the Complaint does not state a substantial federal question. The Plaintiff’s Complaint here makes clear that he has not pled any claims arising under federal law to establish federal question jurisdiction. The Plaintiff has instead pled a mere tort claim – one that is not grounded in federal law applicable to the Tribe.

V. THE TRIBE'S SOVEREIGN IMMUNITY IS AN INDEPENDENT JURISDICTION BAR TO THIS ACTION

In addition to the lack of underlying subject matter jurisdiction over the Plaintiff's claims, the Tribe is protected from suits seeking money damages by its sovereign immunity from unconsented civil suits. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998) (tribal sovereign immunity barred private party's suit against the tribe for money damages for breach of contract arising from off-reservation construction project); *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas, et al.*, 261 F.3d 567 (5th Cir. 2001). Courts have long recognized the sovereign immunity of Indian tribes unless the right has been abrogated by Congress or the respective tribe. *Kiowa*, 523 at 754 ("As 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.")

In this case, the Tribe has not consented to be sued in this Court by Plaintiff on these claims. *See* Choctaw Tribal Code, § 1-5-4, of which the Court may take judicial notice:

§ 1-5-4 Sovereign Immunity

Except as expressly abrogated by act of Congress, or as specifically waived by resolution or ordinance of the Tribal Council specifically referring to such, the Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

This non-waiver is expressly reiterated at § 13 of Ordinance 56 (included in Exhibit 3) regarding the Tribe's Ordinance 56 enterprises such as the Silver Star:

The Mississippi Band of Choctaw Indians hereby retains its sovereign immunity, and nothing contained in this Ordinance shall be construed as a waiver of the tribe's sovereign immunity, nor as authorization for any enterprise board to waive the Tribe's sovereign immunity. No enterprise board has or shall have any power or authority to waive the sovereign immunity of the Mississippi Band of Choctaw Indians or any of its divisions or enterprises or to pledge or encumber any Tribal Assets or revenues without approval of the Tribal Council. The property and

assets of individual tribal members shall in no event be subjected to any claim or levy for any liabilities or debts of the Tribe.

Even if the Court had underlying subject matter jurisdiction under 28 U.S.C. § 1331 or 1332, the Tribe's sovereign immunity presents an independent jurisdictional bar requiring dismissal per Rule 12(b)(1). It is undisputed that the Defendant herein is the Tribe, which operates the Silver Star. An unincorporated commercial enterprise of the Tribe d/b/a that enterprise has the same legal status of the Tribe in general and likewise possesses sovereign immunity. *Thomas v. Choctaw Management Services Enterprise*, 313 F.3d 910 (5th Cir. 2002) (holding that "unincorporated commercial enterprises entirely owned and operated by recognized Indian tribes" have same legal status as do their owner/operator tribes, dismissing Title VII claim); *see also Graham v. Applied Geo Technologies, Inc.*, 593 F. Supp. 2d 915, 920-21 (S.D. Miss. 2008) (reviewing and applying cases holding that "an action against a tribal enterprise is, in essence, an action against the tribe itself" and upholding tribal sovereign immunity defense even as to tribally-owned, tribally chartered corporation).

The Tribe has not waived its immunity as to unconsented suits in this Court as to any of the claims pled in the Complaint.

The only question that remains is whether Congress has by legislation abrogated the Tribe's sovereign immunity from unconsented civil suits respecting the kind of claims here pled. *See Kiowa Tribe*, 523 U.S. at 754 (acknowledging the congressional power to abrogate or limit tribal sovereign immunity and inviting congressional action to do so). The answer is "no."

Once the sovereign immunity defense has been raised, Plaintiff has the burden to establish that an express and unequivocal waiver or abrogation of the Tribe's immunity has occurred, either by Congress or the Tribe itself. *Kiowa Tribe*, 523 U.S. at 754. Since the defense is jurisdictional, mere conclusory allegations asserting the existence of such a waiver will not be

sufficient to avoid dismissal on the grounds of sovereign immunity. *Id.* In *Kiowa Tribe of Oklahoma*, the Court reaffirmed that any congressional action to abrogate tribal sovereign immunity must unequivocally do so and ruled that Indian tribes are immune from suits seeking monetary damages in state or federal courts. *Id.*

Because there are no Congressional acts or other agreements abrogating the Tribe's sovereign immunity from unconsented civil suits, the Tribe has not consented to suit in this Court; the Choctaw Resort Development Enterprise as an entity of the Tribe is immune from civil suit in this Court. Thus, this Court is obligated to dismiss the complaint. *Kiowa Tribe, supra*; see also *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 512-22 (5th Cir. 1966).

VI. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AND PROVIDE PROPER NOTICE OF CLAIM

The Tribe also prays for application of Choctaw Tribal Code law to this action. Pursuant to the Choctaw Tribal Code, this lawsuit should be dismissed based on the Plaintiff's failure to comply with the special exhaustion requirements of §1-5-10.

No court of the Mississippi Band of Choctaw Indians shall have jurisdiction to entertain any civil suit or action, . . . against the Mississippi Band of Choctaw Indians, the Tribal Council, a Tribal government agency or instrumentality, or any Tribal official or employee complaining of the official conduct thereof unless the plaintiff in such action has first exhausted Tribal administrative remedies in an effort to correct that matter complained of;"

Choctaw Tribal Code § 1-5-10 (emphasis added). The Choctaw Tribal Code further states that, to exhaust administrative remedies under this section, a plaintiff must: (1) "make a good faith effort to invoke and comply with all then existing, reasonable administrative procedures for handling disputes, grievances or complaints applicable to the office or department in which the matter arose;" and (2) "file a written complaint with the tribal Chief setting out the

basis for the complaint and the administrative remedies pursued to correct the matter complained of” *Id.*

Furthermore the Tribe, as a sovereign Indian nation, enacted the Choctaw Tort Claim Act, modeled after the Federal Tort Claims Act, 23 U.S.C. §§1346, 2671, *et seq.* Section 25-1-6 provides the procedural requirements to pursue a claim under the Choctaw Tort Claims Act, and states in relevant part:

No lawsuit shall be filed upon any such claim until and unless the six (6) month administrative review period created by §25-1-6(1) shall have expired **and the other administrative exhaustion requirements of §1-5-10, Choctaw Tribal Code, have been satisfied.**

Choctaw Tort Claims Act § 25-1-6(2) (emphasis added).

Plaintiff filed his lawsuit before filing any written Complaint with the Tribal Chief of the Mississippi Band of Choctaw Indians as required by Choctaw Tribal Code. The Choctaw Tort Claims Act is clear that both the six (6) month administrative review period created by § 25-1-6(1) and all administrative exhaustion requirements of § 1-5-10 of the Choctaw Tribal Code must be met before a lawsuit can be filed. Plaintiff has failed to demonstrate compliance with the requirement of these provisions as required by Choctaw Tribal Code § 1-5-10(4). Therefore, Plaintiff has wholly failed to satisfy the jurisdictional prerequisites established by the Choctaw Tribal Code. The Tribal Council specifically enacted these provisions to ensure that the Executive Branch had the power to attempt to resolve these claims without the necessity and expense of litigation.

Accordingly, this Court has the authority and duty under § 1-5-10(4) to dismiss this lawsuit as the Plaintiff has not complied with the requirements of this section.

VII. CONCLUSION

For the foregoing reasons, this action should be dismissed for lack of subject matter jurisdiction. Plaintiff has failed to present a “substantial” federal question to invoke this Court’s subject matter jurisdiction. To the contrary, Plaintiff has merely asserted a tort claim that turns on state law. Additionally, Plaintiff cannot establish complete diversity in this matter because the Tribe is not a citizen of any state. Further, the Tribe is shielded from unconsented lawsuits based on its sovereign immunity. Finally, dismissal is warranted because Plaintiff failed to exhaust administrative remedies and satisfy the notice requirements under the Choctaw Tort Claims Act prior to filing his suit.

Therefore, Defendant respectfully requests this Honorable Court to dismiss Plaintiff’s Complaint in its entirety. Defendant further requests any further relief this Court deems necessary.

Respectfully submitted this the 17th day of March 2015.

MISSISSIPPI BAND OF CHOCTAW
INDIANS D/B/A CHOCTAW RESORT
DEVELOPMENT ENTERPRISE

/s/ Charles P. Copeland _____
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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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