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**IN THE COURT OF THE HUALAPAI NATION
HUALAPAI RESERVATION, STATE OF ARIZONA
PEACH SPRINGS, ARIZONA
CIVIL DIVISION**

WD AT THE CANYON, LLC, an Arizona limited liability company; **JAMES R. BROWN**, a married man,

Plaintiff,

CASE NO.: 2014-CV-005

vs.

HWAL'BAY BA:J ENTERPRISES, INC. d/b/a GRAND CANYON RESORT CORPORATION, a tribally chartered corporation of and owned by the Hualapai Indian Tribe; **CARRIE IMUS DANIEL ALVARADO, NEIL GOODELL, DERRICK PENNEY, CAMILLE NIGHORSE, MICHAEL VAUGH and WILFRED WHATONAME, SR.**, each individuals and Members or former Members of Grand Canyon Resort Corporation's Board of Directors and **JENNIFER TURNER**, an individual and Chief Exccutive Officer of Grand Canyon Resort Corporation,

Respondents.

ORDER

THE COURT FINDS THAT:

A. Facts:

1. The Plaintiffs are WD At The Canyon, LLC (hereinafter "WD"), an Arizona limited liability company and James R. Brown, an individual.

2. The Specially Appearing Respondents (hereinafter "Respondents") are Hwal' Bay Ba:J Enterprises, Inc. d/b/a Grand Canyon Resort Corporation (hereinafter "GCRC"), Carrie Imus, Daniel Alvarado, Neil Goodell, Derrick Penney, Camille Nighthorse, Michael Vaughn and Wilfred Whatoname, Sr., individuals Members or former Members of the Grand Canyon Resort Corporation's Board of Directors and Jennifer Turner, Chief Executive Officer

1 of Grand Canyon Resort Corporation. The Grand Canyon Resort Corporation is a wholly-
2 owned enterprise of the Hualapai Indian Tribe.

3 3. Plaintiffs commenced this action with the filing of a *Verified Complaint* on
4 January 14, 2014. Shortly thereafter, on February 14, 2014, Respondents filed a *Motion to*
5 *Dismiss*.

6 4. On April 8, 2014, Plaintiffs filed an *Amended and Verified Complaint*.

7 5. Soon after on April 23, 2014, Respondents filed *Specially Appearing*
8 *Respondents' Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction*.
9 Then, on May 2, 2014, Plaintiffs filed *Plaintiffs' Opposition to Motion to Dismiss*. Answering
10 on July 7, 2014, Respondents filed a *Reply to Plaintiffs' Opposition to Respondents' Motion to*
Dismiss.

11 6. On December 15, 2014, a Review Hearing was held. At the Review Hearing, an
12 Evidentiary Hearing, with oral arguments, was scheduled for February 16, 2015 at 11:00 a.m.

13 7. Then, on January 21, 2015, the Court held a telephonic conference with the
14 parties to reset the February 16, 2015 hearing because the Court was scheduled for closure for
15 a national holiday on the date for which the hearing was set. The parties agreed by stipulation
16 to reschedule an Evidentiary Hearing, with oral arguments, to March 16, 2015.

17 8. The Evidentiary Hearing, with oral arguments, was held on March 16, 2015 and
18 resumed on March 20, 2015. All parties were in attendance for the hearing. The court granted
19 Respondents' request to specially appear for the hearing.

20 9. The Court reviewed evidence, heard testimony and legal argument from the
21 parties.

22 10. The Court has considered the testimony and evidence presented by the parties.
23 As such, this Court finds that it lacks jurisdiction to preside over this matter, and thereby,
24 grants Respondents' *Motion to Dismiss for Lack of Subject Matter Jurisdiction*, filed on
25 December 3, 2014, along with the *Specially Appearing Respondents' Notice of Motion*.

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B. Law:

The Constitution of the Hualapai Indian Tribe (“Hualapai Constitution”), Article VI, Section 2, regarding the jurisdiction of the Court specifically states:

The tribal courts shall exercise jurisdiction over all cases and controversies within the jurisdiction of the Tribe, in law and equity, whether civil or criminal in nature, that arise under this document. The laws of the customs of the Tribe, by virtue of the Tribe’s inherent sovereignty...

Thus, this Court must possess the necessary jurisdiction to proceed with a review of the instant matter. Moreover, a thorough analysis of this matter requires an evaluation of the Tribe’s law regarding sovereign immunity. Without sovereign immunity, Plaintiffs’ Complaint against Respondents may proceed. In contrast, if the Tribe’s sovereign immunity remains intact, Plaintiffs’ Complaint against Respondents fails.

Well-settled law regarding sovereign immunity declares that sovereign immunity can be waived by either: 1) an express waiver, or 2) Congressional abrogation. Otherwise, this Court cannot preside over litigation of an action initiated against a tribal employee or member of the Tribal Council, acting within the scope of his/her duties or authority.

As such, Article XVI, Section 1(a) of the Hualapai Constitution regarding the Tribe’s sovereign immunity declares:

The Hualapai Tribe hereby declares that, in exercising self-determination and sovereignty to its 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 constitution. *No tribal employee or Tribal Council member acting within the scope of his duties or authority is subject to suit.* (Emphasis added.)

Thus, the Tribe, its employees and Tribal Council, acting within their official duty or authority, are immune from suit, unless an express waiver of the Tribe, tribal employee or Tribal Council Member’s immunity exists. As such, any waiver of sovereign immunity must be express. Therefore, an implied waiver is insufficient. No pertinent evidence has been presented by Plaintiffs to support the existence of an express waiver permitting Plaintiffs to proceed with

1 their claim against the tribal enterprise or individual Respondents. Thus, Plaintiffs cannot
2 proceed with their action against Respondents.

3 In regard to express waivers of sovereign immunity, Article XVI, Section 2 of
4 the Hualapai Constitution states:

5 Express waivers of sovereign immunity *shall* require the approval
6 of at least thirty (30) percent of the total number of eligible voters
of the tribe voting in a special election if the waiver may:

7 (1) expose the Tribe to liability in excess of \$250,000 (sic)
8 dollars, or its equivalent. ...

8 (Emphasis added).

9 In addition to claiming the existence of an express waiver, Plaintiffs must also
10 prove that the requirements for an express waiver are in accordance with the Hualapai
11 Constitution. Specifically, the testimony presented by Plaintiff, James Brown, asserted that the
12 transaction, which is the subject of Plaintiffs' claim, exceeds \$1 million. Consequently, an
13 express waiver would be necessary due to the Tribe's potential monetary exposure.
14 Accordingly, an express waiver under these circumstances would require a) a special election
15 and b) the approval of thirty percent (30%) of the Tribe's eligible voters. Plaintiffs have not
16 provided this Court with credible evidence that a special election was held and the requisite
number of the Tribe's eligible voters approved of an express waiver.

17 Further, Plaintiffs contend that sworn testimony presented by the Tribe to the
18 U.S. Senate in 1998 in response to the American Indian Equal Justice Act at which the Tribe
19 accepted the jurisdiction of the Hualapai Tribal Court is an effort to waive the tribe's sovereign
20 immunity. Moreover, Plaintiffs cite Senate Testimony offered by Chief Judge Joseph Flies-
21 Away in 2008 at which time he stated that sovereign immunity does not shield illegal or
22 unconstitutional acts. Lastly, Plaintiff's maintain that the attendance of Tribal Council
23 Members at meetings with Plaintiff Jim Brown and the ultimate execution by the Tribe of the
24 2010 *Amended Agreement* with James Brown are express waivers of sovereign immunity. This
25 Court does not agree. In fact, the Court finds such legal argument tenuous at best. Frankly, the
Court finds the instances referenced as merely irrelevant or, in certain instances, evidence of

1 the parties' intention to contract but not necessarily having the legal effect of an express
2 waiver.

3 For instance, a review of the agreements between the parties to determine
4 whether Respondents intended to expressly waive the Tribe's sovereign immunity is
5 appropriate. In particular, Section 15.4(b) of the *Western Town Development and Management*
6 *Agreement*, entered into in March, 2005 (no date specified), states:

7 *The validity, meaning and effect of this Agreement shall be*
8 *determined in accordance with the laws of the State of Arizona and*
9 *the Hualapai Indian Tribe. The laws of the State of Arizona*
10 *specifically exclude, however, any laws of the State of Arizona*
11 *that may be interpreted to (i) waive GCRC's or the Nation's*
12 *sovereign immunity; (ii) require arbitration, other than as agreed to*
13 *in Section 15.4(a); or (iii) require GCRC or the Nation to appear in*
14 *any courts or other proceedings in the State of Arizona, except*
15 *federal courts. The venue and jurisdiction for (x) any litigation*
16 *under this Agreement and (y) all other civil matters arising out of*
17 *this Agreement shall be in the federal courts sitting in the State of*
18 *Arizona, and located in or around Peach Springs, Arizona.*
19 *(Italic emphasis added.)*

20 The more recent *Development and Management Agreement (Cabins)* executed
21 on September 29, 2006 by CEO Sheri Yellowhawk for Hwal'Bay Ba:J Enterprises, Inc. dba
22 Grand Canyon Resort Corporation, and James Brown on behalf of WD At The Canyon, LLC
23 included identical language as the *Western Town Development and Management Agreement*.

24 Subsequently, an amended agreement was executed between the parties titled
25 the *Amended and Restated Development and Management Agreement* ("Amended
26 *Agreement*"). This revised agreement was executed on January 1, 2010 between Interim CEO
27 for Hwal'Bay Ba:J Enterprises, Inc. d/b/a Grand Canyon Resort Corporation, Robert Bravo,
28 and James Brown, President of WD At the Canyon, LLC. The terms of the *Amended*
29 *Agreement* varied significantly in regard to venue and jurisdiction when compared to the prior
30 version of the same agreement. Specifically, Section 15.4 of the *Amended Agreement* begins
31 similarly to the prior two agreements, however the *Amended Agreement* concludes by granting
32 jurisdiction for litigation related to all matters with the Hualapai Tribal Court. The contract
33 further requires the Manager, WD At the Canyon, to be subject to consent to the Tribal Court's
34 jurisdiction.

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Particularly, Section 15.4 states:

The validity, meaning and effect of this Agreement shall be determined in accordance with the laws of the State of Arizona and the Hualapai Indian Tribe. *The venue and jurisdiction for (a) any litigation under this Agreement and (b) all other civil or criminal matters arising out of the services provided hereunder will be in the Hualapai Tribe, Peach Springs, Arizona.* (Emphasis added.)

Further, the *Amended Agreement* asserts:

Manager consents and agrees to be subject to the civil jurisdiction of the Tribe and the Tribe's Court ...

Essentially, in the newer and revised *Amended Agreement*, it is evident Plaintiffs' consented to the jurisdiction of the Tribe and its court, the Hualapai Tribal Court, for any matters arising out of the *Amended Agreement*. However, a closer analysis of the *Amended Agreement* reveals an apparently different requirement for Respondents.

Specifically, Section 15.4 of the *Amended Agreement* declares:

Nothing in this Agreement will be deemed or interpreted to be a waiver of GCRC's or the Hualapai Tribe's immunity from suit, it being acknowledge (sic) by Manager that GCRC and the Hualapai Tribe are entitled to sovereign immunity with respect to disputes and other matters arising in connection with this Agreement. (Emphasis added).

In essence, Section 15.4 of the *Amended Agreement* makes it evident that the parties lack "a meeting of the minds." Because a "meeting of the minds" between the parties did not occur, the Court is unable to find it was the intent of Respondents to expressly waive the Tribe's sovereign immunity, according to the text of the *Amended Agreement*. Moreover, the text of the *Amended Agreement* indicated the Hualapai Tribal Court would be the appropriate venue and possess jurisdiction over all litigation arising out of the parties' agreement. Whereas, later in the document, by contrast, the document states nothing contained in the *Amended Agreement* shall be interpreted as a waiver of immunity. Accordingly, although it appears evident, the intentions of the respective parties, when the agreement is read as a whole, is unclear.

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1 In summary, a waiver of sovereign immunity can only be achieved in one of
2 two ways: 1) an express waiver by the Tribe, or 2) a Congressional abrogation. The Court does
3 not find evidence that a waiver (either express or implied, nor full or partial) exists in the
4 instant matter. Further, the same *Amended Agreement*, which appeared to grant jurisdiction of
5 disputes with the Hualapai Tribal Court, also in the opinion of this Court fails to expressly
6 waive the sovereign immunity of the Respondents, as the Plaintiffs have suggested. Moreover,
7 this Court does not find that Respondents' intent to contract with Plaintiffs is sufficient to
8 expressly waive the Tribe's sovereign immunity from suit. Further, the Court does not find that
9 the text of the *Amended Agreement*, which attempts to grant jurisdiction of all matters arising
10 from the *Amended Agreement* with the Hualapai Court, is a definitive waiver of sovereign
11 immunity. To the contrary, the Court finds it is evident that Respondents had no intention of
12 waiving their sovereign immunity from suit and, as a result, finds it does not possess the
13 necessary jurisdiction to hear this matter.

14 Although the Court acknowledges the parties did not have a "meeting of the
15 minds" related to the issue of sovereign immunity, the Court recognize that Plaintiffs entered
16 into the *Amended Agreement* with Respondents in good faith and belief in the assurances made
17 by the GCRC representatives, as well as the provisions set forth in the *Amended Agreement*
18 which appeared to grant jurisdiction for all matters arising out of the Agreement to the
19 Hualapai Tribal Court. Despite this Court's obligation to follow the Hualapai Constitution and
20 Hualapai Tribal Code, this Court is concerned that at some point, the Hualapai Tribe's
21 members, employees and Tribal Council members, will soon be deprived of the benefit of
22 contracting with non-member individuals and businesses due to the ambiguity and uncertainty
23 surrounding tribal sovereign immunity. Albeit, this Court finds tribal sovereignty paramount to
24 the survival of the Tribe, its people and enterprises. However, sovereign immunity and
25 jurisdiction will continue to be principal areas of contention between tribal enterprises and
outside businesses. Therefore, tribal nations should be aware that there is a possibility that
outside companies may become less willing to contract with tribal nations, including the
Hualapai Tribe, for fear that sovereign immunity will be used as a sword rather than a shield


1 which, ultimately, poses the possibility that the risks for outside businesses to engage in
2 business transaction with a tribally owned enterprise will outweigh the countless benefits.

3 ***Based upon the foregoing,***

4 **IT IS HEREBY ORDERED THAT:**

- 5 1. The Court grants *Respondents' Motion to Dismiss.*
6 2. The relief requested by Plaintiff is denied.

7 **DATED** this 4th day of August, 2015.

8 
9 _____
Rachel F. Johnson, *Pro Tem Judge*
Hualapai Tribal Court

10 Distribution of Copies:

11 Ali J. Farhang, *Co-Counsel for Plaintiffs*

12 Roscoe J. Mutz, *Co-Counsel for Plaintiffs*

13 James R. Brown (*on behalf of WD at the Canyon*), *Plaintiff*

14 Jason Croxton, *Co-Counsel for Respondents*

15 Verrin T. Kewenvoyouma, *Co-Counsel for Respondents*

16 Hwal' Bay Ba:J Enterprises, Inc., d.b.a. Grand Canyon Resort Corp., *Respondent*

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HUALAPAI TRIBAL COURT

Case No. 2014-CV-005

In The Matter Of _____

WD at the Canyon, LLC vs. Hual'apai Baij Enterprises

* * * * *

AFFIDAVIT OF MAILING BY REGULAR MAIL

I, TINA GROUNDS, being first duly sworn, upon his/her oath deposes and says:

That I am a duly authorized official of the Hualapai Tribal Court and that I am making this affidavit in order to establish service of process by mail pursuant to Sec. 4.5(A)(2) and (B) of the Hualapai Law and Order Code and that on the 5 day of August 2015 I deposited a:

- Notice of Hearing
- Minute Order
- Order
- Judgment Order
- Disposition Order
- other _____

to in a sealed envelope (postage prepaid) addressed to the last known post office address on file with the Court at the United States Post Office in Peach Springs, Arizona, to be delivered by the U.S. Postal Service by regular first class mail.

Co-Counsel:
Ali J. Farhang, 4801 E. Broadway Blvd. Suite 311, Tucson, AZ 85711 (Rosee Mutz)
Verrin T. Kewenapuma, 700 E. Baseline Road, Suite C1, Tempe, AZ 85283 (Jason Croxton)
Jim Brown => via Attorneys Farhang & Medcoff, PLLC.
Grand Canyon Resort Corp., PO Box 359, Peach Springs, AZ 86434

(Affiant's signature)

SUBSCRIBED AND SWORN to before the undersigned official this 5 day of 8, 2015

Murray Crookhewer
(Court Clerk/Tribal Judge/Notary Public)