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Barona Band of Mission Indians, d.b.a.
Barona Resort and Casino and Barona Gaming Commission

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CLARENCE BUTLER,	)	Case No. 5:16-cv-00268-RSWL(KKX)
Plaintiff,	)	REPLY MEMORANDUM OF
	)	POINTS AND AUTHORITIES IN
v.	)	SUPPORT OF MOTION OF
THE BARONA BAND OF MISSION	)	BARONA BAND OF MISSION
INDIANS OF	)	INDIANS, D.B.A. BARONA RESORT
CALIFORNIA;BARONA TRIBAL	)	AND CASINO, AND BARONA
GAMING AGENCY;BARONA	)	GAMING COMMISSION TO
RESORT AND CASINO, AND DOES	)	DISMISS
1 through 50, inclusive,	)	[Rule 12(b)(1, 3, and 6)]
Defendants	)	Hearing Date: May 3, 2016
	)	Time: 10:00 am
	)	Dept. 21
	)	Judge Roland S.W. Lew

INTRODUCTION

Defendants, the Barona Band of Mission Indians dba Barona Resort & Casino and Barona Gaming Commission, appearing specially for purposes of this motion only, hereby submit the following Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss.

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ARGUMENT

I. PLAINTIFF’S OPPOSITION IS UNTIMELY AND SHOULD NOT BE CONSIDERED

Plaintiff’s opposition to Defendants’ motion to dismiss was not filed within the time specified in the local rules for this court. L.R. 7-9 states that:

Each opposing party shall, not later than 10 days after service of the motion in the instance of a new trial motion and not later than twenty-one (21) days before the date designated for the hearing of the motion in all other instances, serve upon all other parties and file with the Clerk either (a) the evidence upon which the opposing party will rely in opposition to the motion and a brief but complete memorandum which shall contain a statement of all the reasons in opposition thereto and the points and authorities upon which the opposing party will rely, or (b) a written statement that that party will not oppose the motion.

Plaintiff’s opposition to Defendants’ Motion to Dismiss was filed on April 18, 2016 – only fifteen days prior to the scheduled hearing and six days after the due date.

L-R 7-12 provides that:

The Court may decline to consider any memorandum or other document not filed within the deadline set by order or local rule. The failure to file any required document, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion...”

1 In addition to any sanctions this court may impose under L.R. 83-7,
2 Moving Defendants request that this court deem Plaintiff's late filing as consent to
3 the granting of this motion.
4

5 **II. PLAINTIFF'S ARGUMENT THAT INDIAN TRIBES ARE**
6 **TREATED AS FOREIGN NATIONS IS WITHOUT MERIT**

7 Plaintiff relies on 28 U.S.C.(f)(3) for the proposition that venue is
8 appropriate because Defendants should be treated as foreign nations. This
9 argument is without merit.
10

11 Article I, Section 8, Clause 3 of the U.S. Constitution grants authority to
12 Congress to regulate commerce, "with foreign Nations, and among the several
13 States, and with the Indian Tribes." Clearly, the framers of the Constitution did
14 not consider Indian tribes to be foreign nations or there would have been no need
15 to reference Indian tribes separately.
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18 This position was first articulated in *Cherokee Nation v. Georgia*, 30 U.S.
19 1 (1831), when the U.S. Supreme Court held that Indian tribes are not foreign
20 nations under the Constitution. In doing so, the court stated, "Had the Indian
21 tribes been foreign nations in the view of the convention, this exclusive power of
22 regulating intercourse with them might have been, and most probably would have
23 been, specifically given in language indicating that idea, not in language
24 contradistinguishing them from foreign nations." *Id.* at 20.
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1 In support of his position, Plaintiff claims that “Defendant is licensed to do
 2 business in California.” This is irrelevant to this action; however, Moving
 3 Defendants do not hold **any** California licenses and own only one enterprise
 4 which is located on the Barona Indian Reservation in San Diego County. This
 5 court is therefore an improper venue and this matter should be dismissed pursuant
 6 to Rule 12(b)(3).
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9 **III. BARONA HAS NOT WAIVED SOVEREIGN IMMUNITY IN** 10 **THIS COURT**

11
 12 Plaintiff admits that Barona’s Tort Claims Ordinance waives sovereign
 13 immunity only in its own forum. (Plaintiff’s Opposition, pg. 5, lines 16-17).
 14 Plaintiff ignores this fact, however, and mistakenly relies upon the opinion of the
 15 California Court of Appeals in *Campo Band of Mission Indians v. Superior*
 16 *Court*, 137 Cal. App. 4th 175, 39 Cal. Rptr 3d. 875 (2006) for the proposition that
 17 this court can order Moving Defendants to arbitration.
 18
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20 While not binding on this court, the same California Appellate Court that
 21 decided *Campo* later decided *Lawrence v. Barona Valley Ranch Resort &*
 22 *Casino*, 153 Cal App 4th 1364 (2007). The *Lawrence* court reviewed the same
 23 Tort Claims Ordinance that is before this court and held that the ordinance does
 24 not waive sovereign immunity in state court. In so holding, the court stated,
 25 “Lastly, as indicated above, a tribe’s consent to suit must be clear and any
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1 conditions imposed thereon must be strictly construed and applied and the
2 language of the Compact is unequivocal that, while Barona agreed to waive its
3 tribal sovereign immunity to certain claims against it, it was permitted to choose
4 the forum for the resolution of those claims and the terms governing the process
5 for such resolution.” Id. at 1372. This reasoning applies to the current case
6 before this court.
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9 Plaintiff had an opportunity to proceed in Barona’s tribal forum. He chose
10 to proceed in federal court, instead. Even if there was no forum, the mere lack of
11 a forum does not grant this court jurisdiction to decide this matter. In *Makah*
12 *Indian Tribe v. Verity*, 910 F.2d 555 (9th circ. 1990) the court stated that,
13 “Nevertheless, lack of an alternative forum does not automatically prevent
14 dismissal of a suit. Wichita, 788 F.2d at 777. Sovereign immunity may leave a
15 party with no forum for its claims.”
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19 Plaintiff claims that he filed the instant case as a last resort. Unlike the
20 Plaintiff in *Makah*, Plaintiff in the instant case had an opportunity to proceed in
21 Barona’s tribal forum and rejected it, choosing instead to file in a court lacking
22 jurisdiction.
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25 **IV. THIS MATTER SHOULD BE DISMISSED RATHER THAN** 26 **TRANSFERRED**

27 Plaintiff claims that he will be irreversibly prejudiced if this matter is
28 dismissed; however, it would not be in the interest of justice to transfer this matter,

1 particularly in light of Plaintiff's misrepresentations and missed deadlines.
 2 Transfer of this case to the Southern District of California would alleviate only one
 3 defect in Plaintiff's complaint – improper forum – and would be a waste of judicial
 4 resources. This matter should therefore be dismissed.
 5

6 **V. PLAINTIFF HAS FAILED TO PROVE THAT THIS COURT HAS** 7 **JURISDICTION TO DECIDE THIS MATTER**

8 When subject matter jurisdiction is challenged under Federal Rule of
 9 Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to
 10 survive the motion. *Tosco Corp. v. Communities for a Better Environment*, 236
 11 F3d 495 (9th Cir. 2001).
 12
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14 Plaintiff has not pointed to any reasonable basis for jurisdiction. He initially
 15 pointed to a compact provision that arises under state law and does not apply to
 16 Barona. He then pointed to a state court case and a federal statute regarding
 17 foreign states that are equally inapplicable to this matter. He has clearly failed to
 18 meet his burden of proof and this matter should be dismissed.
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21 **CONCLUSION**

22 As stated in its moving papers, Barona has not consented to this suit. It is a
 23 federally-recognized Indian tribe, possessing sovereign immunity from all
 24 unconsented suits. The Tribe's business enterprise, the Barona Resort & Casino
 25 and its regulatory agency, the Barona Gaming Commission, share the same
 26 sovereign immunity as the Tribe itself.
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1 Even if Barona waived its immunity, which it has not, Plaintiff has not
2 demonstrated any basis for federal jurisdiction. Plaintiff has consistently ignored
3 all statutes and rules – tribal, state and federal - regarding proper venue and
4 ignored this court’s rules regarding deadlines for filing.
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6 For these reasons, the Barona Band of Mission Indians, d.b.a. Barona
7 Resort & Casino, and Barona Gaming Commission named herein as Barona
8 Tribal Gaming Agency, urge this Court to dismiss this action.
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12 Dated: April 19, 2016

Respectfully submitted,

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14 /s/

15 Kathryn Clenney
16 Attorney for Specially-Appearing
17 Defendants, Barona Band of
18 Mission Indians, dba Barona
19 Resort & Casino, Barona
20 Gaming Commission
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