

Kathryn Clenney, SBN 174177
 Barona Band of Mission Indians
 1095 Barona Road
 Lakeside, CA 92040
 Tel.: 619 328-3987
 FAX: 619-443-2719
kcclenney@barona-nsn.gov

Attorney for Specially-Appearing Defendants
 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, Plaintiff, v. THE BARONA BAND OF MISSION INDIANS OF CALIFORNIA;BARONA TRIBAL GAMING AGENCY;BARONA RESORT AND CASINO, AND DOES 1 through 50, inclusive, Defendants) Case No. 5:16-cv-00268-RSWL(KKX))) MEMORANDUM OF POINTS AND) AUTHORITIES IN SUPPORT OF) BARONA BAND OF MISSION) INDIANS, D.B.A. BARONA RESORT) AND CASINO, AND BARONA) GAMING COMMISSION MOTION) OF TO DISMISS) [Rule 12(b)(1, 2, 3, and 6)])) Hearing Date: May 3, 2016) Time: 10:00 am) Dept. 21) Hon. Ronald S.W. Lew
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

INTRODUCTION

The Barona Band of Mission Indians is a federally-recognized Indian tribe (the “Tribe”), which occupies the Barona Indian Reservation north of Lakeside, California in San Diego County. It owns and operates a resort complex, including a casino, known as the Barona Resort & Casino, on the Barona Indian Reservation, which is regulated by the Barona Gaming Commission, the Tribe’s gaming agency.

1 As required by its 1999 Compact with the State of California, the Tribe
2 provides a procedure by which injured patrons may seek a remedy, as set forth in
3 its Tort Claims Ordinance. That Ordinance provides that, if a claim is denied by
4 the Tribe's insurer, the claimant may appeal to the Barona Tribal Court, which is
5 the **only** forum in which the Tribe waives its sovereign immunity. (A true and
6 correct copy of the ordinance is attached s Exhibit B to the Declaration of
7 Kathryn Clenney).

10 Attorney, Loftry Mrich, filed a claim on behalf of Clarence Butler alleging
11 that he sustained an injury at the Barona Casino on February 16, 2014. The claim
12 was denied and Mr. Mrich filed an appeal with the Barona Tribal Court. The
13 appeal was deficient and was returned with a notice advising him that the
14 corrected form must be received within fourteen (14) days. Rather than proceed
15 with Barona's dispute resolution process, Mr. Mrich filed the present suit.

19 The Barona Gaming Commission is Barona's Tribal Gaming Agency, its
20 regulatory arm, as defined in its compact with the State of California, which can
21 be found on the California Gambling Control Commission website,
22 <http://cgcc.ca.gov>. Plaintiff erroneously claims that the Barona Tribal Gaming
23 Agency operates a casino on the Morongo Indian Reservation. (Complaint p. 2,
24 lines 14-19) and that it signed an amended compact in 2006.

27 Neither the 1999 compact under which Barona operates its casino, nor
28

Barona's Tort Claims Ordinance allows or waives sovereign immunity for any action in federal court, nor is there diversity jurisdiction or a federal question raised in Plaintiff's complaint. In addition, this court is improper because none of the actions or defendants are located within the Central District of California.

ARGUMENT

I. THIS MOTION TO DISMISS IS PROPER UNDER FRCP RULE 12(b)

This motion is proper under Rule 12 (b)(1,2,3 and 6) of the Federal Rules of Civil Procedure.

The Barona Band of Mission Indians is a federally-recognized Indian tribe. As such, it is immune from suit. Courts have held that such immunity precludes subject matter jurisdiction in an action brought against an Indian tribe. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-1016 (9th Cir., 2007). See also *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-1303 (10th Cir., 2001).

Neither Barona's Compact nor its Tort Claims Ordinance waives its immunity in this forum. Barona is therefore immune from suit and this action should be dismissed pursuant to FRCP Rule 12(b)(1).

II. BARONA POSSESSES SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT.

It is well-established that, as a general proposition, Indian tribes possess sovereign immunity from unconsented suit. "Suits against

Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Oklahoma Tax Commission v. Citizen Band of Potawatami Indian Tribe*, 498 U.S. 505, 509 (1991). See also *In re Greene*, 980 F.2d 590, 592 (9th Cir., 1992); *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir., 1991); *Pan American Co. v. Sycuan Band of Mission Indians*, 894 F.2d 416, 418 (1989); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 754 (1998).

Clearly, Barona as a federally-recognized Indian tribe enjoys immunity from suit absent Congressional abrogation or its explicit consent to suit.

III. THE DOCTRINE OF SOVEREIGN IMMUNITY APPLIES TO THE BARONA RESORT & CASINO.

As noted in the accompanying Declaration of Kathryn Clenney, “Barona Gaming Commission” is the correct name of the Barona Tribal Gaming Agency. Both the Barona Resort & Casino and the Barona Gaming Commission have the same legal status as does the Tribe itself, including its sovereign immunity. The Ninth Circuit has so held in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1066 (9th Cir., 2006). See also *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir., 2002); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir., 2008) and *Central Machinery Co. v. Arizona State Tax*

1 *Commission*, 448 U.S. 160, 164, n. 3 (1980), in which the Supreme Court stated
 2 that “It is irrelevant that the sale was made to a tribal enterprise rather than to the
 3 tribe itself.”
 4

5 For this reason, the Tribe submits that a suit against its enterprise and its
 6 gaming commission operates as a suit against the Tribe itself.
 7

8 **IV. BARONA HAS NOT WAIVED SOVEREIGN IMMUNITY**

9 Plaintiff claims that the Tribe and State entered into an amendment to their
 10 1999 compact on August 29, 2006, which requires the Tribe to waive its sovereign
 11 immunity and submit to binding arbitration. (Complaint, p. 3, line 12-25). There
 12 is no 2006 amendment. (See Declaration of Kathryn Clenney). The
 13 Tribe’s only waiver of sovereign immunity is in Section 10.2(d), on page 31, of
 14 Barona’s compact with the State of California, which provides in pertinent part
 15 that:
 16
 17
 18

19 (d)... the Tribe shall adopt and make available to patrons a
 20 tort liability ordinance setting forth the terms and conditions,
 21 if any, under which the Tribe waives immunity to suit for
 22 money damages resulting from intentional or negligent
 23 injuries to person or property at the Gaming Facility or in
 connection with the Tribe’s Gaming Operation...

24 Plaintiff was provided a copy of Barona’s Tort Claims Ordinance, as he
 25 acknowledges in his complaint. (Complaint, p. 5, lines 18-21). The Tort Claims
 26 Ordinance clearly states that it waives immunity from suit only in Tribal Court.
 27

28 Limitations on a waiver of sovereign immunity by a sovereign, such as

as those asserted by Barona, must be respected and strictly construed. Citing *Lane v. Peña*, 518 U.S. 187, 116 S.Ct. 2092, (1996), the U.S. Supreme Court stated that a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 1662 (2011).

The only waiver of sovereign immunity granted by Barona is in tribal court. This Court therefore lacks jurisdiction to hear this case.

V. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The general rule is that a court may take jurisdiction if it must make determinations of law in order to determine the existence of a federal claim. *Bell v. Hood*, 327 U.S. 678, 682-85, 66 S.Ct. 773, 776-77 (1946); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir.1983). In this case, Plaintiff does not allege any statutory basis for this Court's jurisdiction. He points only to state compact language, which is not even from Barona's compact, to serve as a basis for suit. Assuming *arguendo* that Barona agreed to this amendment, Plaintiff has not named a single federal statute that grants this court subject matter jurisdiction to hear this case.

If Plaintiff alleges jurisdiction under 28 U.S.C. §1331, Plaintiff must show in his pleading, affirmatively and distinctly, the existence of those facts that are essential to federal jurisdiction. *Smith v. McCullough*, 270 U.S. 456, 459

(1926). See also *K2 America Corp. v. Roland Oil & Gas Co.*, 653 F.3d 1024, 1029 (9th Cir. 2011).

Neither Plaintiff's Civil Cover Sheet nor his complaint cite any federal statute that serves as the basis for this suit. The Ninth Circuit has held that, even if a claim involves a tribe and requires the interpretation of federal law, that is not enough for a claim to "arise under" federal law. Otherwise, the federal courts would become small claims courts for every contract, tort, or other state law claim involving a tribe and federal law. *Gila River Indian Community v. Henningston, Durham & Richardson*, 626 F.2d 708, 714-715 (9th Cir., 1980).

The essential nature and origin of Plaintiff's claims determine whether those claims "arise under" federal law. There is no statutory basis for Plaintiff's claims and Plaintiff has failed to state a claim upon which relief can be granted, pursuant to 28 U.S.C. §1331.

VI. THE COURT LACKS DIVERSITY JURISDICTION

It is unclear if Plaintiff is asserting diversity jurisdiction; however, Indian tribes and their unincorporated entities cannot sue or be sued in federal court based on diversity jurisdiction because they are not citizens of any state. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.2d 1091 (9th Cir. 2002); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir.2000); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th

1 Cir.1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th
 2 Cir.1974); *Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of*
 3 *Digueno Mission Indians*, 83 F.Supp.2d 1155, 1157 (S.D.Cal.2000); Diversity
 4 jurisdiction therefore does not exist and this court lacks jurisdiction to hear this
 5 matter.
 6

7
 8 **VII. THIS MATTER SHOULD BE DISMISSED PURSUANT**
 9 **TO RULE 12(b)(3) DUE TO IMPROPER VENUE**

10 Rule 12(b)(3) provides that improper venue is a defense that may be asserted
 11 by motion. This motion is therefore proper.

12
 13 28 U.S.C. § 1391 provides that civil actions may be brought in a judicial
 14 district in which any defendant resides or the events or omissions occurred that
 15 gave rise to the claim.
 16

17 In the present case, all defendants reside on the Barona Indian Reservation
 18 in Lakeside, California, which is located in San Diego County, in the Southern
 19 District of California. Plaintiff acknowledges in his complaint that the Barona
 20 Reservation is located in San Diego County. (Complaint p. 2, lines 5-7).
 21

22 The events that gave rise to this claim occurred in their entirety on the
 23 Barona Indian Reservation in San Diego County. (Complaint p.4, line 25 – p. 5,
 24 line 6)
 25
 26
 27
 28

1 Assuming arguendo that federal courts have jurisdiction over this matter,
2 based on the facts alleged in Plaintiff's complaint, this matter should have been
3 filed in the Southern District of California – not the Central District.
4

5 28 U.S.C. §1406(a) provides that "The district court of a district in which is
6 filed a case laying venue in the wrong division or district shall dismiss, or if it be in
7 the interest of justice, transfer such case to any district or division in which it could
8 have been brought." In the instant case, it would not be in the interest of justice to
9 transfer this matter, particularly in light of the misrepresentations made to this
10 court by Plaintiff. This matter should therefore be dismissed.
11
12

13 CONCLUSION

14

15 Barona has not consented to this suit. It is a federally-recognized
16 Indian tribe, possessing sovereign immunity from all unconsented suits. The
17 Tribe's business enterprise, the Barona Resort & Casino and its regulatory
18 agency, the Barona Gaming Commission, share the same sovereign immunity as
19 the Tribe itself.
20
21

22 Even if personal and subject matter jurisdiction existed, Plaintiff has not
23 demonstrated federal jurisdiction under either 28 U.S.C. §1331 or §1332.
24 Lacking such jurisdiction in this Court, Plaintiff has failed to state a claim on
25 which relief can be granted.
26

27 If this claim is to move forward, this is not the proper venue. All
28

1 defendants reside in, and all events that gave rise to this suit occurred in, San
2 Diego County, in the Southern District of California.

3 For these reasons, the Barona Band of Mission Indians, d.b.a. Barona
4 Resort & Casino, and Barona Gaming Commission named herein as Barona
5 Tribal Gaming Agency, urge this Court to dismiss this action.
6
7
8

9 Dated: March 18, 2016

Respectfully submitted,

11 /s/ _____
12 Kathryn Clenney
13 Attorney for Specially-Appearing
14 Defendants, Barona Band of
15 Mission Indians, dba Barona
16 Resort & Casino, Barona
17 Gaming Commission
18
19
20
21
22
23
24
25
26
27
28