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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LISA WILSON,

Plaintiff,

v.

UMPQUA INDIAN DEVELOPMENT CORPORATION; SEVEN FEATHERS CASINO AND HOTEL CORPORATION; COW CREEK BAND OF UMPQUA INDIANS TRIBAL COURT; TRIBAL COURT JUDGE RONALD YOKIM, IN HIS OFFICIAL CAPACITY; AND DOES 1-10,

Defendants.

Case No.: 6:17-cv-00123-AA

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(5), AND 12(b)(6)

NO ORAL ARGUMENT REQUESTED

MOTION

Defendants move to dismiss this action under Fed. R. Civ. P. 12(b)(1) because Plaintiff has not pled a federal question and Defendants possess sovereign immunity from Plaintiff's suit. Defendants also move for dismissal under Fed. R. Civ. P. 12(b)(5) for insufficient service of process, to the extent Defendant's immunity from process is a Fed. R. Civ. P. 12(b)(5) defense. Defendants also move to dismiss this action under Fed. R. Civ. P. 12(b)(6) because the

Complaint fails to state a claim upon which relief can be granted. Under LR 7-1(a), counsel for Defendants made a good-faith effort through a telephone conference with Plaintiff's counsel to resolve the dispute but has been unable to do so. In bringing this Motion, respectfully, Defendants do not waive their sovereign immunity or consent to the jurisdiction of the Court.

SUPPORTING MEMORANDUM

I. INTRODUCTION

Plaintiff asks the Court to serve as a super-appellate court of the Cow Creek Band of Umpqua Tribe of Indians ("Tribe"), to allow Plaintiff to re-litigate her casino slip-and-fall tort claims in the Tribe's Tribal Court system, including the Tribal Civil Court and Appeals Board of the Tribe's Board of Directors (collectively, "Tribal Court"), or at her election, to pursue those claims fresh in federal or state court. She urges the Court to rewrite the Tribe's Tort Claims Code by relaxing the Tribe's administrative claim presentation requirements or excusing her admitted failure to comply with them. *See generally* ECF No.1 (Complaint), § VI(A)-(F), ¶¶ 16-36, at 10-17, and § VI(I), at 49; *see also* ECF No. 1-3 (Cow Creek Band of Umpqua Tribe of Indians Tribal Legal Code, Title 4, Tort Claims), §4-40, at 3-4 (administrative claims procedure). Plaintiff also asks the Court to "reverse" and "remand" the Tribal Court's dismissal of her claims; declare she has exhausted tribal remedies and "may now pursue her claims in state or federal court"; and enjoin the Defendants, including a Tribal Civil Court judge, "from interfering, in any manner, with [Plaintiff's] pursuit of her claims in . . . in state court." ECF No. 1 (Complaint), Prayer for Relief, ¶¶ 1-3, at 22-23.

Plaintiff may not obtain the relief she seeks from the Court, because the Court lacks subject matter jurisdiction to review tribal court orders where a tribe's civil-regulatory jurisdiction over a non-Indian is not at issue, and because the Defendants have sovereign

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immunity from Plaintiff's suit and court process. In the alternative, Plaintiff cannot state a claim for relief; and on that basis, this action should be dismissed with prejudice.

II. RELEVANT FACTS

Plaintiff concedes she did not lose her Tribal Court case on the merits, but rather because her attorney failed to serve the Secretary of the Tribe's Board of Directors with an administrative claim before filing suit, as required by the Tribe's Tort Claims Code. *See* ECF No. 1 (Complaint), §VI(A), ¶¶ 19-20, at 11. As the Tribal Civil Court noted, the Tort Claims Code requires that its claim presentation requirements be strictly construed, consistent with the Tribe's limited consent in the Code to be sued exclusively in Tribal Court. ECF No. 1-7 at 3 (Findings of Fact and Conclusions of Law of the Honorable Ronald Yockim, Cow Creek Band of Umpqua Tribe of Indians Tribal Civil Court, *Wilson v. Cow Creek Band of Umpqua Indians*, No. TCV-20140175, Apr. 6, 2016).[1] The Appeals Board of the Tribe's Board of Directors affirmed the Tribal Civil Court's Findings of Fact and Conclusions of Law, and the Tribal Civil Court's Order granting summary judgment to the Tribe. ECF No. 1-8 (Decision of Tribal Board of Directors on Appeals Panel of the Cow Creek Band of Umpqua Tribe of Indians, *Wilson v. Cow Creek Band of Umpqua Indians DBA Seven Feathers Casino Resort*, No. AP16-0101-TCCV, Nov. 7, 2016).

On or about January 25, 2017, Plaintiff filed her "Complaint for Declaratory and Injunctive Relief and Federal Review of Tribal Court Decision" in this Court. ECF No. 1 (Complaint). Plaintiff has not yet accomplished service of process on Defendants. Thus, Defendants' motion to dismiss is timely under Fed. R. Civ. P. 12(a)(1)(A)(i) and (b).

[1] Judge Yockim's surname is misspelled as "Yokim" in the case caption. *See* ECF No. 1 (Complaint) at 1.

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III. ARGUMENT

A. Plaintiff's Complaint Does Not Present A Federal Question.

Federal courts must dismiss a complaint that does not allege facts indicating the presence either of federal question or diversity subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513-14 (2006). Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). In particular, "when subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the burden to prove jurisdiction in order to survive the motion." *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (2008) (quotation omitted). To determine whether an action arises under federal law, a court applies the "'well-pleaded complaint rule.'" *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir.1998) (*quoting Metro. Life. Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). "[A] claim arises under federal law only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1243 (9th Cir. 2009) (quotation omitted).

Plaintiff alleges that federal question jurisdiction exists under 28 U.S.C. § 1331 "as to whether or not the Tribe's Tort Claims Ordinance, which was enforced against a non-Indian [i.e., Plaintiff], was lawful and is in conflict with the Tribe's Compact with the State of Oregon and was properly applied in this case." ECF No. 1 (Complaint), §II, ¶ 6, at 3.

Even giving Plaintiff all the benefits of doubt, this allegation does not present a federal question. Plaintiff has not alleged that the Tribe or its court lacked civil-regulatory jurisdiction over her. Plaintiff voluntarily invoked tribal jurisdiction by submitting claims and filing suit

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under the Tribe's Tort Claims Code. Further, the Tribe's Compact with Oregon does not give Plaintiff an avenue to federal court; the Compact allows only the Tribe or the State to sue on it.

1. Whether The Tribe's Tort Claim Code Is "Lawful" Is Not A Federal Question.

As one of the cases Plaintiff cites makes clear, whether the Tribe's Tort Claims Code was "lawful" or "properly applied in this case" are not federal questions. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (noting that "[a]n ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction") (citation omitted). Rather, as the other case Plaintiff cites explains, the federal question (if any) would be whether the Tribe could "compel a non-Indian to submit to *tribal civil-adjudicatory jurisdiction* . . . ." *Muhammad v. Comanche Nation Casino*, 742 F.Supp.2d 1268, 1276 (W.D. Okla. 2010) (emphasis added) (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985)); *see also Morongo*, 893 F.2d at 1077 (federal question whether Tribe could invoke its "sovereign power" to enforce a tribal ordinance against a non-Indian, because "it is pressing 'the outer boundaries of an Indian tribe's power over non-Indians[,]' which 'federal law defines,'" quoting *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474 (9th Cir. 1989) and *Nat'l Farmers Union*, 471 U.S. at 851). It is hornbook federal Indian law that federal courts have jurisdiction to decide if a tribal court has jurisdiction over a non-Indian. *Nat'l Farmers Union*, 471 U.S. at 852.

But Plaintiff has not alleged that the Tribe or Tribal Court lacked civil-adjudicatory jurisdiction over her. On the contrary—she disputes *how* the Tribal Court interpreted and applied the Tribe's Tort Claims Code to her case and asks this Court to force the Tribal Court to *continue to assert its jurisdiction over her.* In particular, Plaintiff argues her "case should be

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remanded to the Tribal Court for trial on the merits," meaning and conceding that the Tribal Court will continue to possess jurisdiction over Plaintiff and her case. ECF No. 1 (Complaint), Prayer for Relief, ¶ 1, at 22. Further, it is Plaintiff who voluntarily invoked the Tribe's civil-adjudicatory jurisdiction over her by submitting administrative tort claims to the Tribe (without following the Tribal Tort Claims Code's presentation requirements), and pursuing an action in Tribal Court.

2. Whether The Tribe's Tort Claim Ordinance Is "In Conflict With The Tribe's Compact" Is Not A Federal Question.

Plaintiff cannot sue on the Compact in an attempt to convert her tribal question into a federal one. While an action seeking to enforce a tribal gaming compact arises under federal law, *Muhammad*, 742 F.Supp.2d at 1276 (citing *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997)), the Tribe's Compact provides only that "either party" to the Compact – meaning the Tribe or Oregon – may sue the other in federal court "to interpret or enforce the Compact." *See* Declaration of Anthony S. Broadman In Support of Defendant's Motion to Dismiss, Mar. 9, 2017, ¶ 2 and Exh. A (Tribal-State Compact for Regulation of Class III Gaming Between the Cow Creek Band of Umpqua Tribe of Indians of Oregon and the State of Oregon, approved by the United States Department of the Interior on February 8, 2007) ("Compact"), Art. XII(E)(1), at 45.[2] In addition, the Compact expressly provides that it is for the exclusive benefit of the Tribe and the State, and that only they can enforce it. Compact, Art. XIV(E), at 48; *see Consentino v. Penchanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (finding an analogous provision "preclude[d] third party suits to enforce

[2] Plaintiff improperly cites and attaches to her Complaint a draft compact, dated May 2011, that has not been finalized, signed, or approved. *See* ECF No. 1-6 (unsigned Tribal-State Compact for Regulation of Class III Gaming Between the Cow Creek Band of Umpqua Tribe of Indians and the State of Oregon, May 2011), at 50; Broadman Decl., ¶ 2.

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the [c]ompact"). Because Plaintiff is barred from bringing suit on the Compact, that agreement cannot provide federal question jurisdiction for her suit. *See Muhammad*, 742 F.Supp. 2d at 1272, 1276-77 (§ 1331 jurisdiction did lie where a *tribal entity* sued to enforce a tribal-state gaming compact).

B. Defendants' Sovereign Immunity Bars Plaintiff's Suit.

Even if the Court were to proceed beyond dismissing this matter for lack of a federal question, Plaintiff's case must be dismissed because Defendants are immune from suit. "Tribal sovereign immunity protects Indian tribes from suit absent express authorization from Congress or clear waiver by the tribe." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). When applicable, such immunity precludes not only claims for damages, but also claims for injunctive and declaratory relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). Sovereign immunity bars lawsuits and court process. *Tonasket v. Sargent*, 830 F.Supp. 2d 1078, 1082 (E.D. Wash. 2011) (citations omitted), *aff'd*, 510 F. App'x 648 (9th Cir.), *cert. denied*, 134 S.Ct. 129 (2013); *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993). A motion to dismiss under Fed. R. Civ. P. 12(b)(1) is the appropriate procedural mechanism to challenge a suit based on sovereign immunity. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (citations omitted). On a Fed. R. Civ. P. 12(b)(1) motion, the Court need not assume that the facts alleged in the Complaint are true, as it would on a Fed. R. Civ. P. 12(b)(6) motion. *Id*. The court may hear evidence concerning jurisdiction and resolve factual disputes if necessary to resolve the motion. *Id*. In opposing this Fed. R. Civ. P. 12(b)(1) motion, Plaintiff bears the burden of demonstrating that tribal sovereign immunity does not exist. *Id*.

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1. Each Of The Defendants Is Immune From Plaintiff's Suit.

Plaintiff does not allege that Defendants do not possess the Tribe's sovereign immunity; rather, she alleges only waiver. Regardless, the Tribe's immunity covers its governmental entity, the Defendant Tribal Court, and Plaintiff does not dispute that fact. The Tribal Civil Court Judge, whom Plaintiff sues in his official capacity, and whom Plaintiff has not alleged acted beyond the scope of his authority, also is covered by the Tribe's immunity. *See Cook*, 548 F.3d at 727 (citation omitted). Additionally, the Tribal Civil Court Judge is absolutely immune from suit because he is a judge. *See Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003) (citation omitted).

The Tribe's immunity also applies to defendant Umpqua Indian Development Corporation ("Corporation"), a wholly-owned tribal entity that owns and operates the Seven Feathers Casino Resort ("Casino"). *See* ECF No. 1 (Complaint), §II, ¶¶ 2-3, at 2-3; Broadman Decl., ¶ 3, Exh. C. The Corporation is federally chartered pursuant to Section 17 of the federal Indian Reorganization Act of 1934, 25 U.S.C. § 477 ("IRA"), as Plaintiff acknowledges in the Complaint. Broadman Decl., ¶ 3, Exh. C; ECF No. 1 (Complaint), §II, ¶ 2, at 2. The Casino is a division of the Corporation, not a separate corporate entity as named in the Complaint. Thus, the Casino is not a real party in interest. Broadman Decl., ¶ 3; Fed. R. Civ. P. 17(a).

Tribal sovereign immunity applies to the Tribe's commercial as well as governmental activities, *Cook*, 548 F3d at 725, and as an IRA section 17-chartered entity, the Corporation is immune just like the Tribe itself. *See American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) (noting that "[a] tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so"); *Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.*, 585 F3d 917, 921 (6th Cir. 2009) (holding Section 17

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corporations are "arms of the tribe" that do not automatically forfeit tribal immunity). Moreover, "tribal corporations acting as an arm of the tribe," including tribal entities such as the Corporation that own and operate casinos on behalf of a tribe and its members, "enjoy the same sovereign immunity granted to a tribe itself." *See Cook*, 548 F.3d at 725. Thus, as an IRA Section 17-chartered entity that owns and operates the Casino on behalf of the Tribe and its members, the Corporation shares the Tribe's immunity from suit and court process.[3]

2. Plaintiff Has Not Pled A Competent Waiver Of Sovereign Immunity.

As a sovereign, the Tribe has the sole authority to prescribe the terms and conditions (if any) upon which it consents to be sued. *See Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). Additionally, "[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *West v. Gibson*, 527 U.S. 212, 226 (1999) (citations omitted); *see also Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d 875, 883 (Cal. Ct. App. 2006) (tribe's waiver did not constitute consent to suit in state court, but instead made arbitration exclusive forum). Oregon Tribes which have legislated tort claims procedures, like the Federal Tort Claims Act and analogous state laws, do not waive immunity beyond the specific terms of tribal law. *See, e.g., Estate of Kalama ex rel. Scott v. Jefferson Cty.*, No. 3:12-CV-01766-SU, 2013 WL 3146858, at *5 (D. Or. June 18, 2013) ("The court concludes [Warm Springs tort law] is a limited waiver for tort actions

[3] The Corporation would also meet the Ninth Circuit test for determining generally when a tribal entity, not necessarily one chartered under IRA Section 17, has sovereign immunity as an "arm of the tribe," including "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (quotation omitted), *cert. denied sub nom. White v. Regents of Univ. of Cal.*, 136 S.Ct. 983 (2016). Again, Plaintiff has not alleged that any Defendant is not immune.

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in Tribal Court, and is not a waiver of immunity for all purposes.") But just as in *Estate of Kalama*, the Tribe here has "expressly authorized a tort claim action in Tribal Court *only*, and there are express limitations on damages and claims for relief in that forum." *Id*. (emphasis in original).

The *Muhammad* case Plaintiff cites in her Complaint, *see* ECF No. 1 (Complaint), § II, ¶ 6, at 3, illustrates the narrow nature of tort claims under Cow Creek and similar law. While the court in that case denied remand of a tort action that the Comanche Nation Casino removed to federal court, it later dismissed the action because the Comanche Nation, like the Tribe in this case, "has waived its immunity from tort claims limited solely to an administrative remedy or a civil action in tribal court. . . . " *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *10 (Oct. 27, 2010). That is precisely what this Tribe has done, by defining an exclusive statutory procedure for persons to assert administrative and judicial tort claims against the Tribe arising from the Casino's operations, while maintaining its immunity to suit for any other attempts to impose tort liability on the Tribe. The Tribal Tort Claims Code provides:

> The procedures and standards for giving notice of claims and commencing actions in Tribal Civil Court provided in Section 4-50 of this Code are integral parts of the limited waiver of sovereign immunity provided by this Code and shall be strictly and narrowly construed. A tort claim for monetary damages against the Tribe shall be forever barred unless written notice of the claim is presented to the Tribe and an action for monetary damages relating to any such claim is commenced in the Tribal Civil Court in compliance with Section 4-40 of this Code.

ECF No. 1-3 (Tribal Tort Claims Code), § 4-50(e), at 7.

This limited immunity waiver reflects the Tribe's deliberate policy decision, as a sovereign, to "provide an exclusive remedy to private persons who are injured by negligent acts or omissions of the Tribe or its agents, employees, officers or certain businesses," while

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otherwise maintaining tribal immunity from suit and court process to preserve "limited Tribal resources so that the Tribe can continue to provide governmental and business services which promote health, safety, welfare and economic security for the residents of and visitors to the lands of the Tribe." ECF No. 1-3 (Tribal Tort Claims Code), § 4-10(d), (b), at 1. The Tribe's decision to set strict boundaries on its consent to be sued and served in tort actions, including its administrative claim presentation requirements, is controlling. *See*, *e.g.*, *Am. Indian Agr. Credit Consortium*, 780 F.2d at 1378 (observing that "a waiver of immunity by tribal action represents a substantial surrender of sovereign power and therefore merits no less scrutiny than a waiver based on congressional action"); *cf. DiCampli-Mintz v. County of Santa Clara*, 150 Cal.Rptr.3d 111, 117 (Cal. 2012) (holding unanimously that failure to serve administrative tort claim on correct party defeats the claim, and observing that "the intent of the California Government Claims Act is to confine potential governmental liability to rigidly delineated circumstances").

3. The Compact Is Not A Waiver For Plaintiff.

Plaintiff alleges that under its Compact with Oregon, the Tribe has waived its immunity to tort claims that private parties like Plaintiff bring in federal and state courts. ECF No. 1 (Complaint), § VI(G), ¶ 40, at 19; § VI(H), ¶ 48 at 21-22. On the contrary, the Compact preserves that immunity. Because the Compact does not contain an express, unequivocal, and unmistakable waiver of the Tribe's immunity to such tort suits, the Tribe's immunity, which the Defendants share, remains intact. *Santa Clara Pueblo v. Martinez*, 436 U.S. 9, 58 (1978) (waiver "cannot be implied but must be unequivocally expressed") (quotation omitted); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) (waiver must be expressed in "clear and unmistakable terms") (quotation omitted).

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The Compact provides that the Tribe waives its immunity "in courts of competent jurisdiction for the limited purpose of enforcing this Compact." Broadman Decl., Exh. A (Compact), Art. XII(E)(3)(b), at 46. It also provides that "[t]his waiver of sovereign immunity shall be strictly construed and limited to its specific terms." *Id*. The Compact continues that the Tribe or Oregon may bring a federal court suit against the other to interpret or enforce the agreement, *id.*, Art. XII(E)(1), at 45, but later declares that it is for their exclusive benefit, and that only they can enforce it. *Id*., Art. XIV(E), at 48. The Compact also disclaims third-party beneficiaries, "unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Compact." *Id*. The Compact does not identify Plaintiff by name as an intended third-party beneficiary of the Compact. Therefore, she cannot bring suit on the Compact.

Plaintiff tries to avoid these express provisions of the Compact by citing an insurance provision of the agreement that Plaintiff alleges "is *clear and unambiguous in that* ***the carrier, Tribe and tribal entities are barred*** from raising sovereign immunity [as a defense to suits] up to the limits of the insurance policy ($2,000,000)." ECF No. 1 (Complaint), §VI(G), ¶ 40, at 19 (emphasis in original). However, Plaintiff misstates the actual language of the Compact. The relevant clause requires only that the Tribe's commercial liability insurance contain an endorsement "providing that the insurer" – without reference to others – "may not invoke Tribal sovereign immunity up to the limits of the policy in state, federal, or Tribal court, including when the Tribe or an entity of the Tribe is a named defendant." Broadman Decl., Exh. A (Compact), Art. VIII(G), at 28. It is not surprising that the parties might want to stop the Tribe's liability insurer from unilaterally asserting tribal sovereign immunity as a coverage defense. But that is a far cry from saying the provision constitutes tribal consent to waive its immunity from

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the instant suit and court process. That would constitute an implied waiver, which is prohibited under federal law. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58; *Bodi*, 832 F.3d at 1016.

Plaintiff's reliance on *Campo* to the contrary is misplaced. *See* ECF No. 1 (Complaint), § VI(H), ¶¶ 47-48, at 21-22. For one thing, the casino tort claimant in *Campo* appears to have had no tribal court or other tribal forum in which to assert her claim against the tribe or a tribal entity. *Campo*, 39 Cal.Rptr.3rd at 884-85 & n.1 (Benke, Acting P.J., dissenting). Here, Plaintiff availed herself of the Tribe's Tort Claims Code procedure and Tribal Court review process, but did not like the outcome. Digging deeper, the insurance provision in the Campos' compact with California explicitly stated that nothing in that provision required the Tribe to "waive its immunity to suit [in state court] *except to the extent of the policy limits and insurance coverage [provided for therein]*." *Id*. at 882 (emphasis in original). Two members of a three-judge California appellate court panel held that this language "unambiguously" waived the Tribe's immunity to an arbitration proceeding. *Id*. Regardless whether that split ruling was correct, the relevant insurance clause contained in the Tribe's Compact, in contrast to the *Campo* compact provision, provides only that the Tribe's *insurer* is barred from unilaterally asserting immunity as a coverage defense. *See* Broadman Decl., Exh. A (Compact), Art. VIII(G), at 28.[4] Thus, *Campo* does not support Plaintiff's argument for a waiver because the *Campo* compact differs materially from the Tribe's compact.

[4] In addition, while the contractual indemnity which follows covers claims attributable to the Tribe "WITHIN THE COVERAGE OF THE INSURANCE DESCRIBED" above, that indemnity runs only to the benefit of "THE STATE, ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS," and no one else. *Id.*, Art. VIII(H), at 28.

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In sum, Plaintiff tries but fails to patch together Compact provisions and policy arguments that support her waiver argument. Nothing in the Compact is a clear, unequivocal waiver of sovereign immunity as to Plaintiff.

4. Under The U.S. Supreme Court's *Santa Clara Pueblo* Decision, The Tribe Is Immune from Plaintiff's "Due Process" Claim.

The Defendants' sovereign immunity from suit is a complete defense to all of Plaintiff's claims. However, Plaintiff's "due process" claim, grounded in allegations that the Tribe's Tort Claims Code is "inconsistent, unclear, and confusing" (which Defendants would dispute), *see* ECF No. 1 (Complaint), § VI(D), ¶¶ 31-34, at 15-16, warrants additional mention. It is axiomatic that Plaintiff cannot invoke the due process clause of the Fourteenth Amendment of the federal Constitution against tribal action, because the Tribe is neither the federal government nor a state. *See Santa Clara Pueblo*, 436 U.S. at 55-56. The Indian Civil Rights Act ("ICRA") guarantees due process, *see* 25 U.S.C. § 1302(a)(8), but does not contain a waiver of tribal sovereign immunity to federal court civil suits for injunctive or declaratory relief (outside habeas context where a person has been detained). *See Santa Clara Pueblo*, 436 U.S. at 58-59, 72. That immunity is fatal to Plaintiff's "due process" claim.

5. Summary

Plaintiff, not the Defendants, bears the burden of establishing that this court has subject matter jurisdiction and that tribal immunity does not apply. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (jurisdiction) (citations omitted); *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (immunity) (citations omitted). Whether the Tribe's Tort Claims Code was "lawful" and "properly applied" is not a federal question. Furthermore, Plaintiff has not established, and cannot establish, that the Tribe has consented to waive the immunity of the Defendants by "clear," "unequivocal," and "unmistakable" language, as governing law requires.

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Santa Clara Pueblo, 436 US. at 58; *Bodi*, 832 F.3d at 1016. The Defendants are therefore immune from Plaintiff's suit and court process. See *Tonasket v. Sargent*, 830 F.Supp. 2d 1078, 1082 (E.D. Wash. 2011) (citations omitted), *aff'd*, 510 F. App'x 648 (9th Cir.), *cert. denied*, 134 S.Ct. 129 (2013); *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993). Therefore, this Court should grant the Defendants' motion to dismiss the Complaint in its entirety under Fed. R. Civ. P. 12(b)(1).

C. Fed. R. Civ. P. 12(b)(5) – Insufficient Service of Process

Fed. R. Civ. P. 12(b)(5) allows a defendant to move to dismiss an action where the service of process of a summons and complaint is improper. Fed. R. Civ. P. 12(b)(5). To the extent that Defendants' immunity from court process, in conjunction with their immunity from suit, must be raised at this time as motion for dismissal under Fed. R. Civ. P. 12(b)(5), and joined with this motion under Fed. R. Civ. P. 12(g)(2) and (h)(1)(A), Defendants assert this defense by motion in tandem with its Fed. R. Civ. P. 12(b)(1) motion to dismiss.

On a Fed. R. Civ. P. 12(b)(5) motion to dismiss, Plaintiff bears the burden of establishing the validity of service pursuant to Fed. R. Civ. P. 4. *Rudolph v. UT Starcom, Inc.*, No. C 07-04578 SI, 2009 WL 248370, at * 1 (N.D. Cal., Feb. 2, 2009) (citing *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004)). If Plaintiff cannot carry her burden, this Court has discretion to dismiss or retain the case. Here, because Defendants bring their Fed. R. Civ. P. 12(b)(5) motion on the basis of tribal sovereign immunity from suit and process, the Court should dismiss. *See Tonasket,* 830 F.Supp. 2d at 1082 (tribe and officials immune from suit and court process); *James*, 980 F. 2d at 1319 (tribe immune from non-party subpoena enforcement to compel production of tribal witnesses or documents).

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This does not mean, however, that the Plaintiff is without a remedy for accomplishing service of process. Pursuant to Fed. R. Civ. P. 4(j), the Tribe has its own code provisions covering the subject. Broadman Decl., ¶ 4, Exh. B (Cow Creek Band of Umpqua Tribe of Indians Tribal Legal Code, Title 3, Rules of Civil Procedure), § 3-20(c), at 2-3. The Tribe's service of process procedures represent a narrow exception to Tribe's sovereign immunity from service, which if followed correctly, will allow Plaintiff to accomplish service on the Defendants.[5]

D. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim

Plaintiff cannot state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiff's effort to have this Court rewrite the Tribe's Tort Claims Code must fail, because the Tribal Court's strict interpretation of the Code – consistent with that Code's requirement that it be strictly interpreted – is binding on the Court. Plaintiff's attempt to invoke the Compact also must fail, because it expressly disclaims the ability of any party, other than the Tribe and Oregon, from suing on that agreement. Finally, the Supreme Court's *Santa Clara Pueblo* precedent deprives Plaintiff of the ability to plead a viable "due process" claim against the Defendants. For these reasons, this Court should dismiss Plaintiff's Complaint with prejudice under Fed. R. Civ. P. 12(b)(6), even if it decides to deny Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(5).

[5] As Plaintiff has not yet purported to serve Defendants under the Tribal Legal Code (or otherwise), and the deadline for doing so under the Code (and Fed. R. Civ. P. 4(m)) has not yet run, Defendants do not know if Plaintiff will follow the applicable requirements. Hence, Defendants do not presently have available to them a defense of insufficient service of process under Rule 12(b)(5) on such grounds. Thus, Defendants have not raised that issue in their Fed. R. Civ. P. 12 motion. *See* Fed. R. Civ. P. 12(g)(2). Defendants expressly reserve this issue.

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1. Motion To Dismiss Standard Under Fed. R. Civ. P. 12(b)(6)

"To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Bryan v. Wal-Mart Stores, Inc.*, No. 14-35235, 2016 WL 6212004, at *1 (9th Cir., Oct. 25, 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Bryan*, 2016 WL 6212004, at *1 (quoting *Ashcroft v. Iqubal*, 556 U.S. 662, 678 (2009)).

2. The Tribal Court's Strict Interpretation Of The Tribe's Tort Claims Code Is Binding on this Court.

Plaintiff urges the Court to overturn the Tribal Court's interpretation of the Tribe's Tort Claims Code requiring that persons present their administrative claims to the Secretary of the Board of Directors, which Plaintiff concedes she did not do. *See* ECF No. 1 (Complaint), § VI(A), ¶¶ 19-20, at 11. Even if the Court had subject matter jurisdiction, which it does not, and the Defendants were not immune, which they are, this Court could not review the Tribal Court's interpretation of tribal law, because that interpretation is binding on the Court. *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) (citation omitted), *cert. denied*, 490 U.S. 1110 (1989).

3. The Compact Does Not Provide An Avenue For Plaintiff to State a Claim.

Even if Plaintiff were correct, which she is not, that the Compact's limited waiver of the Tribe's immunity applies to her suit, Plaintiff cannot invoke the Compact as a means to evade the Tribal Court's rejection of her suit under tribal law. The Compact expressly provides that it is for the exclusive benefit of the Tribe and the State, and that only they can enforce it. Broadman Decl., Exh. A (Compact), Art. XIV(E) at 48. These provisions preclude Plaintiff from

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using the Compact as a springboard to seek her requested relief. *See Consentino v. Penchanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016) (finding an analogous provision against third-party beneficiaries "preclude[d] third party suits to enforce the [c]ompact"). The Compact's disclaimer of third-party beneficiaries bolsters this conclusion. *See* Broadman Decl., Exh. A (Compact), Art. XIV(E), at 48.

In addition, the *Campo* case on which Plaintiff relies is of no more help to her under a Fed. R. Civ. P. 12(b)(6) analysis than it is under a Fed. R. Civ. P. 12(b)(1) inquiry. *Campo* does not cite to a compact provision which disclaimed third-party enforcement of the compact, like the compact provisions at issue in *Consentino* and in this case. *See Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d 875, 877-79 (Cal. Ct. App. 2006) (reciting compact provisions); *see also id.* at 886 (Burke, Acting P.J., dissenting) (observing that "[n]othing in the Compact states the failure of the Tribe to abide by its provisions results in a waiver of sovereign immunity [to suit by a casino patron in state court]"). Thus, *Campo* is distinguishable from this case.

4. The Supreme Court's *Santa Clara Pueblo* Decision Deprives This Court Of Jurisdiction To Entertain Plaintiff's "Due Process" Claim.

Plaintiff's "due process" claim must be construed as an ICRA claim, and habeas corpus is the ICRA's sole means of enforcement in federal court. *Santa Clara Pueblo*, 436 U.S. at 58, 70. Habeas corpus is available under the ICRA only to "test the legality of [a plaintiff's] detention by order of an Indian tribe." 25 U.S.C. § 1303. Plaintiff has not pled that she was detained by the Defendants; hence, her "due process" claim must fail.

IV. CONCLUSION

Plaintiff's suit should be dismissed with prejudice in its entirety under Fed. R. Civ. P. 12(b)(1), because subject matter jurisdiction is lacking and each of the Defendants is immune

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from suit and court process; and, to the extent Defendants' immunity from process must be pled as a defense of insufficient service of process, under Fed. R. Civ. P. 12(b)(5). In the alternative, the Court should dismiss the Complaint with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation under LR 7-2(b) because it contains 5,583 words, including headings, footnotes, and quotations, but excluding the caption, signature block, and certificate of counsel.

Respectfully submitted March 9, 2017.

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