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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

FRANK IRESON,

Plaintiff,

vs.

AVI CASINO ENTERPRISES, INC., a Foreign Corporation, d/b/a AVI RESORT & CASINO; DOES I-X, inclusive,

Defendants.

Case No. 2:17-CV-987-JCM-VCF

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Avi Casino Enterprises, Inc. d/b/a Avi Resort & Casino, hereby replies in support of its Motion to Dismiss and requests that it be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SOVEREIGN IMMUNITY IS JURISDICTIONAL

The plaintiff does not dispute, in the complaint or otherwise, that Avi Casino Enterprises is a tribal entity, wholly owned by the Ft. Mojave Tribe, and that it operates a casino and resort on tribal land situated within the State of Nevada. There is nothing alleged in the complaint, nor in the opposition to the motion to dismiss, that would allow this Court to assert subject matter jurisdiction over a Federally-recognized Indian tribe without its consent and without an express waiver of tribal sovereign immunity. *See Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015) (sovereign immunity is jurisdictional and should be asserted in a Rule 12(b)(1) motion); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005); *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1177 (10th Cir. 2010).

The plaintiff's opposition to the motion to dismiss acknowledges tribal sovereign immunity, and that it extends to the casino enterprise, but plaintiff contends that sovereign immunity is "not absolute under these facts." *See* Opposition at p.3/ln 19. To the contrary, "[s]overeign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize," and there is no evidence of record that the Ft. Mojave Indian Tribe expressly waived its sovereign immunity. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). In the context of a Rule 12(b)(1) Motion to dismiss on the basis of tribal sovereign immunity, "the party asserting subject matter jurisdiction has the burden of proving its existence," namely that immunity does

not bar suit. *See Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013), quoting *Robinson v. United States*, 586 F.3d, 683, 685 (9th Cir. 2009). When the District Court is presented with a challenge to its subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations." *Robinson*, 586 F.3d at 685.

The plaintiff complains that it is "unfair" to allow the tribe to operate a casino in competition with other non-tribal casinos in the Laughlin area, and that it "just makes sense" that liability standards should be the same. But as the U.S. Supreme Court pointedly stated, restrictions on sovereign immunity are for Congress alone to make. *Kiowa Tribe of Okla. v. Mfg Tech. Inc.*, 523 U.S. 751, 760 (1998) (tribal sovereign immunity exists for commercial activity even off the reservation.); *Cook v. Avi Casino Enterprises, Inc*., 548 F.3d 718 (2008), *cert. denied* 129 S. Ct 2159 (2009) (sovereign immunity extends to casino employees in dram shop action); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) (Indian casino functions as an arm of the tribe and has sovereign immunity for commercial operations).

The underlying facts of the case, or the arguments of counsel, do not affect the jurisdictional analysis. Unless the United States Congress has acted legislatively to abrogate sovereign immunity, or the tribe itself has clearly and unequivocally waived its immunity, it is absolute under any set of facts. *Santa Clara Pueblo v. Martinez*, 436 US 49, 58, 98 S. Ct. 1670 (1978) (waiver of sovereign immunity "must be unequivocally expressed.") A waiver of sovereign immunity cannot be inferred or implied, and it must be strictly construed. *See Reynolds v. United States*, 643 F.2d 707,

713 (10th Cir.) *cert. denied* 454 U.S. 817, 102 S. Ct. 94 (1981); *Cook v. Avi Casino Enterprises, Inc*., 548 F.3d 718, 726 (9th Cir. 2008).

II. REFERENCES TO "FACTS" OUTSIDE THE RECORD DO NOT CHANGE THE JURISDICTIONAL ANALYSIS

In the motion to dismiss, the defense pointed out that the Ninth Circuit Court of Appeals affirmed the dismissal of the very same tribal corporation on the basis of sovereign immunity, as did the Arizona Court of Appeals, and that the United States Supreme Court denied review in both actions. *Cook v. Avi Casino Enterprises, Inc*., 548 F.3d 718 (2008), *cert. denied* 129 S. Ct 2159 (2009). Although there is no allegation or evidence of record that the tribe expressly waived its sovereign immunity, in the text of the opposition brief the plaintiff quotes from the appellate brief of the plaintiff in the *Cook* case to advance the mistaken assumption that a tribe's "enabling ordinance" might be construed as an express waiver of sovereign immunity. The business enabling ordinance referenced by *Cook* in his appellate briefing was not in the court record, however, nor was the argument timely raised. Thus, neither the Arizona Court of Appeals nor the Ninth Circuit ever addressed the fact that the cited ordinance was repealed and replaced, and there is nothing in the record here to establish that the tribe expressly waived its sovereign immunity. *See* Opposition at p.4-5.

Plaintiff never addresses the fact that the subject complaint is absolutely silent when it comes to the issue of sovereign immunity. Instead, the allegations of a potential waiver are based "upon information and belief" in the text of the opposition, and is devoid of any evidentiary support. There is nothing in the record that would

allow the court to even consider whether the language of the applicable tribal business ordinance even has a "sue and be sued clause." The fact that plaintiff's counsel was not able to obtain a copy of the business ordinance online or by recently placing a call to the tribal court in the face of a motion to dismiss does not change the outcome.[1] Speculation and innuendo about the language of the business ordinance, or the applicable Tort Claims Ordinance that the plaintiff never requested, does not confer subject matter jurisdiction over the Ft. Mojave Tribe or its wholly-owned business enterprise.

III. THE GAMING COMPACT WITH THE STATE OF ARIZONA HAS NO BEARING ON THIS COURT'S SUBJECT MATTER JURISDICTION

Here again, there is nothing in the complaint regarding the Intergovernmental Agreement (Gaming Compact) between the Fort Mojave Tribe and the State of Arizona nor any allegation or evidence of record as to how this might conceivably be a waiver of sovereign immunity for injury to a patron of the Avi Casino in Nevada. There is no allegation or evidence that the Ft. Mojave Tribe or Avi Casino Enterprise expressly waived sovereign immunity for tort claims of patrons at this facility. To the contrary, the Ninth Circuit examined the record and concluded that "[a]s a tribal corporation and an arm of the Fort Mojave Tribe, ACE enjoys sovereign immunity from Cook's suit."

[1] It is noteworthy that plaintiff's counsel did not ask defense counsel or the Tribe's General Counsel to obtain a copy of the current enabling ordinance for tribal businesses.

Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718, 726 (2008), *cert. denied* 129 S. Ct 2159 (2009).

IV. CORRESPONDENCE WITH THE CLAIMS ADJUSTER HAS NO BEARING ON SUBJECT MATTER JURISDICTION OR TRIBAL SOVEREIGN IMMUNITY.

The plaintiff alleges, in the alternative, that even if the court finds the tribal sovereign immunity applies, this Court should craft a remedy based on the provisions of the intergovernmental agreement (Gaming Compact) between Fort Mojave Tribe and State of Arizona. The plaintiff also complains that the claims adjuster did not provide a copy of the applicable tort claims ordinance and that the failure to comply with the notice of claim procedures should therefore be excused.

Attached to the opposition are three letters; the first is a letter of representation that was sent to Risk Management on June 29, 2015; the second letter was a settlement demand package mailed to Risk Management on December 16, 2016; The third letter is from the Third-Party Administrator, Tribal First, dated January 9, 2017, explaining that the claim was being denied due to the failure to comply with the Tribal Tort Claims Ordinance. The plaintiff still does not explain how any of these letters constitute an express waiver of the Tribe's sovereign immunity. See *E. G. Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (prior suit brought *by the tribe* did not constitute a waiver of immunity for a later suit brought *against the tribe*); *citing McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989).

It should also be noted that attaching extrinsic evidence in the form of unauthenticated and inadmissible correspondence does not require that this motion be

treated as one for summary judgment under Rule 56, nor does it create a question of fact regarding sovereign immunity. The issue of tribal sovereignty and subject matter jurisdiction is a determination to be made by the court at the outset under Fed. R. Civ. P. Rule 12(b) (1). *Pistor v. Garcia*, 791 F.3d 1104, 1110 - 1111 (9th Cir. 2015). Even when considering a Rule 12 (b) (6) motion to dismiss for failure to state a claim, as a general rule "[a] district court may not consider any material beyond the pleadings in ruling on a Rule 12 (b) (6) motion." *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). If matters outside the pleadings are presented to *and not excluded by* the court in a Rule 12 (b)(6) or Rule 12 (c) motion, only then must the motion be treated as one for summary judgment under Rule 56. This clearly was not the intent of the plaintiff, however, because they failed to comply with local Rule 56 - 1 which requires "[a] concise statement setting forth each fact material to the disposition of the motion," including whether or not the facts are disputed or undisputed, along with pinpoint citations to the record regarding the admissible evidence upon which the party relies. See *Joe Hand Promotions, Inc. v. Steak*, 2014 WL 1304723 (D. Nev. 3/31/14); *John Bordynuik, Inc. v. J.B.I, Inc.*, 2015 WL 153439 (D. Nev. 1/13/15).

CONCLUSION

For the foregoing reasons, plaintiff's complaint against Avi Casino Enterprises, Inc., must be dismissed for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 31st day of May, 2017.

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PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Maria Silva, the undersigned, declare as follows:

I am over 18 years of age and not a party to the within action; my business address is: 702 East Osborn Road, Suite 200, Phoenix, Arizona 85014.

On May 31, 2017, I served a copy of the accompanying document(s) entitled: ***Defendant's Reply in Support of its Motion to Dismiss*** on the following interested parties:

Steven M. Burris, Esq.
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[ ] **BY U.S. MAIL** by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business.

[**X**] **BY ELECTRONIC SERVICE (via individual persons)** by electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth above. The transmission was reported as completed and without error.

I certify under penalty of perjury that the foregoing is true and correct and that the declaration was executed on May 31, 2017 at Phoenix, Arizona.

/s/Maria Silva