Little Fawn Boland (SBN 240181)
Keith Anderson (*admission pending*, SBN 282975)
Ellen Venegas (*pro hac vice pending*, NM 147370)
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Telephone: (415) 684-7670
Facsimile: (415) 684-7273
Attorneys for Defendants Santa Ysabel Tribal Development Corporation and David Chelette

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Outliers Collective, a Nonprofit Mutual Benefit Corporation,

Plaintiff,

v.

The Santa Ysabel Tribal Development Corporation, a Tribally chartered corporation; GardenPharma, LLC, a limited liability company; David Chelette, an individual; and DOES 1 through 50, Inclusive,

Defendants.

Case Number: 3:18-cv-00834-JAH-KSC

DEFENDANT SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS

[Fed. R. Civ. P. 12(b)(1); 12(b)(7)]

Judge: Honorable John A. Houston
Magistrate: Honorable Karen S. Crawford

Hearing Date: October 22, 2018
Hearing Time: 2:30 p.m.
Courtroom: 13B

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on October 22, 2018 at 2:30 p.m. or as soon thereafter as the matter may be heard, in Courtroom 13B, of the United States District Court for the Southern District of California, located at 333 West Broadway, San Diego, California, 92101, Defendant SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION will move for dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(7).

The motion is based on this notice of motion, the accompanying memorandum points and

authorities filed in support of this motion, all pleadings and records heretofore filed in this action, and all relevant matters subject to judicial notice.

CEIBA LEGAL, LLP

_/s/ Ellen Venegas_____
_/s/ Little Fawn Boland_____
_/s/ Keith Anderson_____

Ellen Venegas (*pro hac vice pending*, NM 147370)
ellen@ceibalegal.com
Little Fawn Boland (SBN 240181)
littlefawn@ceibalegal.com
Keith Anderson (*admission pending*, SBN 282975)
keith@ceibalegal.com
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Telephone: (415) 684-7670
Facsimile: (415) 684-7273

Attorneys for Defendants Santa Ysabel Tribal Development Corporation and David Chelette

CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, a true and correct copy of:

DEFENDANT SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS

and all attached exhibits were served on Counsel for Plaintiff electronically through CM/ECF.

DATED: August 31, 2018

CEIBA LEGAL, LLP

By: /s/ Little Fawn Boland

Little Fawn Boland

Little Fawn Boland (SBN 240181)
Keith Anderson (*admission pending*, SBN 282975)
Ellen Venegas (*pro hac vice pending*, NM 147370)
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Telephone: (415) 684-7670
Facsimile: (415) 684-7273
Attorneys for Defendants Santa Ysabel Tribal Development Corporation and David Chelette

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Case Number: 3:18-cv-00834-JAH-KSC

[CORRECTED] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION'S MOTION TO DISMISS

[Fed. R. Civ. P. 12(b)(1); 12(b)(7)]

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INTRODUCTION

Plaintiff Outlier's Collective is seeking relief in the wrong place, at the wrong time and from the wrong persons.

Plaintiff seeks relief in the wrong place because Defendant Santa Ysabel Tribal Development Corporation ("Tribal Corporation"), a sovereign tribal entity, granted Plaintiff a limited waiver of its sovereign immunity to resolve disputes arising under a certain Land Use Agreement ("Agreement") exclusively by arbitration conducted by the American Arbitration Association ("AAA"). No waiver was granted to have disputes heard by the federal courts. Plaintiff has made no attempt to have the dispute heard before the AAA.

Plaintiff seeks relief at the wrong time because a condition of the Tribal Corporation's waiver was that it would expire after the longer of (1) one year after the termination or expiration of the Agreement, or (2) at the conclusion of any suit with respect to this Agreement pending at the termination or expiration of this Agreement. The Agreement was terminated on April 24, 2017. At the time of termination, no suits relating to the Agreement were pending. Plaintiff initiated this action on April 30, 2018, a date more than one year following the Agreement's termination.

Plaintiff seeks relief against the wrong persons because many of Plaintiff's claims are in reality claims against the Iipay Nation of Santa Ysabel ("Tribe") and its Tribal Cannabis Regulatory Agency ("Regulatory Agency"). Both the Tribe and the Regulatory Agency are indispensable parties that cannot be joined because of the privilege of sovereign immunity.

Any one of the above deficiencies is sufficient grounds for dismissal of Plaintiff's complaint. However, the most insurmountable bar to Plaintiff's claim is the nature of the dispute itself. Plaintiff complains of an ordinary breach of contract, not invoking diversity jurisdiction or a federal question.[1] As courts of limited jurisdiction, federal courts must be presented with one or the other. Even if the Tribal Corporation waived sovereign immunity for disputes to be heard in the federal courts; even if the Plaintiff filed its complaint prior to the expiration of the waiver

[1] Diversity jurisdiction is not possible in this case because all the parties are based in California.

granted; and even if the harms alleged were properly lodged against the Tribal Corporation, this court would still lack jurisdiction to adjudicate Plaintiff's claims. In other words, even if this court were the "right" place to adjudicate claims under the terms of the Agreement, and even if Plaintiff's claims had been filed at the "right" time and been lodged against the "right" persons, this court would be the "wrong" forum to grant the relief sought.

FACTUAL SUMMARY

The Tribal Corporation is a tribally chartered corporation wholly owned by the Tribe, a federally recognized Indian tribe. Complaint, ¶ 2. The Tribal Corporation operates pursuant to a tribal charter of incorporation ("Charter") and is governed by a Board of Directors. Declaration of David Chelette, ¶ 3 ("Chelette Decl."). Pursuant to its authority granted by the Tribe and the Charter, the Tribal Corporation oversees tribal business activity including leasing space on the Tribe's reservation for authorized cannabis and cannabis-related activities. Chelette Decl., ¶ 6.

The Tribal Corporation operates the Santa Ysabel Botanical Facility ("Facility"). Chelette Decl., ¶ 7. The Facility is a tribally-licensed medical cannabis cultivation facility. Chelette Decl., ¶ 7. Numerous tenants (previously including Plaintiff) rent space in the Facility from the Tribal Corporation. Chelette Decl., ¶ 7. The Facility is managed by Back Country Property Management Corporation ("Back Country"), a tribal corporation that is not a party to this case. Chelette Decl., ¶ 8. Back Country is responsible for business operations, site development, and tenant relations at the Facility. Chelette Decl., ¶ 8. The Regulatory Agency regulates all permitted cannabis activities on the reservation, pursuant to tribal ordinances and extensive written regulations. Declaration of David Vialpando, ¶ 3 ("Vialpando Decl.").

David Chelette, Vice Chairman of the Tribal Corporation Board of Directors (Chelette Decl., ¶ 4), is also named as a Defendant in this case (Mr. Chelette and the Tribal Corporation are collectively referred to as the "Tribal Defendants"). In addition to serving on the Tribal Corporation Board, Mr. Chelette is the General Manager of Back Country. Chelette Decl., ¶ 9. GardenPharma, LLC is also named as a Defendant in this action. GardenPharma has a contractual relationship (and dispute) with Plaintiff concerning the rental of equipment. *See* Complaint, ¶ 19.

In 2015, Plaintiff and the Tribal Corporation entered into a Land Use Agreement ("Agreement")[2] with an effective date of July 28, 2015. Complaint, ¶ 10. A copy of the Agreement is attached as Exhibit 1 to the Declaration of David Chelette. Pursuant to the Agreement, the Tribal Corporation (landlord) agreed to allow Plaintiff (tenant) to use indoor and outdoor space located on the Tribe's reservation for permitted wholesale cannabis operations. Complaint, ¶ 10. The terms of Agreement were agreed to by the Tribal Corporation and Plaintiff through an arm's length negotiation. Per the Agreement, Plaintiff agreed, *inter alia*, to the following provisions:

- To make various payments including but not limited to: (1) monthly land use payments to the Tribal Corporation (Land Use Agreement, § 1.4); (2) remission of tax to the Tribe pursuant to tribal law (*id.* § 5); (3) security costs to the Santa Ysabel Tribal Cannabis Regulatory Agency (*id.* § 2.9); (4) licensing fees and other regulatory expenses to the Regulatory Agency (*id.* §§ 3.10(c); 18.15) and (5) repair and maintenance costs (*id.* § 6);
- That David Chelette would be the point of contact to receive notices for the Tribal Corporation under the Agreement (*id.* § 1.1);
- To accept the premises "as is" (*id.* § 2.4);
- To consent to the Tribe's regulatory jurisdiction and abide by the rules and regulations of the Regulatory Agency (*id.* at p. 2);
- To abide by tribal law and that the Agreement would be governed by the laws of the Tribe (*id.* §§ 3.8; 17.1);
- That failure to make any payment due under the agreement constitutes an event of default (*id.* §14.1(b)) and specifically that that failure to pay taxes, including the Tribe's Medical Cannabis Tax, constitutes an event of default (*id.* § 14.1(m));

[2] Plaintiff repeatedly refers to the parties' "rights and duties under their agreement, including the Land Use Agreement." *See, e.g.*, Complaint, ¶ 50. As to the Tribal Defendants, the only relevant agreement referenced in the Complaint is the Land Use Agreement. Plaintiff has not alleged the existence of any other valid, relevant agreements between itself and the Tribal Defendants.

- To adhere to a specific dispute resolution process, including informal dispute resolution and formal arbitration (*id.* §§ 14; 17.3);
- To either surrender improvements upon termination or dismantle improvements and return the premises to its pre-Agreement condition (*id.* § 16.3);
- That the Agreement constituted the entire agreement between the parties and that notices and amendments must be made in writing (*id.* §§ 1.1; 18.2; 18.12); and
- That the prevailing party in any dispute shall be entitled to recover attorney fees from the other party (*id.* § 17.4).

Plaintiff also acknowledged in the Agreement the sovereign status of the Tribal Corporation and its immunity from suit. *Id.* § 17.2. Plaintiff accepted the Tribal Corporation's limited waiver of sovereign immunity, which authorized the parties to arbitrate timely-filed disputes. *Id.* §§ 17.2; 17.3.

Per the Agreement, Plaintiff made land use payments to the Tribal Corporation, totaling approximately $319,000 for the nearly two-year tenancy. Chelette Decl., ¶ 13. However, Plaintiff failed to pay the Tribe's Medical Cannabis Tax, amounting to a deficit to the Tribe in excess of $1,500,000 (excluding any penalties or interest the Tribe may assess). Chelette Decl., ¶ 14. At the time of the termination of the Agreement, this amount was nearly one year overdue.

For several months the Tribal Corporation attempted to resolve Plaintiff's noncompliance pursuant to the notice and cure period provisions in the Agreement. On March 22, 2017, the Tribal Corporation sent Plaintiff a Notice of Default and a proposed written amendment to the Agreement to resolve the issue. Chelette Decl., ¶ 15. Subsequent negotiations regarding the matter were unsuccessful and the Tribal Corporation sent Plaintiff an additional default notice on April 10, 2017, giving Plaintiff a chance to cure its default by April 21, 2017. Chelette Decl., ¶ 17. Thereafter, the Tribal Corporation made attempts to resolve the issues with Plaintiff, including holding a "meet and confer" session per the terms of the Agreement. Chelette Decl., ¶ 17.

During this same time period, a dispute between Plaintiff and Defendant GardenPharma

as to property and a contract between the two entities escalated to the point where the Regulatory Agency got involved. Complaint, ¶ 20. Correspondence received by the Regulatory Agency from GardenPharma indicated the company's intent to remove and dismantle equipment and material in the possession of Outlier's Collective and located at or near the Facility. Vialpando Decl., ¶ 7. Outlier's Collective insinuated that it would not permit Garden Pharma to remove and dismantle the equipment. Vialpando Decl., ¶ 7. This matter raised significant safety concerns due to the possibility of Outlier's Collective tending to cannabis plants in the same facility as GardenPharma representatives would be in the process of dismantling equipment and materials that constituted collateral under an agreement between those two entities. Vialpando Decl., ¶ 7. The Regulatory Agency evaluated the situation and took action against both entities, temporarily suspending licenses and placing restrictions on their access to parts of the Facility. Vialpando Decl., ¶ 8. The Regulatory Agency also ordered Plaintiff to remove its cannabis plants from a portion of the Facility. Vialpando Decl., ¶ 8.

Ultimately, Plaintiff failed to cure its default. After several months of attempting to resolve these longstanding noncompliance issues by the Plaintiff, the Tribal Corporation (by and through its Board of Directors) decided to exercise its right to terminate the Agreement, even though the early termination of Plaintiff's tenancy caused the Tribal Corporation to lose substantial revenue. Chelette Decl., ¶ 21.

The Tribal Corporation terminated the Agreement in writing on April 24, 2017. Chelette Decl., ¶ 20. A copy of the Notice of Termination is attached as Exhibit 2 to the Declaration of David Chelette. The Tribal Corporation reaffirmed and clarified its decision to terminate the entire agreement, effective immediately, in additional letters to Plaintiff sent on April 27, 2017 and April 28, 2017. Chelette Decl., ¶ 22. In terminating the Agreement, the Tribal Corporation fully complied with the dispute resolution procedures agreed to by the parties, including providing adequate notice of the Plaintiff's default and multiple opportunities to cure. Chelette Decl., ¶ 23.

On April 28, 2017, the Regulatory Agency revoked Plaintiff's license pursuant to its

regulations, and prohibited Plaintiff and its affiliates from accessing the Facility, except for limited and supervised access to retrieve Plaintiff's property. Vialpando Decl., ¶ 10. Following termination of the Agreement, the Tribal Corporation permitted Plaintiff to remove all of its property, equipment, and cultivation supplies from the Facility. Chelette Decl., ¶ 24. The Regulatory Agency's supervision was required pursuant to its regulations governing transportation of cannabis. Vialpando Decl., ¶ 11. On May 9, 2017, the Tribal Corporation sent Plaintiff a reminder that all of its property must be removed, and that Plaintiff must coordinate the removal under the Regulatory Agency's supervision. Chelette Decl., ¶ 25.

The Regulatory Agency facilitated Plaintiff's access to the Facility for the purpose of removing its property. Vialpando Decl., ¶ 11. Plaintiff removed all of its computers, printers, trimmers, tools, racks, product packaging, and cultivation equipment from the Facility. Vialpando Decl., ¶ 11. The Regulatory Agency followed all applicable regulations regarding Plaintiff's departure from the Facility and performed all duties in a professional and impartial manner. Vialpando Decl., ¶ 14. After Plaintiff obtained its property, a small number of marijuana plants (1,316) were left behind at the Facility. Vialpando Decl., ¶ 12. At the request of Plaintiff, the plants were destroyed by the Regulatory Agency pursuant to its cannabis waste disposal regulations. Vialpando Decl., ¶ 12. Following the plants' destruction, no plants, cultivation equipment, supplies, or material remained in the space previously leased to Plaintiff. Vialpando Decl., ¶ 13.

The Tribal Corporation and Back Country sought a new tenant in order to mitigate its losses. *See* Chelette Decl., ¶¶ 26–27. The spaces previously leased to Plaintiff remained vacant for several months while Back Country looked for a new tenant. Chelette Decl., ¶ 27. During the time the space was vacant, the Tribal Corporation and the Tribe missed out on revenues that cannabis enterprise activity in the space would have provided. Chelette Decl., ¶ 27.

On April 30, 2018—more than one year after the Agreement was terminated—Plaintiff initiated this action for breach of contract and related claims. Plaintiff made no attempts to initiate arbitration as contemplated in the Agreement.

ARGUMENT

The Plaintiff cannot establish that the federal courts have jurisdiction over this dispute for a multitude of reasons. First, the Complaint does not present a federal question and the Court therefore lacks subject matter jurisdiction. Second, the Tribal Corporation is a sovereign entity possessing sovereign immunity from unconsented suit. The Complaint does not fall within the scope of the limited sovereign immunity waiver in the Agreement. Finally, the claims in the Complaint cannot be resolved in the absence of additional tribal parties, which cannot be joined due to their sovereign immunity from suit. Any one of these grounds alone is sufficient to mandate dismissal of the claims against the Tribal Corporation.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S COMPLAINT

"[F]ederal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see also Lowdermilk v. United States Bank Nat'l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007) ("[A]s federal courts, we are courts of limited jurisdiction and we will strictly construe our jurisdiction."). A plaintiff bears the burden of establishing subject matter jurisdiction, and federal courts are presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The Plaintiff fails to meet its burden to demonstrate the presence of federal court jurisdiction. While the Complaint alleges the case presents a federal question (Complaint, ¶ 6), in fact no federal laws are implicated in this matter. Additionally, Plaintiff's claims that the presence of tribal defendants suffice to vest the federal court with jurisdiction are not supported by law. Where the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, the complaint is properly dismissed for lack of subject matter jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

A. Plaintiff's Complaint is Completely Devoid of a Federal Question.

Plaintiff's jurisdictional statement alleges that this Court possess federal question jurisdiction over the claims in the Complaint. Complaint, ¶ 6. Federal question jurisdiction under

28 U.S.C. § 1331 requires a plaintiff's complaint to "establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law." *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28 (1983)). The Complaint fails to meet either of these tests.

1. Federal Law Does Not Create Plaintiff's Cause of Action.

Federal courts have original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[T]he cornerstone of federal subject matter jurisdiction is statutory authorization." *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007) (citations omitted). This case does not arise under any federal statute, treaty, the Constitution, or any other law. Plaintiff does not allege that any federal statutes or other laws have been violated. Rather, the Complaint details a simple breach of contract case under which no federal laws are implicated.

The only federal laws mentioned in the Complaint are the "Cole Memorandum" and the "Wilkinson Memorandum." Complaint, ¶¶ 8, 9. These Memorandums do not create federal causes of action for civil litigation between private parties. Moreover, Plaintiff does not allege that the Tribal Corporation violated any provisions of these Memorandums. To the contrary, Plaintiff's agreement with the Tribal Corporation was entered into "*consistent with* the Cole Memorandum and the Wilkinson Memorandum." Complaint, ¶ 9 (emphasis added).

2. Plaintiff's Asserted Right to Relief Does Not Depend on the Resolution of a Substantial Question of Federal Law.

Just as federal law does not create any of the Complaint's causes of action, resolution of Plaintiff's claims does not depend on or relate to federal laws whatsoever. The Court lacks subject matter jurisdiction over this case because Plaintiff has not shown in its Complaint that the Court would be required to resolve a substantial and disputed question of federal law. Federal question jurisdiction "does not exist if 'the real substance of the controversy centers upon' something other than the construction of federal law." *Longie v. Spirit Lake Tribe*, 400 F.3d 586,

589–90 (8th Cir. 2005) (quoting *Littell v. Nakai*, 344 F.2d 486, 488 (9th Cir. 1965) (internal quotation marks omitted)).

Plaintiff's main contention is that the Tribal Corporation breached its contractual obligations in the Land Use Agreement. The Agreement is governed solely by the laws of the Tribe, not federal law. Land Use Agreement, §§ 3.8; 17.1. Indeed, part of the reason that the Tribal Corporation terminated the Agreement is because of Plaintiff's failure to comply with *tribal* laws. Plaintiff agreed to be bound by such laws and makes no claims that the Tribe lacked authority to impose its laws on the Plaintiff. "[T]he federal courts do not stand ready to entertain every case arising under a tribal ordinance, when there is no inherent and disputed federal question about the tribe's power to enact it." *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1476 (9th Cir. 1989).

Every one of the Plaintiff's claims stem from an alleged breach of contract and infringement of other contractual rights. Ninth Circuit precedent holds that a simple contractual dispute is a common law matter which does not invoke federal court jurisdiction. "[F]ederal courts do not have jurisdiction over run-of-the-mill contract claims" involving tribes or tribal entities. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055 (9th Cir. 1997) (citing *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (hereafter "*Gila River*")); *see also Peabody Coal Co*, 373 F.3d at 951 ("Peabody's claim for enforcement of an arbitration award sounds in general contract law and does not require the resolution of a substantial question of federal law.").

In *Gila River*, the Ninth Circuit rejected a tribe's attempt to invoke federal court jurisdiction over a contract dispute, explaining "[t]here is nothing in the present case which suggests that the action is anything more than a simple breach of contract case." *Gila River*, 626 F.2d at 714. The court found jurisdiction lacking because the dispute centered on "adequacy of performance" of the contract rather than issues that could potentially vest the federal courts with jurisdiction such as "[t]he Tribe's possessory right to the land or any rights granted under any federal treaty or statute." *Id*. The same factual scenario is present in this case. The Plaintiff seeks

recovery based on alleged contractual violations that do not involve federal law. Further, the case against federal jurisdiction is even stronger in this action because rather than a tribe initiating litigation as in *Gila River*, a plaintiff is attempting to hale a non-consenting tribal corporation into federal court as a defendant.

B. Plaintiff's Contention That a Dispute Arising on an Indian Reservation and Involving a Tribal Entity is Automatically Subject to the Jurisdiction of the Federal Courts is Misguided and Unsupported by Law.

Plaintiff believes that because the Tribal Corporation is a tribal entity, the federal courts are vested with jurisdiction over the claims. *See* Complaint, ¶ 6. This is not the law.

1. Williams v. Lee is Inapposite.

Plaintiff alleges there is "jurisdiction of the federal courts over civil suits by non-Indians against Indians when the cause of action arises on an Indian reservation." Complaint, ¶ 6 (citing *Williams v. Lee*, 358 U.S. 217 (1959)). *Williams v. Lee*, a seminal federal Indian law case, has never stood for such a proposition. Plaintiff's distortion of Supreme Court precedent is a misguided and ineffective attempt to create federal jurisdiction where none exists.

Under *Williams*, states cannot assert jurisdiction over the affairs of Indians on reservations if the state actions infringe on the right of Indians to make their own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *Williams*, the Supreme Court rejected state jurisdiction over a civil matter between an Indian and a non-Indian involving a transaction that took place on the reservation. *Id*. at 223. The Supreme Court noted that the tribal court possessed broad criminal and civil jurisdiction, including jurisdiction over cases brought by outsiders against Indian defendants. *Id*. at 222. In addition, no federal law or act vested state courts with jurisdiction over internal Indian affairs. *Id*. at 222–23. Because the state court's assertion of jurisdiction "infringe[d] on the right of the Indians to govern themselves," the state's jurisdiction was rejected by the Supreme Court. *Id*. at 223.

No reasonable reading of *Williams* would lead one to conclude that all civil suits between Indians and non-Indians arising on reservations are subject to the jurisdiction of the federal

courts. In fact, *Williams* does not even address federal court jurisdiction in the slightest. The only place that *Williams* even references "federal courts" is in a footnote, briefly noting that Congress granted *criminal* jurisdiction to federal courts to adjudicate cases involving Indians alleged to have committed various major crimes in violation of federal statutes. *See id*. at 220 n.5.

There simply is no law in existence that vests federal courts with jurisdiction to adjudicate all civil disputes between Indians and non-Indians occurring on reservations.[3] Rather, binding precedent holds "federal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). The fact that the Tribal Corporation is a tribal entity is not, by itself, sufficient to raise a federal question. *See, e.g.*, *Peabody Coal Co*, 373 F.3d at 950–51 (9th Cir. 2004) (determining there was no federal question jurisdiction over a non-Indian corporation's suit against the Navajo Nation).

2. The Land Use Agreement Cannot Confer Jurisdiction on the Federal Court.

Plaintiff alleges the terms of the sovereign immunity waiver in the Land Use Agreement confers jurisdiction on the federal courts. Complaint, ¶ 6. As discussed below, this suit does not fall within the scope of the waiver. In addition, the mere presence of a waiver of sovereign immunity cannot possibly confer jurisdiction on a federal court. *See Alvarado*, 509 F.3d at 1016 ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction.").

Simply put, regardless of the terms of the Agreement, no amount of agreement by the parties can create jurisdiction where none exists. "[P]arties have no power to confer jurisdiction on the district court by agreement or consent." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) (citations omitted). Because "no action

[3] Even if the federal court did have jurisdiction, the law requires that a plaintiff exhaust tribal remedies in disputes arising on the reservation and involving tribal entities. *See, e.g.*, *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). Plaintiff has not sought relief in the tribal court.

of the parties can confer subject-matter jurisdiction upon a federal court . . . the consent of the parties is irrelevant." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citing *California v. LaRue*, 409 U. S. 109 (1972)); *see also Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997) ("This is not to say that a defect in jurisdiction can be avoided by waiver or stipulation to submit to federal jurisdiction. It cannot.").

The Seventh Circuit rejected an argument that language extremely similar to the sovereign immunity waiver in the Land Use Agreement conferred jurisdiction on the federal courts. In *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006), *abrogated on other grounds by Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009), a tribal-state compact contained an agreement of the parties to use the federal court system for dispute resolution. The court rejected the notion that the agreement conferred jurisdiction on the court stating: "neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction. An Indian tribe's waiver of its sovereign immunity to subject itself to suit does not change this requirement. The provisions in the compact do not alter our determination that [plaintiff]'s complaint does not provide for subject matter jurisdiction over its cause of action." *Id.* at 661 (citation omitted). Likewise, language in the Land Use Agreement providing for federal court jurisdiction does not suffice to confer jurisdiction on this Court.

II. THE LIMITED WAIVER OF SOVEREIGN IMMUNITY IN THE LAND USE AGREEMENT IS INEFFECTIVE AS APPLIED TO PLAINTIFF'S COMPLAINT

Even if the Plaintiff could meet its burden to establish federal question jurisdiction, it faces yet another insurmountable hurdle—the Tribal Corporation is protected by tribal sovereign immunity. This Court lacks jurisdiction over the claims against the Tribal Corporation because there is no valid waiver of sovereign immunity permitting suit against the tribal corporation. "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado*, 509 F.3d at 1015–16.

The Tribal Corporation is a tribally chartered corporation, wholly owned by the Iipay Nation of Santa Ysabel, a federally recognized Indian tribe. Complaint, ¶ 2. As an arm of the

Tribe sharing in its privileges and immunities, the Tribal Corporation is protected from this suit by sovereign immunity. The "settled law" of the Ninth Circuit "is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Cook v. AVI Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008); *see also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (A tribe's sovereign immunity extends both to tribal governing bodies and to tribal agencies which act as an arm of the tribe.).

Plaintiff does not contest that the Tribal Corporation is an arm of the Tribe vested with immunity from suit.[4] Section 17.2 of the Agreement contains an acknowledgment by Plaintiff and the Tribal Corporation that the Tribal Corporation is "wholly owned by the Tribe, a federally recognized Indian tribe, and, as such, it possesses sovereign immunity from suit." Rather, Plaintiff alleges that a limited waiver of immunity in the Agreement confers jurisdiction on this Court. Complaint, ¶ 6. It does not. Under the plain language of the immunity waiver—which Plaintiff agreed to accept—the waiver is only for arbitration of disputes and the waiver was for a limited period of time which has now expired. Further, any doubtful expressions in the immunity waiver must be resolved in the Tribal Corporation's favor.

[4] If Plaintiff were to contest the Tribal Corporation's status as an arm of the Tribe such efforts would be futile because the requisite test is unquestionably met. To determine whether an entity is an "arm of the tribe" entitled to sovereign immunity the Ninth Circuit examines the following factors: "(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) (citation omitted). The facts show: (1) the Tribal Corporation was created by the Tribe pursuant to tribal law (Land Use Agreement at p. 1); (2) the Tribal Corporation's purposes include providing the Tribe and tribal members with economic development opportunities and to generate revenue for governmental operations (Chelette Decl., ¶ 5); (3) the Tribe is the sole shareholder of the Tribal Corporation, the Tribal Corporation is overseen by a Board of Directors appointed by the Tribal Council, and at least half of the members of the Board of Directors must be tribal members (Chelette Decl., ¶ 3); (4) the Tribal Corporation's Charter establishes the Tribal Corporation shall have the same immunities under federal law as the Tribe (Chelette Decl., ¶ 5); and (5) the financial relationship between the Tribe and the Tribal Corporation is such that the Tribe would be harmed by any judgment against the Tribal Corporation. If judgment was issued against the Tribal Corporation, it would not be able to fully fulfill its expressed purpose of generating revenue for governmental operations.

A. The Limited Waiver of Sovereign Immunity was Only for Arbitration.

Waivers of immunity must be unequivocally expressed and cannot be implied from actions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). For a tribe or tribal entity to waive immunity, the waiver must be "clear." *C & L Enters., Inc. v. Citizen Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citation omitted). Without question, the limited waiver of immunity in the Land Use Agreement does not waive the Tribal Corporation's immunity as to litigation of the merits of a dispute in this Court or any other court.

In the Complaint, Plaintiff alleges that the Court has jurisdiction because a section of the Agreement captioned "Limited Waiver of Sovereign Immunity" permits "an action" to "be submitted to any federal court of competent jurisdiction within the United States District Court of the Southern District of California . . ." Complaint, ¶ 6 (citing to Land Use Agreement, § 17.2(b)). Plaintiff does not accurately describe the terms of the limited waiver.

Plaintiff's partial description fails to accurately portray the terms agreed to by the parties to the Agreement. Plaintiff's claim that an "action" may be submitted to the federal courts fails to explain what an "Action" is pursuant to the Land Use Agreement. The only permissible "Actions" under the Agreement are: (1) compelling arbitration; or (2) confirming an arbitration award. Land Use Agreement, § 17.2(a). The Tribal Corporation's limited waiver in favor of Plaintiff was expressly "for the limited and sole purpose of" either compelling arbitration, or confirming an arbitration award. *See id*.

Plaintiff's Complaint is not a motion to compel arbitration[5] or an action seeking

[5] Plaintiff chose not to style its cause of action as a motion to compel arbitration. However, even if a motion to compel was before the Court, jurisdiction would still be lacking. The Court would not be authorized to take action on such a request because federal jurisdiction must be present over the underlying claims of the dispute. *See, e.g.*, *Vaden*, 129 S. Ct. at 1271 (stating the Federal Arbitration Act requires an independent jurisdictional basis over the parties' dispute for access to a federal forum); *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004) ("It is well-established that . . . a petitioner seeking to confirm or vacate an arbitration award in federal court must establish an independent basis for federal jurisdiction."). As discussed in Section I, *supra*, there are no federal questions implicated in this matter. In any event, the waiver is expired. *See* Section II.B, *infra*.

confirmation of an arbitration award. Accordingly, the limited waiver of sovereign immunity does not authorize Plaintiff's breach of contract action and related claims against the Tribal Corporation.

B. The Limited Waiver of Sovereign Immunity Expired.

Plaintiff faces yet another uncurable jurisdictional defect. Assuming the Agreement between the parties could confer jurisdiction on the federal courts, and assuming that the waiver was broad enough to permit federal court litigation on the merits of the dispute, the federal courts would remain unable to entertain Plaintiff's claims against the Tribal Corporation because the waiver of sovereign immunity is expired and thus no longer valid.

It is well known and undisputed that when an Indian tribe or tribal entity voluntarily consents to a waiver of sovereign immunity, the tribal entity possesses an indefeasible right to "prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Amer. Indian Agr. Credit v. Stand. Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). Any conditional limitations a tribal entity imposes on consent to be sued "must be strictly construed and applied." *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 509 (8th Cir. 1975) (citing *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1966)).

In this case, the waiver of immunity was only valid for a limited duration. Section 17.2(d) of the Land Use Agreement states "[t]he limited waiver of sovereign immunity provided for in this Section shall expire at the conclusion of the longer of (i) one (1) year after the termination or expiration of this Agreement, or (ii) at the conclusion of any suit with respect to this Agreement pending at the termination or expiration of this Agreement, including the collection of any award."

Plaintiff conveniently omits from the Complaint the fact that the Land Use Agreement was terminated on April 24, 2017. Chelette Decl., ¶ 20; *see also* Exhibit 2 to Chelette Decl. Such termination was effectuated with notice to Plaintiff and in accordance with the relevant provisions of the Land Use Agreement. Chelette Decl., ¶ 23. The Complaint was filed on April

30, 2018—more than one (1) year after the April 24, 2017 termination of the agreement. Plaintiff never filed any other formal claim against the Tribal Corporation aside from this litigation and thus no argument can be made that a pending suit kept the waiver intact for a longer timer period under Section 17.2(d)(ii). The waiver was expired—and therefore void—at the time the Complaint was filed.

C. To the Extent the Waiver is Unclear, Doubtful Expressions Must be Construed in the Tribal Corporation's Favor.

The plain language of the Tribal Corporation's waiver establishes that Plaintiff's Complaint does not fall within the waiver's limited scope. Although the language is clear, if the Court has any doubt, it must tip the scales in favor of the tribal entity. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (citation omitted). It has long been understood that a waiver of sovereign immunity "must be liberally construed in favor of the [tribal entity] and all doubtful expressions therein resolved in favor of the [tribal entity]." *Maryland Casualty Co.*, 361 F.2d at 521. Moreover, "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir. 1985) (citation omitted).

III. PLAINTIFF'S CLAIMS MUST BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES

Plaintiff's claims are all intricately bound to the Land Use Agreement and cannot overcome the "double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction." *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005). If the Court determines that any claims against the Tribal Corporation survive these jurisdictional barriers, yet another basis supports dismissal. The Complaint sets forth claims involving matters that cannot be resolved in the absence of additional tribal parties that are not named as defendants and cannot be joined due to sovereign immunity.

Under Rule 12(b)(7), a defendant may move to dismiss an action for failure to join an indispensable party under Rule 19. Fed. R. Civ. P. 12(b)(7). Rule 19 "provides a three-step

process for determining whether the court should dismiss an action for failure to join a purportedly indispensable party." *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). First, the Court must determine whether the absent party is "necessary." *Id.* If the absent party is necessary, the Court next considers whether joinder is "feasible." *Id*. Finally, if joinder is not feasible, the Court must decide whether the absent party is "indispensable." *Id*.

The Regulatory Agency and the Tribe are necessary parties to this case because they have legally protected interests and complete relief cannot be awarded in their absence. Joining these additional tribal parties is not feasible because of their sovereign immunity from suit. The Regulatory Agency and the Tribe are indispensable parties because they would be prejudiced by any relief granted to Plaintiff, and such prejudice greatly outweighs any interest Plaintiff has in adjudicating its claims in this forum. Equity and good conscience direct that this case should not proceed in the absence of the Regulatory Agency and the Tribe.

A. The Santa Ysabel Tribal Cannabis Regulatory Agency is an Indispensable Party to any Claims Alleging Misuse of Plaintiff's Property.

Plaintiff's claims alleging wrongful exercise and control over Plaintiff's property and Facility access rights cannot be adjudicated in the absence of the Regulatory Agency, which cannot be joined because of its sovereign immunity from suit. Access to the Facility and removal of property are both within the purview of the Regulatory Agency. Claims alleging misuse of property must be alleged against the Regulatory Agency, because it is the entity responsible for monitoring the transportation and disposal of cannabis and cannabis-related products pursuant to established regulations. Vialpando Decl., ¶ 5. The Regulatory Agency is charged with the additional duty of licensing the facilities, investors, employees, and primary management officials associated with authorized cannabis and cannabis-related activities under tribal law. Vialpando Decl., ¶ 4. Claims alleging denial of access to the Facility must also be alleged against the Regulatory Agency because it revoked Plaintiff's license, resulting in Plaintiff's inability to enter the Facility.

A party is necessary under Rule 19(a) when (1) complete relief is not possible without the

party's presence; or (2) the absent party has a legally protected interest in resolving the action. *Bowen*, 172 F.3d at 688; *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Complete relief is not possible without the Regulatory Agency because it managed the disposition of Plaintiff's property left on at the Facility. In addition, the Regulatory Agency has a legally protected interest in safeguarding its obligation to regulate licensees pursuant to tribal law.

The Complaint alleges that the "Defendants" barred Plaintiff from accessing the premises. Complaint, ¶ 30. In fact, a Regulatory Agency-issued license is required to access the Facility and the Tribal Corporation has no power to issue or revoke that license. Vialpando Decl., ¶ 6. On April 28, 2017, the Regulatory Agency revoked Plaintiff's license and prohibited Plaintiff and its affiliates from accessing the Facility, except for limited and supervised access to retrieve Plaintiff's property. Vialpando Decl., ¶ 10.

Plaintiff also alleges that it was denied its property and that property remaining on the premises was used by Defendants for their personal benefit. Complaint, ¶¶ 42–48. The Regulatory Agency facilitated Plaintiff's access to the Facility for the purpose of removing its property. Vialpando Decl., ¶ 11. Plaintiff retrieved most of its property. Vialpando Decl., ¶ 12. With Plaintiff's permission, the Regulatory Agency removed and destroyed Plaintiff's medical cannabis plants that were left on site. Vialpando Decl., ¶ 12. Any claims involving property alleged to have been left at the Facility and converted lie with the Regulatory Agency because of its responsibility in supervising removal of property, including proper disposal of cannabis products.

It is not feasible to join the Regulatory Agency as a party. "Generally, a necessary non-party will be joined as a party. . . . Indian tribes, however, are sovereign entities and are therefore immune from nonconsensual actions in state or federal court." *Confederated Tribes*, 928 F.2d at 1499. The Regulatory Agency is an arm of the Tribe that has not waived its sovereign immunity for this action and thus cannot be joined.

The Regulatory Agency is a necessary party that cannot be joined due to its tribal

sovereign immunity. Accordingly, it must be determined whether the Regulatory Agency is an indispensable party. *Bowen*, 172 F.3d at 688. "A party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) (citing Fed. R. Civ. P. 19(b)).

To make this determination, a court balances four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Id.* at 1161–62. "Although Rule 19(b) contemplates balancing the factors, 'when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *White*, 765 F.3d at 1028 (quoting *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)).

Throughout the Complaint, Plaintiff alleges that "Defendants" took various actions to infringe upon the Plaintiff's contractual rights. However, many, if not most, of these actions were taken by the Regulatory Agency, a non-party governmental agency of the Tribe with regulatory control over the Plaintiff. In the absence of the Regulatory Agency, the Court will not be able to determine which acts were taken by the Regulatory Agency or as a result of the Regulatory Agency's regulatory actions. Any relief the Court may grant would infringe on the Regulatory Agency's regulatory jurisdiction and authority, including contradicting rulings it rightfully issued.

The Regulatory Agency would be prejudiced if the suit were to proceed in its absence because any ruling would infringe upon its rights and obligations to regulate licensees pursuant to the laws of the Tribe. Moving forward with this lawsuit in the Regulatory Agency's absence means that the Defendants could be held liable for acts that were in reality taken by the Regulatory Authority in exercising its sovereign authority as a regulatory body of the Tribe. In the absence of the Regulatory Authority the possibility exists that this Court could ultimately

deem that the actions and conduct of the Regulatory Authority were in violation of law. This prejudice greatly outweighs any interest Plaintiff has in adjudicating its claims in this forum. Equity and good conscience direct that the claims against the Tribal Corporation should not proceed in the absence of the Regulatory Agency. Further, the Regulatory Agency's regulations allow licensees to appeal enforcement actions. Another forum is available which Plaintiff chose to ignore.

B. The Tribe is an Indispensable Party to any Claims Involving Disputes over Plaintiff's Obligations to Pay Tribal Tax.

Plaintiff makes the broad request for "a judicial determination of [the parties'] rights and duties under their agreement, including the Land Use Agreement." Complaint, ¶ 50. Plaintiff alleges this judicial determination is "necessary." Complaint, ¶ 51. One of the main issues that Plaintiff seeks a declaration on is whether it rightfully withheld taxes from the Tribe. Elsewhere in the Complaint, Plaintiff provides insight into its position, including that it disputes the date on which taxes would start to accrue. Complaint, ¶¶ 15–17. Plaintiff frames the entire dispute as one centered on its obligation to pay tribal taxes. Complaint, ¶ 18 (describing the only dispute as "the tax payment issue").

Per the Agreement, Plaintiff was to pay taxes to the Tribe. Land Use Agreement, §§ 5.1; 14.1(m). Indeed, only the Tribe (and not the Tribal Corporation) as a sovereign government possesses the authority to impose taxes. Plaintiff failed to remit the required tax payments. Chelette Decl., ¶ 14. Plaintiff claims that it was not required to pay taxes until after a certain point. Complaint, ¶ 16. While a commitment to pay tribal tax was a term of the Agreement with the Tribal Corporation, disputes over how much tax is due and when it must be paid are not disputes with the Tribal Corporation. Rather, those contentions lie with the taxing authority—the Tribe.

Given that the dispute over tribal tax is the impetus behind Plaintiff's whole lawsuit, the Tribe is without a doubt a necessary party to this case. Plaintiff asks the Court to declare whether it breached the Land Use Agreement due to its failure to pay tribal tax. Were the Court to

examine this question, it would have to determine when the obligation to pay tax began and the precise amount of tax due to the Tribe. At the time of termination, Plaintiff owed in excess of $1,500,000 (excluding any penalties or interest the Tribe may assess) in taxes. Chelette Decl., ¶ 14. Plaintiff asks this Court to wipe away that debt without any input from the tribal government.

It is not feasible to join the Tribe because it possesses sovereign immunity and has not waived its immunity as to this Complaint. Proceeding in the Tribe's absence would prejudice the Tribe because it cannot set forth its position as the taxing authority on when the obligation to pay tax first accrued, how much tax is due, and whether any penalties or interest should be imposed. These are the questions underlying Plaintiff's claims that it is asking this Court to answer. Were Plaintiff granted the relief it seeks—a judicial determination that it did not breach the Agreement—the Court would essentially be ruling that Plaintiff has no obligation to pay the tax owed to the Tribe. Federal court is not the appropriate place for resolution of these tribal tax claims. In the Land Use Agreement, Plaintiff agreed that it must contest taxes under the applicable tribal statutes and procedures. *See* Land Use Agreement, § 5.2.

The Tribe would be prejudiced if the suit were to proceed in its absence because any ruling would infringe upon its sovereign authority to impose taxes and enforce tribal tax laws. Like any government, the Tribe possesses the sovereign right to self-govern. The Tribe has a legally protected interest in exercising that right through asserting its taxation authority, imposing taxes, and resolving tribal tax matters pursuant to tribal law. The Supreme Court has recognized the right of inherent tribal self-governance as the law of the land for nearly two hundred years. *See Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . ."). Denying the Tribe its right to self-govern is a prejudice that greatly outweighs any interest Plaintiff has in adjudicating its claims in this forum. Equity and good conscience direct that the claims against the Tribal Corporation should not proceed in the absence of the Tribe.

CONCLUSION

Plaintiff's Complaint is defective for a multitude of reasons which cannot be overcome.

The Tribal Corporation respectfully requests this Court dismiss the Complaint in its entirety with prejudice and without leave to amend.

Respectfully submitted this 31st day of August, 2018.

CEIBA LEGAL, LLP

_/s/ Ellen Venegas_____
_/s/ Little Fawn Boland_____
_/s/ Keith Anderson_____

Ellen Venegas (*pro hac vice pending*, NM 147370)
ellen@ceibalegal.com
Little Fawn Boland (SBN 240181)
littlefawn@ceibalegal.com
Keith Anderson (*admission pending*, SBN 282975)
keith@ceibalegal.com
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, CA 94941
Telephone: (415) 684-7670
Facsimile: (415) 684-7273

Attorneys for Defendants Santa Ysabel Tribal Development Corporation and David Chelette

CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, a true and correct copy of:

DEFENDANT SANTA YSABEL TRIBAL DEVELOPMENT CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

and all attached exhibits were served on Counsel for Plaintiff electronically through CM/ECF.

DATED: August 31, 2018

CEIBA LEGAL, LLP

By: /s/ Little Fawn Boland

Little Fawn Boland