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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE DISTRICT OF ARIZONA**

13 Nadia Drake, an unmarried woman,

14 Plaintiff,

15 v.

16 Salt River Pima-Maricopa Indian  
17 Community, a federally recognized  
18 Indian Tribe, d/b/a Talking Stick Resort  
19 and Casino,

20 Defendant.

No. CV-19-2957-PHX-MTL

**REPLY IN SUPPORT OF  
DEFENDANT’S MOTION TO  
DISMISS**

**ORAL ARGUMENT REQUESTED**

21 This Court lacks personal jurisdiction over Defendant Salt River Pima-Maricopa  
22 Indian Community (“SRPMIC”) because Plaintiff never served SRPMIC with the  
23 summons and complaint in a manner that constitutes valid service under the Federal  
24 Rules of Civil Procedure. Even if Plaintiff had properly served the summons, it was  
25 issued to SRPMIC’s “President of Tribal Counsel” – a non-existent entity. Moreover,  
26 SRPMIC is a sovereign Indian nation. *See* Bureau of Indian Affairs, 84 Fed. Reg. 1200,  
27 1200-1205 (Feb. 1, 2019). As such, it is entitled to sovereign immunity, which deprives  
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1 the Court of subject-matter jurisdiction over Plaintiff's claims. For all of these reasons,  
2 this Court should grant SRPMIC's Motion to Dismiss (Doc. 14).

3 In her Response, Plaintiff first argues that the Court should not grant SRPMIC's  
4 Motion because she properly served the summons and complaint on SRPMIC by leaving  
5 a copy at the office of undersigned counsel and by sending them via certified mail. These  
6 arguments fail because SRPMIC never authorized undersigned counsel to accept service  
7 of process on its behalf, as counsel clearly communicated to Plaintiff's process server and  
8 counsel. Furthermore, the Rules of Civil Procedure do not permit Plaintiff to serve  
9 SRPMIC via mail.

10 Plaintiff also contends that the Court has subject matter jurisdiction over this  
11 action because SRPMIC's sovereign immunity does not bar her claim under Title III of  
12 the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.* Plaintiff's claim  
13 arises out of a visit to the Talking Stick Resort and Casino, which is operated by a  
14 division of SRPMIC on tribal land. *See* Complaint, Doc. 1 at ¶¶ 3, 5. Plaintiff's  
15 arguments rely solely on a Ninth Circuit case decided under a completely different and  
16 inapplicable statute, the Occupational Safety and Health Act, and a law review article,  
17 which do not establish that SRPMIC expressly waived its sovereign immunity or that  
18 Congress expressly gave any private individual a right of action against SRPMIC for  
19 claims arising under Title III of the ADA. Thus, SRPMIC's sovereign immunity bars  
20 Plaintiff from bringing a claim under Title III of the ADA against SRPMIC (as well as  
21 her state law claims), and this Court should dismiss this action for lack of subject-matter  
22 jurisdiction.

23 **I. The Court should dismiss this action for insufficient service of process and**  
24 **lack of personal jurisdiction because Plaintiff failed to properly serve the**  
25 **summons and complaint on SRPMIC.**

26 As explained in more detail in SRPMIC's Motion to Set Aside Clerk's Entry of  
27 Default and reply (Docs. 15, 24), the Supreme Court has explained that "[b]efore a  
28 federal court may exercise personal jurisdiction over a defendant, the procedural

1 requirement of service of summons must be satisfied.” *Omni Capital Int’l, Ltd. v. Rudolf*  
2 *Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). “Service of summons is the procedure by  
3 which a court having venue and jurisdiction of the subject matter of the suit asserts  
4 jurisdiction over the person of the party served.” *Id.* (quoting *Mississippi Publishing*  
5 *Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) (alterations omitted)). This procedural  
6 requirement has not been met here; therefore, the Court should dismiss this case.

7 In her Response to Defendant’s Motion to Set Aside Clerk’s Entry of Default  
8 (Doc. 21), Plaintiff first argues that she properly served the summons and complaint on  
9 SRPMIC through undersigned counsel. Plaintiff does not (and cannot) argue that  
10 SRPMIC ever explicitly or implicitly authorized undersigned counsel to accept service on  
11 its behalf. To the contrary, Plaintiff acknowledges that undersigned counsel “refused to  
12 ‘accept’ service of process on behalf of Defendant.” Doc. 21. Indeed, because SRPMIC  
13 never authorized undersigned counsel to accept service of process in this (or any other)  
14 action and undersigned counsel expressly advised Plaintiff’s process server and counsel  
15 that she could not accept service on behalf of SRPMIC, Plaintiff’s service of process on  
16 undersigned counsel was neither proper nor valid.

17 Plaintiff also argues that she properly served the summons and complaint on  
18 SRPMIC via certified mail because service of process on SRPMIC via certified mail was  
19 authorized by Federal Rule of Civil Procedure 4(e) and (4)(f)(2)(ii).<sup>1</sup> Rule 4(e) states that  
20 “[u]nless federal law prohibits otherwise, an individual . . . may be served in a judicial  
21 district of the United States by following state law for serving a summons in an action  
22 brought in courts of general jurisdiction in the state where the district court is located or  
23 where service is made.” Plaintiff argues that Arizona Rule of Civil Procedure 4.2 permits  
24 service by mail in certain circumstances, and thus, she claims that service by mail on  
25 SRPMIC was valid in this case. Plaintiff’s argument ignores the language of both rules,  
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27 <sup>1</sup> Plaintiff clearly realized her attempt to serve process on undersigned counsel did not  
28 constitute effective service because, more than two months later, she attempted to serve  
the complaint and summons by mailing them to SRPMIC (twice).

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1 which expressly refer only to service upon *individuals* or *persons* within a judicial district  
2 of the United States. Similarly, Rule 4(f)(2)(ii) governs service upon an individual in a  
3 foreign country. SRPMIC is a federally-recognized sovereign Indian tribe, not an  
4 individual nor a foreign country. Thus, Plaintiff’s attempt to serve SRPMIC via certified  
5 mail was not authorized by the Federal Rules of Civil Procedure.

6 Plaintiff elected to file suit against SRPMIC, a sovereign territory, therefore, she  
7 was required to comply with SRPMIC’s Rules of Civil Procedure, which require that a  
8 private process server obtain permission from the tribe to effect service of process upon  
9 tribal land. *See* SRPMIC Rule of Civil Procedure 5-13. Plaintiff does not allege that she  
10 ever petitioned SRPMIC for permission to complete service on the Community. One  
11 purpose of the rules governing the service of process is to notify a defendant that it is  
12 being sued, but an even more important purpose of those rules is to establish the Court’s  
13 jurisdiction over a defendant because “[u]ntil service is properly accomplished (or  
14 waived), the Court does not have personal jurisdiction over the defendant.” *Lagod v.*  
15 *Valley Metro Rail, Inc.*, No. CV-07-2027-PHX-JAT, 2009 WL 440216, at \*3 (D. Ariz.  
16 Feb. 23, 2009) (citing 5B Wright & Miller, Federal Practice and Procedure § 1353 (3d ed.  
17 2004) at 338). Plaintiff’s attempts to serve SRPMIC via mail instead of taking the  
18 necessary measures to complete service in accordance with the Federal Rules of Civil  
19 Procedure and SRPMIC’s Rules of Civil Procedure were improper and ineffective.

20 In sum, because all three of Plaintiff’s attempts to effect serve on SRPMIC failed  
21 to comply with the Rules of Civil Procedure, the Court should dismiss this action for  
22 insufficient service of process and lack of personal jurisdiction.

23 **II. The Court must dismiss this action for lack of subject matter jurisdiction**  
24 **because Plaintiff’s suit against SRPMIC is barred by sovereign immunity.**

25 As a federally-recognized Indian tribe, SRPMIC is a “domestic dependent nation”  
26 that exercises sovereign authority over its members and territories. *Oklahoma Tax*  
27 *Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509  
28 (1991) (citation omitted). Congress has long held that Indian tribes, like other sovereign

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1 powers, possess immunity from suit. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782,  
2 789 (2014) (“[W]e have time and again treated the doctrine of sovereign immunity as  
3 settled law and dismissed any suit against a tribe absent congressional authorization (or a  
4 waiver.)”) (internal citations and quotation marks omitted). SRPMIC’s tribal sovereign  
5 immunity deprives this Court of subject matter jurisdiction and requires dismissal under  
6 Federal Rule of Civil Procedure 12(b)(1) unless “Congress has authorized the suit or the  
7 tribe has waived its immunity.” *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754  
8 (1998). “Both congressional abrogation and tribal waiver of sovereign immunity must be  
9 unequivocally expressed, and cannot be implied.” *Navajo Arts & Crafts Enter. v.*  
10 *McGough*, No. CV-17-08239-PCT-DLR, 2010 WL 4575012, at \*1 (D. Ariz. June 26,  
11 2018) (citing *Santa Clara Pueblo*, 436 U.S. 49 (1978); *C&L Enters., Inc. v. Citizen Band*  
12 *Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)). The Ninth Circuit has  
13 explained that this immunity “applies to the tribe’s commercial as well as governmental  
14 activities.” *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (alterations and citation  
15 omitted). Because SRPMIC has not waived its sovereign immunity and Congress has not  
16 authorized an exception for a Title III suit brought by a private individual against  
17 SRPMIC in federal court, Plaintiff’s suit against SRPMIC is barred by sovereign  
18 immunity. Accordingly, the Court must dismiss this action for lack of subject matter  
19 jurisdiction.

20 Plaintiff’s Complaint fails to identify the basis for this Court’s subject matter  
21 jurisdiction, however, the accompanying Civil Cover Sheet states the basis for  
22 jurisdiction is “federal question.” The only claim Plaintiff asserts in the Complaint that  
23 purports to arise under federal law is her claim for violation of the public accommodation  
24 provisions of Title III of the ADA. Plaintiff has not asserted that SRPMIC expressly  
25 waived its sovereign immunity to suit under the ADA; therefore, the relevant inquiry is  
26 whether Congress has authorized an exception for an individual plaintiff to bring a  
27 private cause of action under Title III of the ADA against Indian tribes. As SRPMIC  
28 explained in its Motion to Dismiss, Congress has authorized no such exception. *See Fla.*

1 *Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131-34  
2 (11th Cir. 1999); *see also Martinez v. Pueblo of Santa Ana*, No. CV-03-224 MCA/LCS,  
3 2003 WL 27385167, at \*3 (D.N.M. June 18, 2003) (concluding that Title III of ADA  
4 does not apply to a casino operated by federally-recognized tribe). Plaintiff's citation to a  
5 law review article that disagrees with the Eleventh Circuit's decision does not establish  
6 that Congress authorized any exception for plaintiffs to bring a private cause of action  
7 against an Indian tribe under Title III. Plaintiff's policy arguments are better directed to  
8 Congress than this Court.

9 Plaintiff also insists that SRPMIC's sovereign immunity should not bar her claim  
10 under Title III of the ADA based on the Ninth Circuit's decision in *Donovan v. Coeur*  
11 *D'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Plaintiff's citation to *Donovan* is  
12 unavailing for two reasons. First, *Donovan* relied upon a claim arising under a completely  
13 different statute, the Occupational Safety and Health Act ("OSHA"), not the ADA.  
14 Therefore, this decision has no relevance to the question of whether Congress authorized  
15 an exception for plaintiffs to bring a private cause of action against an Indian tribe under  
16 Title III of the ADA. Second, *Donovan*, a case brought by the United States Secretary of  
17 Labor, holds only that OSHA applies to Indian tribes – *not* that Congress has authorized  
18 an exception for plaintiffs to bring a private cause of action under OSHA against Indian  
19 tribes.

20 In the *Florida Paraplegic, Association* case, the court held that Title III of the  
21 ADA governed the Miccosukee Tribe in its operation of its gaming and restaurant  
22 facility. *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d  
23 1126, 1129-30 (11th Cir. 1999). The court also recognized, however, that "whether an  
24 Indian tribe is subject to a statute and whether the tribe may be sued for violating the  
25 statute are two entirely different questions." *Id.* at 1130. As to the issue of subjecting a  
26 tribe to suit under Title III, the court noted that no specific reference to Indians or Indian  
27 tribes exists anywhere in Title III. *Id.* at 1131. Furthermore:  
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1 Neither the enforcement provision of Title III of the ADA nor the parallel  
 2 section of the Civil Rights Act specifically authorizes suits against Indian  
 3 tribes who allegedly have violated the Acts' substantive requirements. In  
 4 short, Congress declined to abrogate Indian tribes' sovereign immunity  
 from suit either by direct statement in Title III itself or by reference to other  
 statutes having that effect. No support exists in the statute for a finding that  
 Congress has waived tribal sovereign immunity under Title III of the ADA.

5 *Id.* at 1131-32. Accordingly, the court concluded “that Congress did not contemplate that  
 6 Indian tribes would be subject to private lawsuits for violating Title III of the ADA.” *Id.*  
 7 at 1133-34. This is consistent with Supreme Court decisions that “recognized that  
 8 Congress could enact a statute with substantive limitations on Indian tribes without  
 9 providing any means for most individuals protected by the law to enforce their rights in  
 10 federal court.” *Id.* at 1134 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978),  
 11 which refused to recognize private right of action arising under Indian Civil Rights Act of  
 12 1968, 25 U.S.C. § 1302(8)).

13 Plaintiff laments that Congress' failure to permit Indian tribes to be subject to  
 14 private lawsuits arising under Title III of the ADA will permit discrimination and impose  
 15 a detriment to individuals with disabilities. The court in *Florida Paraplegic, Association*  
 16 recognized this concern; however, and refuted that this omission rendered the statute  
 17 ineffectual. *Id.* “Under Title III of the ADA . . . Congress has created an alternative  
 18 method of enforcement: the United States Attorney General may bring a civil action to  
 19 compel Indian tribes' compliance with the statute.” *Id.*<sup>2</sup> Plaintiff cites no controlling case  
 20 law that refutes the holding of the Eleventh Circuit in *Florida Paraplegic, Association* or  
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 24 <sup>2</sup> This enforcement option is consistent with the limitations of Title III, which limits the  
 25 remedies available to plaintiffs who bring a civil action to injunctive relief and recovery  
 26 of attorneys' fees and costs. Thus, barring Plaintiff from bringing a private right of action  
 27 does not deprive her of any personal remedy or economic damages. *See* 42 U.S.C. §  
 28 12188(a)(1); 42 U.S.C. § 2000a-3(a); *see also Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115,  
 1120 (9th Cir. 2000) (“Monetary relief is not an option for private individuals under Title  
 III of the ADA. As a result, a plaintiff who files an ADA claim can at most hope to  
 improve access through an injunction.”).

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1 otherwise establishes that Congress has authorized individuals to maintain a private right  
2 of action against a recognized tribal entity for claims arising under Title III of the ADA.<sup>3</sup>

3 Finally, although Plaintiff does not advance any argument for the Court’s subject  
4 matter jurisdiction over her state law claims, because this Court must dismiss Plaintiff’s  
5 claim under Title III of the ADA for lack of subject matter jurisdiction, it also must  
6 dismiss Plaintiff’s accompanying state law claims for intentional and negligent infliction  
7 of emotional distress. Without Plaintiff’s ADA claim, there is no “hook . . . on which to  
8 hang” her state law claims. *Herman Family Revocable Tr. v. Teddy Bear*, 254 F.3d 802,  
9 805 (9th Cir. 2001) (citing 28 U.S.C. § 1367); *see also State v. Zaman*, 194 Ariz. 442,  
10 445-46 (Ariz. 1999) (Feldman, J., dissenting) (“Moreover, Arizona has failed to adopt  
11 Public Law 280, which would have allowed Arizona to assume civil and criminal  
12 jurisdiction over Indian country.”). Accordingly, Plaintiff’s state law claims must also be  
13 dismissed for lack of subject matter jurisdiction.

14 **III. Conclusion**

15 For all the foregoing reasons and the additional reasons stated in its Motion to  
16 Dismiss and reply (Docs. 14, 24), SRPMIC respectfully requests that the Court dismiss  
17 Plaintiff’s claims against SRPMIC for insufficient service of process, lack of personal  
18 jurisdiction, and lack of subject matter jurisdiction pursuant to Federal Rules of Civil  
19 Procedure 4(m) and 12(b)(1), 12(b)(2), and 12(b)(5).

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25 <sup>3</sup> Notably, Congress substantially amended the ADA with the ADA Amendments Act of  
26 2008, almost ten years after the decision in *Fla. Paraplegic, Ass’n, Inc. v. Miccosukee*  
27 *Tribe of Indians of Fla.*, 166 F.3d 1126, 1129-30 (11th Cir. 1999). If Congress intended  
28 to permit a private right of action against tribal entities, it would have clarified that intent  
in the amended Act.



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Respectfully submitted this 17th day of October 2019.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

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