UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 19-CV-62591-BLOOM/VALLE

EGLISE BAPTISTE BETHANIE
DE FT. LAUDERDALE, INC., etc.,
et al.,

Plaintiffs,

v.

THE SEMINOLE TRIBE OF
FLORIDA, et al.,

Defendants.
_____________________________________/

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE DECEMBER 13, 2019, MOTION OF DEFENDANT THE SEMINOLE TRIBE OF FLORIDA TO DISMISS THE FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION
(Fla. Bar No. 133162)

I INTRODUCTION

Defendant The Seminole Tribe Of Florida ("SemTribe"), on December 13, 2019, invoking Rule 12(b)(1), Federal Rules of Civil Procedure, moved to dismiss the First Amended Complaint in the above styled civil action on the basis of the judicial doctrine of tribal sovereign immunity. [ECF 28]

Because the First Amended Complaint describes *criminal* conduct on the part of SemTribe (in violation of 18 U.S.C. § 248(a)(2)), SemTribe's claim of tribal sovereign immunity is specious, thereby necessitating the denial of SemTribe's Rule 12(b)(1) dismissal

motion.

II THE STATUTORY FRAMEWORK

Section 248, Title 18, United States Code, is entitled *Freedom of access to clinic entrances* and in pertinent part provides:

> **(a) Prohibited activities.**– Whoever-
>
> * * * * * * *
>
> (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship;...
>
> * * * * * * *
>
> Shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.
>
> **(b) Penalties.**– Whoever violates this section shall-
>
> (1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and
>
> (2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 1 year, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length or imprisonment shall be not more than six months, or both, for the first offense, and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense, and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies.-

(1) Right of action.-

(A) In general.– Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B)... and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.- In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to receive, in lieu of actual damages, an award of statutory damages in the amount of $5,000.00 per violation...

U.S. Senior District Judge Jack B. Weinstein, in *Zhang Jingrong v. Chinese Anti-Cult World Alliance*, 311 F. Supp. 514 (E.D.N.Y. 2018), has observed:

In what appears to have been an attempt to soften Bray, *see supra* Section IIIc, Congress passed the Freedom of Access to Clinic Entrances Act of 1994 ("FACEA"). Kathleen M. Sullivan and Noah Feldman, *Constitutional Law* 883 (19th Ed. 2016); H.R. Conf. Rep No. 103–488, at 7–8, *reprinted in* 1994 U.S.C.C.A.N. 724, 724–25 (May 2, 1994) ("Prior to the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), the conduct described in [the FACEA] was frequently enjoined by federal courts in actions brought under 42 U.S.C. 1985(3), but in that case the Court denied a remedy under such section to persons injured by the obstruction of access to abortion-related services.").

The FACEA contains a provision about religious freedom:

> Whoever ... [1] *by force or threat of force* or by physical obstruction, [2] intentionally injures, *intimidates or interferes* with or *attempts to injure*, intimidate or interfere with [3] *any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom* [4] *at a place of religious worship* shall be subject to the penalties provided in ... the civil remedies provided in subsection c.

18 U.S.C. §248(a)(2) (emphasis added).

The FACEA allows plaintiffs to obtain "appropriate *relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages*, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C. § 248(c)(1)(B) (emphasis added). A plaintiff may choose, "in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation." *Id.*

The magistrate judge's report and recommendation on the motion to dismiss concluded that "the plain language of § 248] dictates that it provides protection to those seeking to exercise their First Amendment right of religious freedom at a place of religious worship. *Zhang Jingrong v. Chinese Anti–Cult World*

All., 287 F.Supp.3d 290, 307 (E.D.N.Y. 2018). Although the statute's history and name suggests a connection to abortion clinic access, legislative history support the conclusion that practicing religion at a religious site is protected by the FACEA:

> This provision, much like the one found at 18 U.S.C. 247, is a reflection of the profound concern of the Congress over *private intrusions on religious worship*, and the judgment of the Congress that the exercise of the right to religious liberty deserves federal protection .... [I]t covers only conduct occurring *at or in the immediate vicinity of a place of religious worship*, such as a church, synagogue or other *structure or place used primarily for worship*. Examples of conduct that would be prohibited and would give rise to a civil cause of action under this Act would be physically blocking access to a church or pouring glue in the locks of a synagogue.

H.R. Conf. Rep No. 103–488, at 9, *reprinted in* 1994 U.S.C.C.A.N. 724, 726 (May 2, 1994) (emphasis added).

311 F. Supp. 3d at 553-554.

* * * * * * * *

The [Freedom of Access to Clinic Entrances Act] functions somewhat similarly to the New York Civil Rights Law. It prohibits violent interference with religious practice. *See supra* Section IV(C)(2). There are four statutory elements:

> Whoever ... [1] by force or threat of force or by physical obstruction, [2] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with [3] any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom [4] at a place of religious worship [may be found liable].

18 U.S.C. § 248(a)(2).

311 F. Supp. 3d at 563-564.

III THE FIRST AMENDED COMPLAINT'S ALLEGATIONS

In pertinent part, the First Amended Complaint alleges that:

> 2. Eglise Baptiste is (a) a Florida not-for-profit corporation, (b) a Haitian Baptist church and (c) affiliated with the Southern Baptist Convention. It adheres to the congregationalist mode of Christian church governance. Eglise Baptiste's principal place of business is located at 2200 N.W. 12th Avenue, Fort Lauderdale, Broward County, Florida 33311, and it possesses fee simple title to the approximately ten (10) acres of improved real property commonly known by the foregoing address and bearing Tax Identification Number 4942-28-32-0010 ("the Church Property"). The Church Property is located 11.1 miles from SemTribe's reservation in Hollywood, Florida.
>
> THE DEFENDANTS
>
> 3. SemTribe is a Native American tribe which has been recognized by the United States Department of the Interior pursuant to 25 U.S.C. § 5123. The Supreme Court of the United States has characterized the several Native American tribes, including SemTribe, as "dependent domestic sovereigns". SemTribe owns and maintains a reservation in Hollywood, Florida, and is governed by a Tribal Counsel, which is established by the Constitution And Bylaws of SemTribe. The Seminole Police Department ("the SPD") is an agency of SemTribe and operates under the supervision of the Tribal Council.
>
> 4. Auguste is a resident of Broward County, Florida. She is not subject to any legal disabilities.
>
> *   *   *   *   *   *   *   *
>
> THE FACTS
>
> 7. Prior to his death on July 26, 2014, the Pastor of Eglise Baptise was the Rev. Usler Auguste ("Pastor Auguste"). Since then, the Board of Directors of Eglise Baptiste and Auguste (the

widow of Pastor Auguste) have contended for the leadership of Eglise Baptiste.

8. On Sunday, September 22, 2019, a meeting of the congregation of Eglise Baptiste was convened for the purpose of approving a process for the selection and installation of a successor to the late Pastor Auguste. Despite the peacemaking efforts of a mediator assigned to Eglise Baptiste by an affiliate of the Southern Baptist Convention, the September 22, 2019, congregational meeting devolved into a pushing, shoving and punching affair between the supporters of the Board of Directors and the supporters of Auguste. The Fort Lauderdale Police Department was summoned and its officers helped to restore order.

9. Eglise Baptiste, on September 24, 2019, filed a civil action for declaratory and injunctive relief against Auguste and her supporters in the Circuit Civil Division, Seventeenth Circuit Court, Broward County, Florida, which came to be styled *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Aida Auguste, et al.*, Case No. CACE-19-19270 (4) ("Case No. 19-19270"). Undersigned counsel for Plaintiffs in this action commenced and continues to represent Eglise Baptiste in Case No. 19-19270.

10. On Sunday morning, September 29, 2019, Eglise Baptiste conducted its weekly Sabbath services in the religious structure located on the Church Property. While those services were in progress, Auguste and her supporters, escorted by six (6) armed (with SPD-issued handguns) officers wearing SPD uniforms (who had traveled from SemTribe's reservation in two vehicles, one of them an SPD marked squad car), without judicial or other valid authorization: (a) entered the Church Property, (b) disabled the Church Property's surveillance cameras (c) expelled from the Church Property all the worshipers who opposed Auguste, (d) changed the locks to the doors of the religious structure located on the Church Property, (e) seized the business records of Eglise Baptiste and (f) locked the gates to the Church Property. Auguste and her supporters continue to occupy the Church Property to the exclusion of Plaintiffs and to control Eglise Baptiste's personal property, including Eglise Baptiste's

bank accounts.

11. The judicial doctrine of tribal sovereign immunity does not insulate SemTribe from the claims which Plaintiffs have asserted against SemTribe in this civil action because: (a) the actions of SemTribe's police officers took place more than eleven (11) miles from SemTribe's Hollywood, Florida, reservation, (b) prior to September 29, 2019, Plaintiffs had not had an opportunity to negotiate with SemTribe for a waiver of SemTribe's tribal sovereign immunity; and (c) other than through this civil action, Plaintiffs have no means by which to secure monetary compensation for SemTribe's infringements of Plaintiffs' rights under Federal and Florida law.

* * * * * * * *

PLAINTIFFS' CLAIMS FOR RELIEF

Count 1-Eglise Baptiste v. SemTribe and Auguste/18 U.S.C. § 248(c)(1)

Eglise Baptiste sues SemTribe and Auguste and alleges:

12. Eglise Baptiste realleges and incorporates by reference the matters set forth in ¶¶ 1 through 11 of this First Amended Complaint.

13. SemTribe and Auguste on September 29, 2019, violated 18 U.S.C. § 248(a)(2) when SemTribe's police officers and Auguste, by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with, or attempted to injure, intimidate or interfere with Eglise Baptiste's exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.

14. Eglise Baptiste has been compelled to engage the professional services of Metschlaw, P.A., for the purposes of preparing, commencing and prosecuting to final judgment this civil action. In that regard, Eglise Baptiste has obligated itself to pay that law firm reasonable attorneys' fees and to reimburse

that law firm's necessary, out-of-pocket, non-overhead expenditures incurred during the prosecution of this civil action.

15. As the proximate result of the foregoing conduct of SemTribe and Auguste on September 29, 2019, Eglise Baptiste has sustained injuries and losses for which, pursuant to 18 U.S.C. § 248(c)(1), Eglise Baptiste is entitled to recover from SemTribe and Auguste compensatory damages, punitive damages, the costs of this civil action, attorneys' fees and expert witness fees.

Wherefore, Eglise Baptiste demands judgment, jointly and severally, against SemTribe and Auguste for compensatory and punitive damages and awarding Eglise Baptiste the costs of this civil action, attorneys' fees and expert witness fees.

* * * * * * * *

Count 4-Berthony Aurelus v. SemTribe and Auguste/18 U.S.C. § 248(a)(2)

Plaintiff Berthony Aurelus sues SemTribe and Auguste and alleges:

22. Plaintiff Berthony Aurelus realleges the matters set forth in ¶¶ 1 through 11 of this First Amended Complaint.

23. Plaintiff Berthony Aurelus (a) is a resident of Broward County, Florida, (b) is a member of Eglise Baptiste, (c) is not subject to any legal disabilities, (d) attended the September 29, 2019, Sabbath services in the religious structure located on the Church Property, (e) was expelled from the Church Property by SemTribe's police officers, and (f) continues to be excluded from the Church Property by Auguste and her supporters.

24. SemTribe and Auguste on September 29, 2019, violated 18 U.S.C. § 248(a)(2) when SemTribe's police officers and Auguste, by force or threat of force or by physical obstruction, intentionally injured, intimidated or interfered with, or attempted to injure, intimidate or interfere with Plaintiff Berthony

> Aurelus's exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.
>
> 25. Plaintiff Berthony Aurelus has been compelled to engage the professional services of Metschlaw, P.A., for the purposes of preparing, commencing and prosecuting to final judgment this civil action. In that regard, Plaintiff Berthony Aurelus has obligated himself/herself to pay that law firm reasonable attorneys' fees and to reimburse that law firm's necessary, out-of-pocket, non-overhead expenditures incurred during the prosecution of this civil action.
>
> 26. As the proximate result of the foregoing conduct of SemTribe and Auguste on September 29, 2019, Plaintiff Berthony Aurelus has sustained injuries and losses for which, pursuant to 18 U.S.C. § 248(c)(1), Plaintiff Berthony Aurelus is entitled to recover from SemTribe and Auguste compensatory damages, punitive damages, the costs of this civil action, attorneys' fees and expert witness fees.
>
> Wherefore, Plaintiff Berthony Aurelus demands judgment, jointly and severally, against SemTribe and Auguste for compensatory and punitive damages and awarding Plaintiff Berthony Aurelus the costs of this civil action, attorneys' fees and expert witness fees.

* * * * * * * *

IV <u>ARGUMENT</u>

A. <u>SemTribe's Conduct On Sunday, September 29, 2019, Violated 18 U.S.C. § 248(a)(2), For Which Conduct That Statute Prescribes Criminal Penalties.</u>

The Sunday, September 29, 2019, invasion of the Church Property, as described in the First Amended Complaint, satisfied each of the elements of a *criminal* cause of action against SemTribe under 18 U.S.C. §§ 248(a)(2) and 248(b):

(1) *By force or threat of force*: Defendant Aida Auguste ("Auguste") and her supporters, on September 29, 2019, when they invaded the Church Property, were escorted by six (6) *uniformed and armed* members of SemTribe's Police Department ("the SPD"), thereby qualifying, at a minimum, as a "threat of force".

(2) *Intentionally intimidates or interferes with or attempts to intimidate or interfere*: Auguste, her supporters and her six (6) armed escorts from the SPD on Sunday, September 29, 2019, intentionally interfered with, by expelling, the individual Plaintiffs from the Church Property.

(3) *Any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom*: Auguste, her supporters and her six (6) armed escorts from the SPD on Sunday, September 29, 2019, invaded the Church Property while the individual Plaintiffs were lawfully engaged in their Sabbath morning prayers, a form of exercise of the First Amendment right of religious freedom.

(4) *At a place of religious worship.* The individual Plaintiffs were lawfully praying in the religious structure located on the Church Property when they were expelled by Auguste, her supporters and her six (6) armed escorts from the SPD.

B. This Court Possesses Subject- Matter Jurisdiction Over Plaintiffs' Claims Against SemTribe Because The Judicial Doctrine Of Tribal Sovereign Immunity Does Not Extend To Off-Reservation Conduct Which Violates A Federal Criminal Statute.

Attached hereto as Exhibit "A" is a copy of the decision in *Hollynn D'Lil v. Cher-AE Heights Indian Community Of The Trinidad Rancheria,* 2002 WL 339442761 (N.D. Cal.

2002), the contents of which are incorporated herein by reference. In that case, the District Court denied the defendant's tribal sovereign immunity-based motion to dismiss the complaint in a disabilities rights case involving the defendants's off-reservation hotel facility. The District Court's reasoning in that decision is hereby applauded and adopted by Plaintiffs.

The Court's attention is also respectfully directed to the decision in *Michigan v. Bay Mills Indian Community,* 572 U.S. 782 (2014), in which the Supreme Court of the United States, 5-4, upheld the tribe's claim of sovereign immunity with respect to the State of Michigan's effort to enjoin the operation of a casino located outside the tribe's reservation (a *commercial* activity of the tribe). Justice Kagan's majority opinion observed:

> We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us. (Citation omitted)

572 U.S. at 799, fn. 8.[1]

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[1] In the wake of *Michigan v. Bay Mills Indian Community, supra,* the Supreme Court of Alabama has concluded that tribal sovereign immunity should not extend to off-reservation tort claims. *Wilkes v. PCI Gaming Authority,* ___ So. 3d ___, 2017 WL 4385738 (Ala. 2017), *cert. denied sub nom Poarch Band of Creek Indians v. Wilkes,* ___ U.S. ___, 139 S. Ct. 2739 (2019) (drunk driver employed by a tribally owned casino caused an off-reservation vehicular crash); and *Harrison v. PCI Gaming Authority*, 251 So. 3d 24 (Ala. 2017) (negligent service of alcohol to a visibly intoxicated person who thereafter drove a car in which his passenger died in an allegedly off-reservation crash).

On Sunday, September 29, 2019, when its six (6) armed police officers entered the Church Property, had SemTribe been engaging in a *commercial* activity, it would have possessed tribal sovereign immunity under the decision in *Michigan v. Bay Mills Indian Community, supra.*

However, if the Court determines that on Sunday, September 29, 2019, when its six (6) armed police officers entered the Church Property, SemTribe was thereby committing a *tort*, the Court would be commended to Footnote 8 of the majority opinion in *Michigan v. Bay Mills Indian Community, supra,* and the Supreme Court of Alabama's decisions in *Wilkes v. PCI Gaming Authority* and *Harrison v. PCI Gaming Authority, supra,* and left with the unsettled question whether tribal sovereign immunity attaches to such *tortious* conduct.

But the conduct of SemTribe on Sunday, September 29, 2019, when its six (6) armed police officers entered the Church Property, was neither commercial[2] nor tortious.[3] Rather, that conduct was *criminal* because it violated 18 U.S.C. § 248(a)(2).

Intensive legal research has disclosed no reported judicial decisions extending tribal sovereign immunity to off-reservation *criminal* conduct and for good reason. Such an extension of tribal sovereign immunity would be unfortunate public policy, to say the least, because it would place the preservation of tribal assets above the safety of the persons, and

[2] This is so because there existed no contractual relationship between Eglise Baptiste and SemTribe.

[3] Because SemTribe's six (6) armed police officers were escorting members of Eglise Baptiste, there could not thereby be committed torts of intentional interference and trespass to real property.

the protection of the properties, of the general population.

V CONCLUSION

SemTribe's motion to dismiss the First Amended Complaint for lack of subject-matter jurisdiction should be denied.

Respectfully submitted,

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by ______________________
LAWRENCE R. METSCH
FBN 133162

CERTIFICATE OF SERVICE

I hereby certify that, using the District Court's CM/ECF facility, true copies of the foregoing response have been electronically served this 16th day of December, 2019, on:

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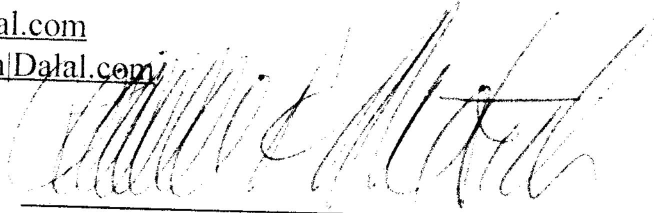

LAWRENCE R. METSCH

EXHIBIT "A"

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Koscielak v. Stockbridge-Munsee Community, Wis.App., February 14, 2012

2002 WL 33942761
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

HOLLYNN D'LIL, Darlene Wooten, Plaintiffs,
v.
CHER–AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA,
dba North Coast Inn, Defendant.

No. C 01–1638 TEH.
|
March 11, 2002.

ORDER DENYING MOTION TO DISMISS

THELTON E. HENDERSON, J.

INTRODUCTION

*1 Defendant Cher–Ae Heights Indian Community of the Trinidad Rancheria, dba North Coast Inn (the "Cher–Ae Tribe") moves the Court to dismiss, pursuant to F.R.C.P. 12(b)(6), all federal and state claims on the basis of Indian tribal immunity. Having carefully considered be parties' briefs, the oral argument of counsel, and the record herein, the motion to dismiss is denied, as set forth below.

FACTUAL BACKGROUND

Plaintiffs Hollynn D'Lil and Darlene Wooten are two individuals with disabilities, and, according to the Complaint, "are severely limited in the use of their legs." Plaintiffs visited the North Coast Inn (the "Inn") in Arcata, California, on March 29, 2001 and on April 7, 2001, for the purpose of staying in a guest room. Plaintiffs allege that the Inn fails to provide barrier free access in violation of federal and state legal requirements, including: (1) insufficient accessible parking spaces in two lots of 80 and 78 total spaces respectively, (2) a lack of accessible seating and an obstacle to the women's restroom in the restaurant bar, (3) various problems with the interior stairs, (4) a lack of raised letter and Braille signs in the rooms, (5) various problems with some of the doors, (6) various problems at the pool and spa, (7) a lobby reception counter that is too high, and (8) too few accessible guest rooms and a failure to disperse the accessible rooms among the various classes of sleeping accommodations. *See* Complaint para. 3.

The parties agree that the Cher–Ae Tribe is a federally recognized Indian Tribe, and, based on the documentation submitted by the defendant, the Court takes judicial notice that it is so. The Tribe is a relatively small community of 200 individuals, and the Rancheria is just 47 acres in size. The Tribe runs the Cher–Ae Heights Indian Bingo & Casino, which is located on the Rancheria. However, the North Coast Inn, which comprises a hotel, restaurant, and night club, is in the city of Arcata, well outside the geographical boundary of the reservation. It is uncontested that the Inn is a public accommodation, and that it is owned and operated by the Cher–Ae Tribe.

Plaintiffs' Complaint contains five canses of action:

(1) Violation of Title III of the ADA, 42 U.S.C. sec. 12101 *et seq.*;

(2) Violation of section 504 of the Rehabilitation Act, 29 U.S.C. sec. 794;

(3) Breach of Statutory Protections for Persons with Physical Disabilities, pursuant to California Health & Safety Code sec. 19955, *et seq.*;

(4) Violation of California Civil Rights Acts, pursuant to Civil Code sections 54, 54.1 and 54.3;

(5) Violation of the Unruh Civil Rights Act, California Civil Code sections 51 and 51.5.

Plaintiff seeks injunctive relief in the form of physical changes to the Inn, general damages, treble damages pursuant to California Civil Code sections 52 and 54.3, punitive damages, and attorneys' fees and costs.

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LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) when a plaintiff's allegations fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 670 (9th Cir.1993); *NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir.1986).

***2** The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir.1998); *Johnson v. Knowles,* 113 F.3d 1114, 1117 (9th Cir.1997); 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed.1990) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)). Dismissal without leave to amend is appropriate only where a court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen,* 80 F.3d 1293, 1296 (9th Cir.1996); *Noll v. Carlson,* 809 F.2d 1446, 1448 (9th Cir.1987).

DISCUSSION

The Court notes at the outset that this is a difficult case, in which significant values are in conflict that cannot be fully reconciled. Both the Indian tribes and people with disabilities share strong interests in maintaining independence and self-sufficiency, and both groups face substantial obstacles in protecting those interests, historically and currently.

With respect to Native Americans, the Supreme Court has recognized that the Indian tribes are to be respected in the exercise of self-government. This is not to overlook, of course, the inconsistent and sometimes hypocritical treatment of Indian sovereignty since its inception. For example, the Court early on recognized that the tribes "retain[ ] their original natural rights" as sovereign entities, while also treating the tribes as "domestic dependent nations" whose sovereignty is defined and limited by Congress. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). Thus, the Indian tribes have a peculiar quasi-sovereign status [1] which is often compared with, but is not congruent with, that which the federal government or the states enjoy, in that the extent of sovereignty enjoyed by the tribes is subject to plenary federal control and definition. [2] While the history of the federal government's and the Supreme Court's treatment of Native Americans, even when narrowed to the issue of sovereign immunity, is extensive and well beyond the reach of this opinion, the point remains that this Court must approach any suit against an Indian tribe with respectful deference to the tribe's legitimate interests in self-determination and self-governance.

In regard to people with disabilities, Congress passed the ADA with the express purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 496–97 (1999), ***quoting*** 42 U.S.C. § 12101(b)(1); ***see also*** *PGA Tour, Inc. v. Martin,* 531 U.S. 1049 (2001). Congress found that " 'individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices....' " *Crowder v. Kitagawa,* 81 F.3d 1480, 1483 (1996), ***quoting*** 42 U.S.C. § 12101(a)(5). Thus, as the Ninth Circuit has stated: "[W]hen Congress has passed antidiscrimination laws such as the ADA ... it is incumbent upon the courts to insure that the mandate of federal law is achieved." *Crowder v. Kitagawa,* 81 F.3d 1480, 1485 (9th Cir.1996).

***3** What happens when these two powerful interests collide is the subject of the remainder of this opinion.

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A. Defendant's Motion to Dismiss the ADA Claim

Defendant argues that the Tribe is entitled to sovereign immunity, that such immunity has not been abrogated by Congress nor waived by the Tribe, and that the location of the Inn off reservation is of no legal relevance. The Court addresses these arguments below, first by analyzing whether the ADA applies to Indian Tribes, and then by analyzing whether the doctrine of tribal immunity releases the Tribe from any potential liability.

1. Applicability of the ADA to Indian Tribes

Our analysis begins with the principle that a "general statute," i.e. one that applies to all persons, "includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). From the language of the legislation itself and from the legislative history, it is evidence that the ADA is a general statute that Congress intended to have broad applicability. Congress stated that the purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(1), (4). The statute addresses discrimination in employment, public services, and public accommodations by private entities, and the terms "public accommodation" and "private entity" both are defined broadly. The Senate and House reports accompanying Title III of the ADA emphasize Congress's intent that the statute apply universally:

> The twelve categories of entities included in the definition of the term "public accommodation are exhaustive. However, within each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase "other similar" entities. The Committee intends that the "other similar" terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.

See S.Rep. No. 101–116, at 59 (1989)S.Rep. No. 101–116, at 59 (1989) (emphasis added); H.R.Rep. No. 101–485, pt. II, at 100 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 382–83.

In an analogous situation in *Donovan v. Coeur d'Alene*, 751 F.2d 1113, 1116 (9th Cir.1985), the Ninth Circuit addressed the application of the Occupational Safety and Health Act ("OSHA") to a farm run by the Coeur d'Alene Tribe.[3] The court explained that OSHA is a statute of general applicability, and that it would apply to tribe-run businesses acting in interstate commerce. In coming to this conclusion, the court utilized a three-part test to determine whether to exempt the tribe from the presumption of general applicability of the statute. The three exceptions are where: (1) the statute touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties;" and (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ..." *Donovan*, 751 F.2d at 1116, *quoting* *U.S. v. Farris*, 624 F.2d 890, 893–94 (9th Cir.1980). Applying this test to the facts before it, the *Donovan* court concluded:

> ***4** The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural ... nor essential to self-government.

Donovan, 751 F.2d at 1116.

The question of general applicability of statutes to Indian tribes, and the *Donovan* exceptions, was squarely addressed by the Ninth Circuit most recently in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (2001) (*"Karuk II"*). In the *Karuk* case, a member of the tribe, who was also an employee of the Karuk Tribe Housing Authority, filed an administrative complaint with the Equal Employment Opportunity

Commission (the "EEOC"), alleging that he had been terminated because of his age. The EEOC opened an investigation and issued a subpoena to the Tribe, which refused to comply on the grounds that the Age Discrimination in Employment Act (ADEA) does not apply to Indian tribes, and that the Tribe enjoys sovereign immunity from the EEOC investigation.

The EEOC sought judicial enforcement of the subpoena, and the district court issued an order enforcing the subpoena. *See EEOC v. Karuk Tribal Housing,* 2000 U.S. Dist. LEXIS 14292 (N.D.Cal.2000) (*"Karuk I"*). Judge Chesney found that the ADEA is a statute of general applicability, and proceeded to analyze the *Donovan* exception for matters touching on the "exclusive rights of self-governance in purely intramural matters." *Donovan,* 751 F.2d at 1116. Judge Chesney found that "the self-governance exception does not preclude application of the ADEA to Indian tribes, as such application does not implicate conditions of tribal membership, inheritance rules, or domestic relations...." The court further reasoned that the fact that the Housing Authority employs and houses non-Karuks and non-Indians "weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters." *Karuk I,* 2000 U.S. Dist. LEXIS 14292.

The Ninth Circuit disagreed with the district court's application of the *Donovan* test to the facts of the case. While agreeing that the ADEA is a statute of general application, and that the *Donovan* factors remain applicable in principle, the Ninth Circuit disagreed with Judge Chesney regarding the self-governance factor:

> [We hold] that the ADEA does not apply to [plaintiff's] employment relationship with the Karuk Tribe Housing Anthority because it touches on "purely internal matters" related to the tribe's self-governance.
>
> Notably, the employer in this case is the tribal government, acting in its role as provider of a governmental service: ensuring adequate housing for its members.... The Housing Authority thus functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance. Courts conducting "self-governance" analysis have distinguished such essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal governmental entities as aspects of "self-government," [citation omitted] while rejecting such a categorization for businesses that happen to be owned and operated by tribes [citations omitted].
>
> *5 Further, the dispute here is entirely "intramural," between the tribal government and a member of the Tribe. [citation omitted] It does not concern non-Karuks or non-Indians as employers, employees, customers, or anything else. [citations omitted].

Karuk II, 260 F.3d at 1080.

Turning to the instant case, the Court notes that neither party explicitly addresses the *Donovan* factors, presumably assuming that Title III of the ADA is a statute of general applicability without exception. The Court, having conducted its own analysis of the *Donovan* factors, finds that this case is analogous to the situation in *Donovan.* The Court further finds that the instant case is distinguishable from *Karuk,* in that the operation of an off-reservation hotel and restaurant that is open to the public goes well beyond the kind of internal and intramural activity that the Ninth Circuit deems significantly related to tribal self-government. The Court concludes therefore that Title III of the ADA applies to the Cher–Ae Tribe in this case.

2. Application of the Doctrine of Tribal Sovereign Immunity

The United States Supreme Court recently held that the questions of (1) whether an Indian tribe is subject to a statute, and (2) whether the tribe may be sued for violating the statute, are two entirely different questions. *Kiowa Tribe v. Manufacturing Tech., Inc.,* 523 U.S. 751 (1998). The Court stated that there is a difference between "the right to demand compliance" with a law and "the means available to enforce" that law. For present purposes, this means that despite application of Title III of the ADA to the Cher–Ae

Tribe (as well as all others), sovereign immunity still might protect the Tribe from plaintiffs' effort to enforce that law.

Because of the importance of the *Kiowa* decision to the instant case, we provide some background as follows. The Kiowa Tribe entered into an agreement with Manufacturing Technologies to purchase stocks. A tribal official signed a promissory note, which did not specify any governing law but merely asserted the sovereign immunity rights of the tribe. The Tribe subsequently defaulted and Manufacturing Technologies sued on the note in state court, taking the position that the purchase agreement had been signed off the Kiowa reservation, thereby exempting the Tribe from immunity. *Kiowa,* 523 U.S. at 754–55.

The Supreme Court began its analysis of the case by reviewing the history of the tribal sovereign immunity doctrine. The Court noted that although the doctrine is now well settled, its development was purely accidental and was a creation of the judiciary. [4] Justice Kennedy, writing for the majority, recognized that over the past century the Supreme Court has applied the doctrine of tribal immunity despite its weak foundation, and he explained the Court's continuation of what one commentator has referred to as a "systematic regurgitation of an accidental doctrine" [5] by putting the onus on Congress. While Justice Kennedy explained that the Supreme Court retained the doctrine based on Congress's apparent decision to promote tribal economic development and self-sufficiency, the *Kiowa* majority was clear in its disagreement with the rationale supporting such broad tribal immunity. The Court stated that a blanket rule supporting tribal immunity does not take into account the fact that tribal activities have broken into non-traditional commercial enterprises. Thus, given the expanding scope of tribal activities, tribal immunity can present a danger to those who are harmed by a tribe's activities yet have no forum in which to argue their claims. In other words, as stated by a commentator, "tribal immunity has developed into a doctrine that is more than large enough to protect the legitimate interests of tribes, but so large that it unnecessarily harms those who interact with tribes and are injured by them." *See* 24 Am. Indian L.Rev. at 125. [6]

***6** Despite its recognition of the incompatibility between blanket tribal immunity and the reality of modern day tribal commercial activity, the *Kiowa* Court refused to alter the doctrine. Rather, by likening tribal immunity to foreign sovereign immunity, the Court decided to leave it to Congress to expand or limit the doctrine.

This brings us to the holding in *Kiowa,* and the crux of the matter at hand. Some of the language used in the decision is quite broad. For example, the Court rejected the plaintiff corporation's suggestion that it abrogate the doctrine of tribal immunity as an *"overarching rule"* and "confine it to reservations or to noncommercial activities." *Kiowa,* 523 U.S. at 758 [emphasis added]. Further, the Supreme Court speaks in general terms regarding the tribal immunity doctrine throughout the opinion.

On the other hand, some of the language used in the decision is quite narrow. For example, just after the language quoted in the preceding paragraph, the Court stated: "We decline to draw this distinction [i.e. onversus off-reservation, and commercial versus noncommercial activity] *in this case.*" *Id.* at 758 [emphasis added]. Most notably, the explicit holding of the case, found in the last paragraph of the majority decision, states: "Tribes enjoy immunity from suits *on contracts,* whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760 [emphasis added]. [7] Notably, in the only subsequent Supreme Court decision to mention *Kiowa,* the Court characterized its *Kiowa* holding again in terms of contract: "Tribal immunity, we ruled in *Kiowa,* extends to suits on off-reservation commercial contracts." *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411 (2001) (holding that arbitration provisions in a contract constituted waiver of the tribe's sovereign immunity against suit to enforce an arbitration award).

The only explicit reference in *Kiowa* to non-contractual activity occurs in the dissent, where Justice

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Stevens (joined by Justices Ginsburg and Thomas) writes: "[T]he rule [announced by the majority] is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet *nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationship." Id.* at 766 (Stevens, J., dissenting) [emphasis added]. Should this statement be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call? [8]

Certainly, at a policy level, the dissent has an excellent point (indeed, it is a point with which the majority *agrees* in principle). Tort victims and civil rights plaintiffs (such as those in the case at bar) have no notice that they are on Indian property, nor any opportunity to negotiate the terms of their interaction with the tribe. This makes the distinction between contractual and non-contractual relationships a reasonable place to draw the line for off-reservation tribal immunity. [9] However, again we must take note that this is a line the Supreme Court failed to draw or even address. [10]

***7** Thus, we are left in a quandary as to what the Supreme Court majority intended in its *Kiowa* ruling. Certainly, the Court has created an across-the-board rule of tribal immunity for all *contractual* activity regardless of where the contract is signed. But the question of immunity for non-contractual activity is, in this Court's opinion, left open.

In *Mescalero v. Jones,* 411 U.S. 145 (1973), the Supreme Court held that activities conducted by an Indian tribe off the reservation were subject to non-discriminatory state laws. *Id.* at 148–49. Specifically, the Court applied this principle to uphold New Mexico's rights to collect taxes from an off-reservation ski resort owned and operated by the Mescalero Tribe. [11]

The *Kiowa* majority state that their decision is "not to the contrary" of *Mescalero,* because *Mescalero* falls into a category of cases where the right to demand compliance has been granted, but the right to *enforce* compliance has been denied. *Kiowa,* 523 U.S. at 755. [12] However, it is difficult to find that distinction in the text of *Mescalero.* Indeed, in the *Mescalero* opinion itself, the Supreme Court rejected the assertion that the state could be prohibited from *"enforcing* its revenue laws against any tribal enterprise" whether on or off the reservation. *Mescalero,* 411 U.S. at 147–48 [emphasis added]. There is no indication in *Mescalero* that the right to collect taxes from a tribe, as affirmed by the Supreme Court, is a right without a remedy. [13]

The Court further notes that a recent decision from this District held that the tribal immunity expressed by the Supreme Court in *Kiowa* is less than universal. In *Karuk I,* 2000 U.S. Dist. LEXIS 14292, discussed *supra,* Judge Chesney determined that the Tribe was not immune from complying with an EEOC subpoena. The court distinguished the *Kiowa* holding is being limited to cases arising in contract, holding:

> *Kiowa* involved the question of whether Indian tribes enjoy sovereign immunity from civil suits founded on contracts [citation omitted], not whether Congress abrogated Indian sovereign immunity pursuant to a federal statute. The analytical model differs where the common law or a state statute is implicated rather than an Act of Congress.

Karuk I, 2000 U.S. Dist. LEXIS 14292 at *16. [14] Thus, according to *Karuk I,* where a tribe's activity is non-contractual and is subject to a federal statute, *Kiowa* does not require a separate immunity analysis. [15]

Looking outside the Ninth Circuit, defendant herein relies heavily on the Eleventh Circuit's decision in *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126 (11th Cir.1999), where the court addressed whether the ADA applies to an Indian tribe's restaurant and casino located on tribal land. The Eleventh Circuit agreed with the analysis

of the Ninth Circuit in *Donovan,* finding that the ADA is a statute of general applicability and that the tribal self-government exception would not apply to a commercial enterprise open to non-Indians that does not relate to the governmental functions of the tribe. *Florida Paraplegic,* 166 F.3d at 1129–30. However, citing *Kiowa's* distinction between rights and remedies, the Eleventh Circuit took the next step and separately evaluated the tribal immunity question. *Id.* at 1130. The court found that Title III of the ADA, despite its broad applicability, does not expressly and unequivocally abrogate tribal immunity, and the court held that waiver or abrogation of tribal sovereign immunity cannot be implied. *Id., citing Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).[16] Therefore, in accordance with *Kiowa,* the Eleventh Circuit found the tribe immune from any suits for enforcement, a result that the court found "troubling" but not entirely without precedent. *Id.* at 1134.[17]

***8** Nonetheless, *Florida Paraplegic* is of limited relevance to the issue presently before this Court. *Florida Paraplegic* is distinguishable from the instant case because the court did not address whether the immunity applicable to the *Miccosukee* Tribe for its on-reservation activity would apply to a business entity located off-reservation.[18]

In conclusion, in light of the ambiguous reach of the holding in *Kiowa* and the apparent continued validity of *Mescalero,* this Court determines that *Kiowa* does not extend the doctrine of tribal sovereign immunity to all non-contractual off-reservation conduct. This Court further concludes that the strong federal policy and the public interest in enforcing the nation's disability-related civil rights laws outweighs any tribal interest in extending their sovereignty to commercial activities conducted off the reservation.[19]

B. Defendant's Motion to Dismiss the Rehabilitation Act Claim

Although defendant separately addresses the Rehabilitation Act claim, plaintiff simply addresses it as being part-and-parcel of the ADA claim for purposes of the instant motion. Indeed, the central issues are the same, and, for the reasons expressed above, the Court rules that the motion to dismiss is denied regarding the Rehabilitation Act claim.

C. Defendant's Motion to Dismiss the State Claims

In their opposition brief, plaintiffs do not address defendant's motion to dismiss the three state law claims in the Complaint. When asked about this omission at oral argument, plaintiffs' counsel stated that the state law claims hinge entirely on the Court's ruling on the federal claims. This is not entirely the case, however. The Court's ruling above is dependent a significant part on the Supreme Court's apparent limitation on the doctrine of tribal immunity for off-reservation activity to contract actions. The California courts, however, read *Kiowa* somewhat differently than this Court. In *Trudgeon,* 71 Cal.App.4th at 636–37, the California Court of Appeal held that *Kiowa* immunity extends to tort actions. Yet, it remains a matter of first impression as to whether the California courts would extend *Kiowa* to civil rights actions as well.

The instant case also is factually distinguishable from *Trudgeon.* In that case, plaintiff was injured while existing an Indian casino, so he had knowingly and voluntarily entered into a relationship with the Tribe, whereas here the plaintiffs had no indication that they were dealing with anything other than an ordinary private establishment. Furthermore, the cases are distinguishable on the basis of the public interest in protecting against discrimination in the instant case.

It is difficult to decipher from the currently existing state court rulings how the California courts would proceed on this issue. While the Court recognizes the possibility that the *Trudgeon* analysis would be extended to civil rights cases, the Court does not believe that would be proper or just to dismiss with prejudice the state law claims at this early stage of the proceedings.

CONCLUSION

***9** For the reasons discussed above, and with GOOD CAUSE APPEARING, the Court hereby ORDERS as follows:

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1. The Motion to Dismiss with respect to the Americans with Disabilities Act and Rehabilitation Act claims is DENIED;

2. The Motion to Dismiss with respect to all state law claims is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 33942761

Footnotes

1 The Ninth Circuit most recently referred to the tribes' quasi-sovereign status as "the semi autonomous status of Indians." *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 900 (9th Cir.2002).

2 As one commentator puts it, the "tribes are sovereign only inasmuch as another sovereign, i.e. the federal government acting through Congress, allows them to be so." LaSpaluto, "A 'Strikingly Anomalous,' 'Anachronistic Fiction': Off–Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises," 36 San Diego L.Rev. 743, 767–68 (1999).

3 Similarly, several courts have examined other federal statutes that set forth comprehensive schemes enforcing the protection of individual rights and have found those laws broad enough to manifest Congress's intent that they apply to the Indian tribes. *See, e.g., Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir.1996) (holding that Secretary of Labor could fine Indian tribeowned and -operated construction company for violations of the Occupational Safety & Health Act); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir.1989) (holding that the Employee Retirement Income Security Act ("ERISA") governs benefit plans of Indian tribe employers).

4 The Court pointed out that the decision upon which the doctrine of tribal immunity was based, *Turner v. United States*, 248 U.S. 354, 358 (1919), did not actually support the doctrine. The Court in *Turner* merely assumed that tribal immunity existed for the sake of argument, and was not creating a new doctrine. The unique facts of the case—the tribal unit had dissolved and therefore could not be subjected to suit unless Congress authorized such a suit—governed the *Turner* Court's references to tribal immunity. As such, Turner was "a slender reed for supporting the principle of tribal sovereign immunity." *Kiowa*, 523 U.S. at 1704–05.

5 *See* "Nations Within a Nation: The Evolution of Tribal Immunity," 24 Am. Indian L.Rev. 99, 125 (1999/2000).

6 This Court cautions, however, that the *Kiowa* Court's recognition of the "accidental" inception of the tribal sovereign immunity doctrine, and its recognition that the doctrine has expanded as the functions of the tribes have expanded beyond traditional tribal customs and activities, should not be taken as justification for discounting the legitimate interest of the tribes in maintaining their rights to self-determination and self-governance. Any limits placed on tribal sovereign immunity must be grounded in the fundamental nature of the tribes as sovereigns within this nation, and not, for example, as a need-based remedy granted temporarily until a certain level of prosperity is reached.

7 The *Kiowa* decision has been narrowly interpreted in another way as well. The Fifth Circuit distinguished *Kiowa* on the basis that it was an action for damages, not a suit for declaratory or injunctive relief. *See* *TTEA Corp. v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir.1999); *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 78 F.Supp.2d 589, 593 (E.D.Tex.1999). The Fifth Circuit therefore recognized the right of plaintiffs to sue individual tribal members for injunctive and declaratory relief, even where they are barred by sovereign immunity from suing the tribe. *But see* *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476–79, 479 (9th Cir.1985) (tribal immunity extends to individual tribal officials acting in their representative capacity and within their scope of authority). This distinction is an extension of the doctrine emanating from *Ex Parte* *Young*, 209 U.S. 123 (1908), wherein the Supreme Court held that the Eleventh Amendment does not preclude suits against state officers in their official capacity when sued for injunctive relief to remedy a violation of federal law. However, in the instant case, plaintiffs have sued only the Tribe, and not any individual tribal members, although plaintiffs' counsel stated at oral argument that they seek only declaratory and injunctive relief under their ADA claim.

8 *See, e.g.,* *Trudgeon v. Fantasy springs Casino,* 71 Cal.App.4th 632, 636–37 (1999) (citing Justice Stevens' *Kiowa* dissent in support of extending tribal immunity to tort claims).

9 Plaintiffs in the instant case argue in their opposition brief: "While *Kiowa* thus sets forth the law as to ordinary contracts where there is not a waiver of sovereign immunity by the tribe, it is wholly unconcerned with the broad and undisputed power of Congress to enact laws to protect all persons through the ADA ..."

10 Defendant argues that the Ninth Circuit has recognized that tribal immunity extends to off-reservation non-contractual conduct in *Pink v. Modoc Indian Health Project, Inc.,* 157 F.3d 1185 (9th Cir.1998), *cert. denied* 528 U.S. 877 (1999). However, *Pink* is distinguishable, because the federal statute at issue, Title VII of the Civil Rights Act, explicitly exempts Indian tribes from the scope of the definition of "employer" in the Act. *Id.* at 1188. Thus, the court engaged in statutory construction to determine that exemption from the Act was warranted for the Tribe, and referred to tribal sovereignty only by analogy to make the point that the statutory exemption served to promote self-determination. *Id.*

11 In a subsequent decision in the same case, *New Mexico v. Mescalero Apache Tribe (Mescalero II),* 462 U.S. 324 (1983), the Supreme Court reaffirmed this point. In *Mescalero II* the state's application of its hunting and fishing laws were held to be preempted by federal law with respect to tribal members on the reservation. In the course of its analysis, the Court stated: "[O]ur cases have recognized that tribal sovereignty contains a 'significant geographical component," ' and that "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary." ' *Id.* at 335, *quoting Mescalero I,* 411 U.S. 148–49.

12 In another passage, the *Kiowa* majority similarly "decline to revisit our case law" and reject the request to limit the Tribe's immunity, thereby implying that its ruling is simply a continuation of precedent. *Kiowa,* 523 U.S. at 760.

13 The Ninth Circuit, in *Cabazon Band of Mission Indians v. Smith,* 249 F.3d 1101 (9th Cir.2001), recently addressed the import of *Mescalero* in light of *Kiowa.* However, the *Cabazon* opinion was recently withdrawn and therefore will not be discussed herein. *See Cabazon Band of Mission Indians v. Smith,* 271 F.3d 910 (9th Cir.2001).

14 On appeal, the Ninth Circuit did not address Judge Chesney's distinction, because it held simply that "Indian tribes do not ... enjoy sovereign immunity from suits brought by the federal government." *EEOC v. Karuk Tribe Housing Authority (Karuk II),* 260 F.3d 1071, 1075 (9th Cir.2001).

15 Also relevant to this discussion is the Ninth Circuit's very recent decision in *Bishop Paiute Tribe,* 275 F.3d 893. In that case, the county district attorney and sheriff executed a search warrant for personnel records at an indian casino located on tribal land. The tribe brought suit, claiming in part that its tribal immunity should have shielded it from the county's authority, and the Ninth Circuit agreed with the tribe on this point. While this Court had anticipated that the Ninth Circuit ruling would address *Kiowa* and thereby provide guidance for the instant decision, *Kiowa* is nowhere cited in the *Bishop Paiute* decision. Nonetheless, the case involves tribal sovereignty and should not be overlooked. The statute at issue in *Bishop Paiute* is Public Law 280, 18 U.S.C. section 1162(a), which grants several states criminal jurisdiction and limited civil jurisdiction over reservation Indians. The question at hand was whether the statute could be applied to the Indian tribes, as opposed to individuals. The Ninth Circuit determined that such application would be inconsistent with both the plain language of the statute and the principle of tribal sovereign immunity. *Id.* at 901. While the facts and nature of the case are quite distinguishable from the instant matter, the decision is somewhat noteworthy for its emphasis on the fact that the "case involves the Tribe's assertion of jurisdiction over uniquely tribal property (Casino employee records) *on tribal land." Id.* [emphasis added]. If *Kiowa* is read to apply immunity to all (i.e. not just contractual) tribal activity on and off the reservation, then the point made by the Ninth Circuit would be gratuitous. This Court does not mean to read too much into the silences and dicta of the Ninth Circuit's decision. However, at a minimum the Court believes that the decision in *Bishop Paiute* is consistent with the analysis set forth herein.

16 This is in contrast to Title I, which prohibits discrimination against disabled individuals in employment, and which "specifically excludes Indian tribes from the definition of 'employer,' thus exempting them from

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coverage of that portion of the ADA." *Florida Paraplegic,* 166 F.3d at 1130–31. Title I plainly states, "the term 'employer' does not include—(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe, 42 U.S.C. § 12111(5)(B)(i) (emphasis added). Thus, while Congress expressly excluded coverage of Indian tribes for Title I, Congress did not do so for Title III. The Court also notes that Congress expressly abrogated sovereign immunity for the States in Title III, while remaining silent as to Indian tribes. 42 U.S.C. § 12202. Thus, any effort to discern Congress' intent from its dual silences comes to naught, as the inference of coverage in the former is balanced by an inference of exclusion in the latter.

17 The Court also notes that in *Karuk I,* which has been reversed on other grounds, Judge Chesney stated that "[t]o the extent *[Florida Paraplegic*] holds to the contrary, it is inconsistent with Ninth Circuit authority." *Karuk I,* 2000 U.S. Dist. LEXIS 14292 at *16 n.2.

18 At oral argument, defense counsel conceded that the Eleventh Circuit decision in *Florida Paraplegic* is not controlling on this Court, and that the case is distinguishable in the sense that it dealt with an on-reservation enterprise.

19 This ruling is limited to the situation at hand where a federal civil rights statute is directly implicated, thereby bringing to bear the strong federal interest in combatting discrimination throughout the nation. This ruling does not address the question of whether tribal sovereign immunity would apply to non-contractual, off-reservation activity when such interests are not present.

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