UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

**CIVIL MINUTES - GENERAL**

| Case No. | 5:19-cv-00124-SVW-SP | Date | January 15, 2020 |
|---|---|---|---|
| Title | *Min Zhang v. Grand Canyon Resort Corporation* | | |

| Present: The Honorable | STEPHEN V. WILSON, U.S. DISTRICT JUDGE |
|---|---|

| Paul M. Cruz | N/A |
|---|---|
| Deputy Clerk | Court Reporter / Recorder |
| Attorneys Present for Plaintiff: | Attorneys Present for Defendant: |
| N/A | N/A |

**Proceedings:** ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [60]

Min Zhang ("Plaintiff") brings her third amended complaint *pro se* against Hwal'bay Bay Enterprises, Inc., d.b.a. Grand Canyon Resort Corporation ("GCRC"), a wholly-owned tribal corporation of the Hualapai Tribe ("Defendant"). This Court previously set aside a default judgment entered against Defendant, Dkt. 48, and dismissed Plaintiff's complaint with instructions on how to amend her pleadings to adequately respond to Defendant's arguments and the Court's concerns. Dkt. 56. Plaintiff has refiled her complaint and opposed the present motion to dismiss, but has failed to sufficiently address the issues raised in the previous Order and the Defendant's pleadings. For the reasons provided below, Defendant's motion to dismiss is GRANTED.

## I. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" without more. *Id.* (internal quotation marks omitted). "Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion." *Odom v. Microsoft Corp.*, 486 F.3d 541, 545 (9th Cir. 2007).

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Defendant has moved to dismiss the complaint on the grounds that Defendant enjoys sovereign immunity as an arm of Hualapai Tribe, the Plaintiff has failed to effectively respond to the Court's previous Order, the action is precluded by earlier action in the Tribal Court, and the action is untimely. Because sovereign immunity is a threshold legal question that would preclude further action by this Court, we consider that issue first.

## II. Tribal Sovereign Immunity

The determination of sovereign immunity is a matter of federal law properly determined by the Court. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* As a sovereign, there is no dispute that the Hualapai Tribe enjoys sovereign immunity. *See* 84 Fed. Reg. 1200, 1201 (December 20, 2018). There is also no reasonable allegation that Congress has specifically abrogated sovereign immunity to allow suit against the Hualapai Tribe. To determine if Plaintiff's suit is barred, this Court must determine if Defendant enjoys sovereign immunity as an extension of the Hualapai Tribe, and if so, if that immunity has been waived by Defendant's statements or actions.

### A. Grand Canyon Resort Company

The Defendant is not the Hualapai Tribe itself, but rather the Grand Canyon Resort Corporation, which is organized under the laws and constitution of the Hualapai Tribe and is a wholly-owned tribal corporation. This is not fatal to sovereign immunity, however, as "[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "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." *Kiowa Tribe*, 523 U.S. at 760. This immunity is not limited to contracts or to the government of the Tribe; "[t]ribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe." *White v. Univ. of California*, 765 F.3d 1010, 1025 (9th Cir. 2014).

In *White*, the Ninth Circuit adopted a five-factor test to determine if an entity functions as an "arm of tribe" so as to enjoy sovereign immunity:

In determining whether an entity is entitled to sovereign immunity as an "arm of the

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> tribe," we examine several factors including: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities."

*White*, 765 F.3d at 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)). This is known as the *Breakthrough* Test or the "arm of the tribe" test. *Id.*

**B. Applying the *Breakthrough* Test**

Verrin T. Kewenvoyouma ("Counsel") serves as Outside General Counsel to GCRC and has provided a sworn declaration with attached documents establishing the facts necessary for this Court to apply the *Breakthrough* Test. Dkt. 30-3. Among other declarations, Counsel has provided the Court with the Constitution of the Hualapai Indian Tribe and the GCRC Second Amended and Restated Plan of Operation ("Plan"). *Id.* These facts are not reasonably in dispute, and the Court takes judicial notice of both documents.

First, the Court must consider "(1) the method of creation of the economic entities" seeking sovereign immunity and "(2) their purpose." *White*, 765 F.3d at 1025 (internal quotation marks omitted). In this case, GCRC was created solely under the laws of the Hualapai Indian Tribe as described by the Plan. Dkt. 30-3 at 28. Its purpose is explicitly stated in the Plan as "creating economic development opportunities for the Hualapai Indian Tribe" through various commercial activities. *Id.* In determining the third prong, the "structure, ownership, and management, including the amount of control the tribe has over the entities," *White*, 765 F.3d at 1025, the Court notes that the Plan specifically states "[t]he sole shareholder of GCRC shall be the Hualapai Indian Tribe. Its interests in GCRC may not be sold, transferred, pledged or hypothecated, either voluntarily or involuntarily." Dkt. 30-3 at 28. The Tribal Council is also permitted to remove any director on the board. *Id.* at 31. These provisions effectively place the Tribe in complete control of the GCRC and do not allow ownership to transfer outside of the Tribe. These factors all weigh in favor of extending GCRC tribal sovereign immunity.

Fourth, the Court considers "the tribe's intent with respect to the sharing of its sovereign immunity" with GCRC. *White*, 765 F.3d at 1025. In this case, the Plan is equally clear, providing: "GCRC shall be entitled to all the privileges and immunities of the Hualapai Indian Tribe GCRC and its

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directors officers, employees and agents while acting in the official capacities are immune from suit." Dkt. 30-3 at 34. The Plan demonstrates the Tribe intended to extend sovereign immunity to GCRC to the maximum extent possible. Finally, the Court considers "the financial relationship between the tribe and the entities." *White*, 765 F.3d at 1025. Under the Plan, the GCRC was originally established by virtue of funds directly from the Tribe. *See* Dkt. 30-3 at 29 ("The initial capital of GCRC consisted of funds and other assets as prescribed by the Tribal Council and as reflected on the balance sheet. Any assets hereafter acquired by GCRC from whatever source will be taken on the accounts of GCRC."). GCRC's financial records are subject to a monthly audit by the Tribal Council. *Id.* at 34. Although there is no provision in the Plan specifically stating revenues flow from GCRC to the Tribe, the Tribe is invested in the GCRC's financial welfare as its sole shareholder and controller. Additionally, as one of its purposes is to provide economic opportunities to Tribe members, GCRC's continued operation directly benefits the tribe by employing its members. Considering all five elements of the *Breakthrough* Test, the Court finds that every elements weighs in favor of Defendant's claim of sovereign immunity. The Court concludes that GCRC is an "arm of the tribe" under *White*, 765 F.3d at 1025, and is therefore entitled to sovereign immunity.

**C. Waiver**

Even though it is entitled to sovereign immunity, Defendant is still subject to suit if it has waived that immunity. *Id.* However, "[a] voluntary waiver by a tribe must be 'unequivocally expressed.'" *Id.* at 1025–26 (quoting *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994)). Further, "[w]aiving immunity as to one particular issue does not operate as a general waiver" for all potential claims. *Id.* at 1026. Notably, the Ninth Circuit has rejected the "argument that a tribe's decision to incorporate waives its sovereign immunity." *Id.* Plaintiff claims Defendant has waived sovereign immunity because of a "sue and be sued" clause contained in a previous version (circa 1943) of GCRC's charter. Dkt. 67 at 12. However, this document is not operative in the Court's determination of GCRC's current status as an "arm of the tribe" or its subsequent waiver of sovereign immunity. At the least, Plaintiff's pleadings have failed to overcome the "strong presumption against waiver of tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). Based on the facts as alleged, the Court cannot conclude Defendant has expressly waived its sovereign immunity—either through contract or conduct. As such, Defendant retains its sovereign immunity in this matter.

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**III. Conclusion**

Defendant is entitled to sovereign immunity, so the Court does not consider Defendant's other defenses. Tribal sovereign immunity is a conclusion of law based on facts that are not reasonably in dispute, so the Court finds that further amendment by Plaintiff would be futile. Even in light of the greater leniency given to *pro se* plaintiffs, the claims must be dismissed with prejudice. *See Sevcik v. Unlimited Const. Servs., Inc.*, 462 F. Supp. 2d 1140, 1146 (D. Haw. 2006) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)). For the reasons set forth above, the Court GRANTS Defendant's motion to dismiss. Plaintiff is DENIED leave to amend.

**IT IS SO ORDERED.**

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