No. 20-30261

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

SHANNON DEMOND DOTSON
PLAINTIFF-APPELANT
V.
TUNICA-BILOXI GAMING COMMISSION, SHEILA AUGUSTINE, LORI PIAZZA, MS. VOCARRO; UNKNOWN SUPERVISOR, AFRICAN; UNKNOWN MANAGER, 1:30 PM; MS. CAMILLA, COMMISSIONER NEWMAN, COMMISSIONER BOBBY PIERITE, CATHERINE PIERITE, CHERYL BARBY
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
Civil Action No. 18-cv-0885
Honorable Dee D. Drell, District Judge, presiding

ORIGINAL BRIEF FOR DEFENDANTS-APPELLEES
Tunica-Biloxi Gaming Commission, Lori Piazza, and Vocarro

Respectfully submitted,

ADAMS HOEFER HOLWADEL, LLC

/s/ D. Russell Holwadel
D. RUSSELL HOLWADEL (#16975) T.A
Email: drh@ahhelaw.com
400 Poydras Street, Suite 2450
New Orleans, Louisiana 70130
Telephone: (504) 581-2606
Facsimile: (504) 525-1488
Attorneys for Appellees
Tunica-Biloxi Gaming Commission,
Lori Piazza, and Ms. Vocarro

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in 5th Cir. Rule 28.2.1 have an interest in the outcome of this litigation.

1. Shannon Dotson, Plaintiff-Appellant *pro se*
2. The Tunica-Biloxi Tribe of Louisiana
3. The Tunica-Biloxi Gaming Commission, Defendant-Appellee
4. Lori Piazza, Defendant-Appellee
5. "Ms. Vocarrro", Defendant-Appellee
6. D. Russell Holwadel, Esq.
   Adams Hoefer Holwadel, LLC

7. Kevin C. Quigley Esq.
   Foley & Quigley, PLC

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ADAMS HOEFER HOLWADEL, LLC

/s/ D. Russell Holwadel
D. RUSSELL HOLWADEL (#16975) T.A
Email: drh@ahhelaw.com
400 Poydras Street, Suite 2450
New Orleans, Louisiana 70130
Telephone: (504) 581-2606
Facsimile: (504) 525-1488
Attorneys for Appellees
Tunica-Biloxi Gaming Commission,
Lori Piazza, and Ms. Vocarro

STATEMENT REGADING ORAL ARGUMENT

Pursuant to 5th Cir. Rule 28.2.3, the Defendants-Appellees respectfully represent that oral argument is not necessary and is unlikely to be helpful to this Honorable Court in adjudicating the matters on appeal. This appeal involves the application of the well-established principal of tribal sovereign immunity and the Federal Rules of Civil Procedure. Oral argument will not aid in this Court's consideration of the matters on appeal.

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JURISDICTIONAL STATEMENT

This Honorable Court has original appellate jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly granted Defendant-Appellee Tunica-Biloxi Gaming Commission's Rule 12(b)(1) Motion to Dismiss, based on that body's tribal sovereign immunity as an arm of the Tunica-Biloxi Tribe of Louisiana?
2. Whether the district court properly granted Defendants-Appellees Piazza and Vocarro's Motion to Dismiss, pursuant to Fed. R. Civ. P 4(m), 12(b)(5), and 41(b), and W.D. La. LR41.3, after Plaintiff-Appellant failed to effect proper service despite multiple extensions of time, repeated warnings from the district court, and a prior dismissal for failure to prosecute?

STANDARD OF REVIEW

This Court reviews a dismissal for lack of subject matter jurisdiction *de novo*, applying the same standards as the district court. *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 336 (5th Cir. 2012). Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. Under Rule 12(b)(1), a claim is "properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate" the claim. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012).

This Court reviews a dismissal for failure to timely effect service for an abuse of discretion. *Thrasher v. City of Amarillo*, 709 F.3d 509, 511 (5th Cir. 2013). A dismissal is warranted "where a clear record of delay or contumacious conduct by the plaintiff exists and a lesser sanction would not better serve the interests of justice." *Id.* at 513.

STATEMENT OF THE CASE

This litigation arises from Plaintiff-Appellant Shannon Dotson's ("Dotson") allegations that the Defendant-Appellees "stole" a slot machine jackpot he allegedly won at the Paragon Casino Resort on June 4, 2017. Dotson filed suit against the Defendant-Appellees: the Tunica-Biloxi Gaming Commission ("Gaming Commission"); Lori Piazza ("Piazza"); and an individual identified only as Ms. Vocarro ("Vocarro"), an alleged employee of the Paragon Casino Resort.[1] ROA.16. Dotson has taken this appeal from the March 26, 2020 Judgment of the district court (ROA.503) which dismissed, with prejudice, all claims against the Gaming Commission, Piazza, and Vocarro.

The Paragon Casino is owned by the Tunica-Biloxi Tribe of Louisiana ("Tribe").[2] As set forth in the Affidavit of Rudolph Wambsgans, III (ROA 307), the Chairman of the Gaming Commission, the Gaming Commission is an agency of the Tribe. *Id.* at ¶ 4. The Gaming Commission regulates gaming activities conducted within the jurisdiction of the Tribe. *Id.* at ¶ 5. The Gaming Commission was established by the Tribe pursuant to tribal law under the Tribe's gaming regulations and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, P.L. 100-497, 102 Stat. 2467. *Id.* at ¶ 6. In the Tribal-

[1] Dotson has provided no further identifying information regarding Defendant-Appellee Vocarro. Dotson has also sued Commissioner Bobby Pierite, Catherine Pierite, Cheryl Barbry, Sheila Augustine, as well as individuals identified only as "Commissioner Newman", "Unknown Supervisor", "Unknown Manager", and "Ms. Camila", but has not claimed to have effected service upon them.

[2] The Report and Recommendations of Judge Perez-Montes refers to the Paragon Casino Resort by its former name, the Grand Casino Avoyelles. (ROA..471)

State Compact between the Tribe and the State of Louisiana, the Tribe, and therefore the Gaming Commission, expressly reserved, and did not waive, its tribal sovereign immunity regarding patron-disputes arising from contested winnings at the Paragon Casino Resort. *Id.* at ¶ 7.

Dotson filed suit on July 5, 2018 (ROA.16), but failed to make timely service on any of the named defendants. With regards to Piazza and Vocarro, the relevant dates of Dotson's delay and contumacious conduct are as follows:

- **July 5, 2018:** Dotson requests issuance of Summonses to Piazza (ROA.34) and Vocarro (ROA.39), to be served at the offices of the Gaming Commission. **There is nothing in the district court record indicating that Dotson attempted service of these Summonses on Piazza and Vocarro. Dotson has not claimed that he attempted to serve them.**

- **December 11, 2018**: Dotson is issued a Notice of Intent to Dismiss for Failure to Prosecute Under LR41.3 (ROA.111), requiring Dotson to show good cause for his failure to effect service within 90 days of instituting suit. [3]

- **December 26, 2018:** Dotson files a Motion for Extension of Time to Effect Service. ROA.112.

[3] W. D. La. LR 41.3 provides:

> **LR41.3 Dismissal for Failure to Prosecute**
>
> A civil action may be dismissed by the clerk of court or any judge of this court for lack of prosecution as follows:
>
> A. Where no service of process has been made within 90 days after filing of the complaint;
>
> * * *
>
> Dismissal under this rule shall be without prejudice unless delay has resulted in prejudice to an opposing party.

- **December 27, 2018**: Dotson's Motion for Extension of Time to Effect Service is granted by electronic order. ROA.5. Dotson is granted an extension until January 25, 2019.

- **January 3, 2019:** Summonses are reissued to Piazza (ROA.127) and Vocarro (ROA.139). **Again, there is no record that Dotson attempted service of these Summonses on Piazza or Vocarro, and Dotson has not claimed that he attempted to serve them.**

- **March 12, 2019**: Dotson is issued a ***second*** Notice of Intent to Dismiss for Failure to Prosecute Under LR41.3. ROA.148.

- **March 15, 2019**: Summonses are reissued to Piazza (ROA.157) and Vocarro (ROA.173).

- **March 18, 2019**: Dotson files a second Motion for Extension of Time to Serve.[4] ROA.197

- **March 21, 2019:** The March 15, 2019 Summonses to Piazza (ROA.204) and Vocarro (ROA.208) are returned to the Clerk of Court unexecuted.

- **March 29, 2019**: Dotson's suit is dismissed pursuant to LR41.3 for failure to effect service within 90 days of filing of suit. ROA.214.

- **April 18, 2019**: Dotson files another Motion for Extension of Time to Effect Service. ROA.215.

- **May 3, 2019**: Dotson files a Motion to Reopen/Reinstate Case. ROA.218.

- **May 10, 2019**: Dotson's April 18, 2019 Motion for Extension of Time to Effect Service and his May 3, 2019 Motion to Reopen/Reinstate Case (ROA.220) are granted. Dotson is granted until June 15, 2019 to complete service.

[4] This motion was mooted by the electronic Order of Judge Perez-Montes on March 19, 2020. ROA.6.

On June 14, 2019, one day before the end of Dotson's second extension of time and eleven months after suit was filed, Bianca Smith, acting on behalf of Dotson, requested that Christy Smith, the Clerk of Court for the Tunica-Biloxi Tribal Court, serve the Summonses on the Gaming Commission, Piazza and Vocarro. *See*, Affidavit of Christy Smith (ROA.349) submitted by Piazza and Vocarro in support of their Motion to Dismiss, at ¶ 7. However, Christy Smith is not the agent for service for the Gaming Commission, Piazza, or Vocarro. *Id*. at ¶ 5. In her capacity as Clerk of Court, Christy Smith only receives requests for service, verifies their sufficiency, and then forwards them to the Tribal Police for service. *Id*. at ¶ 4. Christy Smith determined that the Summons issued to Piazza could not be served by the Tribal Police because Piazza was no longer employed at Paragon Casino Resort. *Id.* at ¶ 8. Christy Smith also determined that the Summons to Vocarro was defective and could not be served because it lacked the complete name of the defendant. *Id.* at ¶ 9. Christy Smith returned both Summonses to Dotson. *Id*. at ¶ 8-9.[5] Dotson has made no further attempts to serve Piazza or Vocarro. *Id.* at ¶ 11.

On July 19, 2019 the Gaming Commission filed a Motion to Dismiss pursuant to Rule 12(b)(1) based on its tribal sovereign immunity and the district court's lack of subject matter jurisdiction. ROA.294. Also, on July 19, 2020,

[5] Christy Smith's faithful execution of her functions as the Clerk of Court is evidenced by the fact that she did forward the Summons issued to the Gaming Commission to the Tribal Police for service. ROA.294, at ¶ 10.

Piazza and Vocarro filed their Motion to Dismiss, pursuant to Fed. R. Civ. P. 4(m), 12(b)(5), and 41(b), and W.D. La. LR41.3. On February 27, 2020, Judge Perez-Montes issued his Report and Recommendations regarding these motions. ROA.471. Judge Perez-Montes held that the Gaming Commission was an agency and arm of the Tribe and therefore had tribal sovereign immunity. Judge Perez-Montes also held that Dotson had not shown good cause for his failure to serve Piazza and Vocarro in accordance with Fed. R. Civ. P. 4(m). Judge Perez-Montes recommended that Plaintiff-Appellant's actions against the Gaming Commission, Lori Piazza and Vocarro be dismissed. On March 26, 2020, Judge Drell entered his Judgment, adopting Judge Perez-Montes' recommendations and dismissing the action as to the Gaming Commission, Lori Piazza, and Vocarro, with prejudice. ROA.503.

SUMMARY OF THE ARGUMENT

Defendant-Appellee Gaming Commission has immunity from Plaintiff-Appellant Dotson's suit. The Tunica-Biloxi Tribe of Louisiana, a federally-recognized sovereign Indian nation, enjoys tribal sovereign immunity. As an arm of the Tribe, the Gaming Commission enjoys that same immunity. Dotson bore the burden of proving the existence of subject-matter jurisdiction, but failed to do so, having offered no evidence or recognizable legal theory in support. For this reason, the district court's dismissal with prejudice of the Gaming Commission was proper and should be upheld.

Dotson failed to properly serve Defendant-Appellees Lori Piazza and "Ms. Vocarro", despite multiple extension of time and two notices of the district' court's intent to dismiss his suit for failure to prosecute, one of which resulted in an actual dismissal of his suit. Dotson did not attempt service on Piazza and Vocarro until eight months after filing suit. There was no good cause for Dotson's failure to effect service, and less severe measures employed by the district court to compel Dotson to perfect service had no result. Piazza and Vocarro have been prejudiced by Dotson's failure to perfect service. The district court did not abuse its discretion in dismissing, with prejudice, Dotson's claims against Piazza and Vocarro.

ARGUMENT

1. THE DISTRICT COURT'S DISMISSAL OF THE GAMING COMMISSION DUE TO TRIBAL SOVEREIGN IMMUNITY WAS PROPER.

The district court properly granted the Gaming Commission's Rule 12(b)(1) Motion to Dismiss. The Tunica-Biloxi Tribe of Louisiana is a sovereign Indian nation. As such, the Tribe has tribal sovereign immunity, which extends to the Gaming Commission as an arm of the Tribe. Dotson has failed to meet his burden of coming forward with competent evidence to the contrary. Dotson's appeal should, therefore, be denied.

A. The District Court's Rule 12(b)(1) Dismissal of the Gaming Commission on the Grounds of Tribal Sovereign Immunity Was Proper.

The Gaming Commission raised a factual challenge to the district court's subject-matter jurisdiction over Dotson's action against the Gaming Commission.[6] A factual challenge to the existence of subject-matter jurisdiction goes beyond the pleadings, and considers evidence such as testimony and affidavits. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

The evidence introduced by the Gaming Commission includes the Affidavit of Rudolph Wambsgans, III (ROA.307), the Chairman of the Gaming

[6] A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction can assert either a facial or factual challenge to the complaint. *Superior MRI Servs. v. All. HealthCare Servs.*, 778 F.3d 502, 504 (5th Cir. 2015).

Commission. His Affidavit verifies that the Gaming Commission is an agency of the Tribe, established pursuant to tribal law and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, P.L. 100-497, 102 Stat. 2467, to regulate the Tribe's gaming activities conducted within the jurisdiction of the Tribe. *Id.* at ¶¶ 4-6. Moreover, the Tribe and the Gaming Commission have not waived their immunity, but specifically reserved it in the Tribal-State Compact between the Tribe and the State of Louisiana. *Id*. at ¶ 7.

The facts sworn to in Wambsgans' affidavit establish the Gaming Commission's immunity to Dotson's suit as a matter of law. The Tribe is federally-recognized by the United States Government as a sovereign Indian nation. 46 FR 38411[7]; *see also Gore v. Grand Casinos of Louisiana, Inc.*, 1998 WL 1990523, at 1 (W.D. La. 1998). As such, the Tribe possesses "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The Tribe's sovereign immunity extends to the Gaming Commission as an arm of the Tribe. *See, e.g. Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006), *cert denied*, 549 U.S. 1231, 127 S. Ct. 1307, 167 L. Ed. 2d 119 (2007) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it

[7] A tribe's enumeration on the Federal Register list of recognized tribes is sufficient to establish entitlement to sovereign immunity. *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009).

functions as an arm of the tribe.") The Tribe's immunity extends to the commercial activities of the Gaming Commission in regulating the gaming activity within the Tribe's jurisdiction. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (tribal sovereign immunity applies without distinction between on and off reservation or governmental or commercial activities); *Havekost v. Grand Casinos of La.*, No. 2000 U.S. Dist. LEXIS 22429, at 3 (W.D. La. Dec. 8, 2000) ("Gaming activities under the IGRA do not constitute an express and unequivocal waiver of immunity from suit.")

Any suit brought against the Gaming Commission must be dismissed, unless authorized by Congress or by express waiver of tribal immunity. *See Kiowa Tribe of Oklahoma,* 523 U.S. at 754 ("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."); *Meyer & Assocs. v. Coushatta Tribe of La.*, 2007-2256 (La. 09/23/08); 992 So. 2d 446, 450 ("Congress' authorization for suit must be unequivocal and a tribe's waiver must be clear").

The Gaming Commission enjoys immunity from suit as a matter of well settled law, and has not waived that immunity with regards to any claim brought by Dotson. Therefore, the district court's dismissal, with prejudice, of all claims

against the Gaming Commission should be upheld, and Dotson's appeal should be denied.

B. Dotson Failed to Meet his Burden in Opposing the Gaming Commission's Rule 12(B)(1) Motion.

Dotson bore the burden of establishing the district court's subject-matter jurisdiction over its action against the Gaming Commission:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction. (Citations omitted.)

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

When the Gaming Commission raised a factual challenge to subject-matter jurisdiction, Dotson was required to support his jurisdictional allegations with "competent proof," *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010), under the same evidentiary standard that governs in the summary judgment context. *See Lindsey v. Sears Roebuck & Co.,* 16 F.3d 616, 618 (5th Cir. 1994); Fed. R. Civ. P. 56(c). Specifically, Dotson bore the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met. *Middle S. Energy, Inc. v. New Orleans, 8*00 F.2d 488, 490 (5th Cir. 1986); *Madrid v. Davis*, 18-00153, 2018 U.S. Dist.

LEXIS 79095, at 2 (W.D. La. May 9, 2018). Dotson failed to meet this burden, both in the district court and on appeal. He has not introduced any evidence whatsoever, competent or otherwise, that the Gaming Commission does not enjoy tribal sovereign immunity. To the contrary, Dotson admits, in the second sentence of Page 2 of his Brief, that the Gaming Commission is a "**Federally recognized Indian gaming establishment**." (Emphasis added.)

Dotson has also failed to identify any legal basis for subject-matter jurisdiction over his action against the Gaming Commission. Dotson contends, at Page 3 of his Brief, that the Gaming Commission's immunity may be "circumvented" by seeking relief against a "specific official", rather than the Tribe or Gaming Commission themselves. However, this argument has no bearing on the matter before this Court. The question of the immunity of the Tribe, and the Gaming Commission as an arm of the Tribe, which was the basis for the district court's dismissal pursuant to Rule 12(b)(1), is independent of the question of whether individual capacity suits may be brought against tribal officials. *Gingras v. Think Fin.*, Inc., 922 F.3d 112, 123 (2d Cir. 2019), *cert. denied Sequoia Capital Operations, LLC v. Gingras*, 140 S. Ct. 856, 205 L. Ed. 2d 458 (2020). Regardless of whether Dotson may, or may not, proceed against tribal officials, the Gaming Commission's immunity cannot thereby be circumvented.

Dotson also appears to assert, at Page 7 of his Brief, that the district court wrongly determined that it lacked subject-matter jurisdiction because he allegedly effected service on unspecified parties. This argument by Dotson improperly conflates the concepts of personal jurisdiction and subject-matter jurisdiction. "The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701, 102 S. Ct. 2099, 2103, 72 L. Ed. 2d 492 (1982). Proper service of process relates to personal jurisdiction but does not determine subject-matter jurisdiction. *York Grp., Inc. v. Wuxi Taihu Tractor Co.*, 632 F.3d 399, 403 (7th Cir. 2011). Dotson's argument lacks merit.

All competent evidence introduced on the question of the district court's subject-matter jurisdiction proves that the Gaming Commission, as an arm of the Tribe, enjoys tribal sovereign immunity from Dotson's suit. Dotson has failed to carry his burden of proving the contrary. The district court's dismissal, with prejudice, of Dotson's suit against the Gaming Commission was proper and should be upheld by this Court. Dotson's appeal should be denied.

2. THE DISTRICT COURT PROPERLY DISMISSED PIAZZA AND VOCARRO DUE TO DOTSON'S REPEATED FAILURES TO TIMELY EFFECT SERVICE.

The district court did not abuse its discretion in dismissing Dotson's suit for failure to timely serve Piazza and Vocarro. The record on appeal demonstrates that there was no good cause for Dotson's failure to make service, which was solely Dotson's fault. Dotson's lack of good cause warranted a dismissal pursuant to Fed. R. Civ. P. 4(M). Several months passed after the initiation of this action, before Dotson even attempted to serve Piazza and Vocarro. After failing to properly serve them in March 2019, Dotson's suit was dismissed for the first time on March 29, 2019. Despite having his suit reopened, and being granted yet another extension, until June 15, 2019, Dotson waited until June 14, 2019, to even attempt (defective) service.

Dotson's failure to prosecute his case against Piazza and Vocarro after multiple warnings from the district court, and the failure of more lenient measures to remedy his lack of diligence, warranted a dismissal with prejudice pursuant to Fed. R. Civ. P 41(b). Due to the prejudice to Piazza and Vocarro which has resulted from Dotson's failure to effect service upon them in over three years since the incident forming the basis of this litigation, it was well within the district court's discretion to dismiss Dotson's suit against these defendants with prejudice pursuant to W.D. La. LR41.3.

A. The District Court Did Not Abuse Its Discretion in Dismissing Dotson's Suit Against Piazza and Vocarro Pursuant to Fed. R. Civ. P. 12(b)(5).

The district court's dismissal of the action against Piazza and Vocarro was not an abuse of discretion. The purported June 14, 2019 service on Piazza and Vocarro was defective and not in conformity with the requirements of Fed. R. Civ. P. 4(e). The Proofs of Service filed by Dotson on June 14, 2019 (ROA.256) state that Piazza and Vocarro were served through Christy Smith, who was allegedly designated by law to accept service on behalf of the Gaming Commission. Cindy Smith is not the agent for service for the Gaming Commission or either Piazza or Vocarro, but merely verifies the sufficiency of summonses received and forwards them to the tribal police for service. ROA.349, at ¶¶ 4,5. In this case, Cindy Smith determined that the Summons issued to Piazza could not be served because Piazza was no longer employed with the Paragon Casino Resort (*Id.* at ¶ 8) and the Summons issued to Vocarro could not be served because it lacked a complete name (*Id.* at ¶ 9). Both Summonses were returned to Dotson unserved. *Id*. at ¶¶ 8,9.

The requirement for service on an individual are set forth in Fed. R. Civ. P. 4(e):

> (e) SERVING AN INDIVIDUAL WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been

> filed—may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Louisiana Code of Civil Procedure Articles 1231-1237 do not differ materially from Fed. R. Civ. P. 4(e).

Dotson did not serve the Summonses on Piazza or Vocarro personally and did not leave the Summonses at their dwellings. Dotson did not, in leaving the Summonses with Cindy Smith, effect service through Piazza or Vocarro's authorized agent. Dotson, therefore, failed to satisfy the requirement for valid service under Fed. R. Civ. P. 4(e). "Strict compliance with the service requirements contained in Rule 4 is mandatory, in part because, absent proper service, the Court lacks personal jurisdiction over a defendant." *Goodwin v. Hous. Auth. of New Orleans*, 2013 U.S. Dist. LEXIS 104396, at 44, 2013 WL 3874907

(E.D. La. July 25, 2013), *citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350-51, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999).

"A motion to dismiss pursuant to Rule 12(b)(5) turns on the legal sufficiency of the service of process. The party making service has the burden of demonstrating its validity when an objection to service is made." *Holly v. Metro. Transit Auth.*, 213 F. App'x 343, 344 (5th Cir. 2007). "Rule 12(b)(5) authorizes the court to dismiss a civil action when service of process is inadequate." *Lake Charles Cane Lacassine Mill, LLC v. Smar Int'l Corp.*, No. 07-CV-667, 2007 U.S. Dist. LEXIS 41941, at 2-3 (W.D. La. June 8, 2007). The Court has broad discretion in determining whether to dismiss a suit under Fed. R. Civ. P. 12(b)(5) for failure of service. *George v. U.S. Dep't of Labor, Occupational Safety & Health Admin.*, 788 F.2d 1115, 1116 (5th Cir. 1986).

The alleged service upon Piazza and Vocarro through the Clerk of Court for the Tunica-Biloxi Tribal Court was defective as a matter of law because it did not accomplish the personal or domiciliary service required by Fed. R. Civ. P. 4(e). Under the facts of this case, dismissal pursuant to Fed. R. Civ. P. 12(b)(5) was appropriate and not an abuse of discretion. Dotson's appeal should be denied.

B. The District Court Did Not Abuse Its Discretion in Dismissing Dotson's Suit Against Piazza and Vocarro Pursuant to Fed. R. Civ. P. 4(m).

Dotson does not have good cause for his failure to serve Piazza or Vocarro. In the eight months between the filing of suit on July 5 2018 and the reissuance of

the Summonses to Piazza and Vocarro on March 15, 2019, Dotson made no effort to serve them. In the interim, Dotson was granted one extension of time (until January 25, 2019) to effect service (ROA.5), which he ignored. Dotson was also issued **two** Notices of Intent to Dismiss for Failure to Prosecute Under LR41.3: on December 11, 2018 (ROA.111) and March 12, 2019 (ROA.148) It was not until after Dotson had received the second Notice of Intent that he requested the reissuance of Summonses to Piazza (ROA.214) and Vocarro (ROA.220). These Summonses were returned to the Clerk of Court unexecuted. (ROA.204, 208) After Dotson's suit was dismissed, on March 29, 2019, for failure to effect service (ROA.214), and then reopened on May 10, 2019 (ROA.220), Dotson was granted yet another extension of time to complete service by June 15, 2019 (ROA.220), but again failed to do so.

Fed. R. Civ. P. 4(m) requires that service be completed within 90 days after a complaint is filed, and dismissal is compulsory if a plaintiff fails to comply:

> (m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—***must*** dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows **good cause** for the failure, the court must extend the time for service for an appropriate period. . . . (emphasis added).

Dotson has failed to show good cause for his failure to timely serve Piazza and Vocarro. In a case involving a much less egregious delay than the present

matter, the Fifth Circuit upheld a dismissal of suit pursuant to Fed. R. Civ. P. 4(m). In *Thrasher v. City of Amarillo*, 709 F.3d 509, 510 (5th Cir. 2013), the *pro se* plaintiff failed to make service on the defendants within the time allowed by Fed. R. Civ. P. 4(m). The *Thrasher* plaintiff served the defendants personally with process but that service was defective. The court ordered the plaintiff to show cause why his suit should not be dismissed. The plaintiff was given an additional ten days to serve the defendants but did not attempt to do so until five months later.

> When service of process is challenged, the serving party bears the burden of proving . . . good cause for failure to effect timely service. Proof of good cause requires at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. Additionally, some showing of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified is normally required. (Citations omitted.)

Id. at 511.

The *Thrasher* plaintiff argued that, because he, like Dotson, was acting *pro se* and suffered from mental illness (and had been institutionalized for seventy days during the relevant time period) he was incapable of understanding the requirements of service. The Fifth Circuit held that neither plaintiff's *pro se* status nor his mental illness and institutionalization justified the delay in service. The Fifth Circuit held that "inadvertence, mistake of counsel, and unfamiliarity with rules . . . fall short of the excusable neglect threshold. *Id.* at 512.

The Fifth Circuit, in *Thrasher*, recognized that the trial court's dismissal under Fed. R. Civ. P. 4(m) had the effect of a dismissal with prejudice due to the applicable statute of limitations, and stated that:

> Because dismissal with prejudice is an extreme sanction . . . it is warranted only where a clear record of delay or contumacious conduct by the plaintiff' exists and a lesser sanction would not better serve the interests of justice. To warrant dismissal, we must find a delay longer than just a few months; instead, the delay must be characterized by significant periods of total inactivity. (Citations omitted.)

Id. at 512-1.

The Fifth Circuit held that there was a clear record of delay, because the *Thrasher* plaintiff failed to make service for ten months, during which time there were prolonged periods of inactivity, including a failure to attempt service until four months after filing suit. *Id.* at 513. Even when granted an extension of time, the *Thrasher* plaintiff failed to perfect service within the time allowed. The Fifth Circuit also held that this delay was aggravated because it was caused by the plaintiff himself. *Id.* at 514. In addition, the Fifth Circuit held that, because the plaintiff had failed to heed prior warnings and did not take advantage of the extension of time afforded by the district court, lesser sanctions would not serve the interests of justice:

> Because the district court's warning of dismissal and grant of extensions accompanied by generous allotments of time did not influence Thrasher to effect service properly, we cannot say that the district court abused its discretion in dismissing Thrasher's claim.

Id. at 514.

Dotson's delay in the matter now on appeal far exceeds that found in *Thrasher*. Whereas the *Thrasher* plaintiff did not attempt service on the defendants for four months after filing suit, Dotson waited over eight months, until March 2019, before first attempting service on Piazza and Vocarro. Dotson did not attempt service on Piazza and Vocarro again until June 14, 2019, the day before the second extension of time expired. By this time, over eleven months had passed since Dotson had filed suit, almost five months had passed since the end of Dotson's first extension of time, and thirty days had passed since Dotson's suit was reopened. In the interim, Dotson had been warned ***twice*** by the district court, had seen his suit ***dismissed*** once, and had exhibited prolonged periods of inactivity. Dotson, who is unrepresented, was solely responsible for these delays, and is not excused by his unfamiliarity with the Federal Rules of Civil Procedure. Dotson, like the *Thrasher* plaintiff, has failed to meet his burden of showing good cause for his failure to serve Piazza and Vocarro. The district court did not abuse its discretion in dismissing his suit.

C. The District Court Did Not Abuse Its Discretion in Dismissing Dotson's Suit Against Piazza and Vocarro with Prejudice Pursuant to Fed. R. Civ. P. 41(b).

The same facts that supported the district court's dismissal of Dotson's claims against Piazza and Vocarro pursuant to Fed. R. Civ. P. 12(b)(5) and 4(m)

also supported the district court's dismissal pursuant to Fed. R. Civ. P. 41(b). Rule 41(b) provides for the dismissal of an action for failure to prosecute:

> **(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

A dismissal for failure to prosecute pursuant to Rule 41(b) is with prejudice. "A Rule 41(b) dismissal for failure to prosecute, however, is a complete adjudication on the merits, and thus with prejudice unless the order states otherwise." *Mastronardi v. Wells Fargo Bank, Nat'l Ass'n*, 653 F. App'x 356, 358 n.2 (5th Cir. 2016). A dismissal under Fed. R. Civ. P. 41(b) can be made if there is a "clear record of delay or contumacious conduct by the plaintiff, and the record shows that the district court employed lesser sanctions that proved to be futile." *Berry V. Cignarsi-Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992). The district court was permitted to take into account three aggravating factors: the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct. *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 418 (5th Cir. 2006). Delay alone can result in prejudice to defendants as

"evidence deteriorates or disappears, memories fade, and witnesses die or move away." *Id.* A delay between filing and service is particularly serious, because it deprives defendants of notice, and impacts their ability to prepare a defense. *Veazey v. Young's Yacht Sale & Serv., Inc.*, 644 F.2d 475, 478 (5th Cir. 1981).

Dotson's failure to prosecute his suit against Piazza and Vocarro warranted a dismissal with prejudice pursuant to Fed. R. Civ. P. 41(b). First, as set forth in the preceding section, there is a clear and undeniable record of inexcusable delay, and the district court was both patient and generous in allowing Dotson repeated extensions of time to perfect service, which failed to induce Dotson to comply with the rules of service. The delay in service was solely Dotson's fault, and he has offered no good cause for the delay. Second, Piazza and Vocarro have been unquestionably prejudiced because they have still not received notice of this suit, over three years from the incident in question, and have been deprived of the opportunity to gather evidence and interview witnesses. This is confirmed by the fact that, in the three years since the incident, Piazza has left her job at the Paragon Casino Resort, limiting her ability to confer with relevant personnel and to examine evidence, including the slot machine which allegedly produced Dotson's jackpot. Finally, it is apparent that Dotson's failures were willful. Whatever excuse Dotson may offer, he has had three years to inform himself of the federal rules regarding service but has still clearly failed to do so.

D. The District Court did Not Abuse Its Discretion in Dismissing Dotson's Suit Against Piazza and Vocarro with Prejudice Pursuant to W.D. La. LR41.3.

Due to the clear prejudice to Piazza and Vocarro resulting from Dotson's failure to perfect service, the district court did not abuse its discretion in dismissing this suit as to Piazza and Vocarro. W. D. La. LR41.3 also permits for the dismissal of Dotson's suit with prejudice for failure to serve Defendants within 90 days, when that failure results in prejudice to adverse parties:

> LR41.3 Dismissal for Failure to Prosecute
>
> A civil action may be dismissed by the clerk of court or any judge of this court for lack of prosecution as follows:
>
> A. Where no service of process has been made within 90 days after filing of the complaint;
>
> . . .
>
> Dismissal under this rule shall be without prejudice ***unless delay has resulted in prejudice to an opposing party***. The Order of Dismissal shall allow for reinstatement of the civil action within 30 days for good cause shown.

As set forth in the preceding sections, Piazza and Vocarro have not been served in over two years since the initiation of this litigation, and more than three years have elapsed since the incident giving rise to this litigation. Piazza and Vocarro have been deprived of notice of this suit, and the opportunity to prepare their defense. Evidence and witnesses have been lost. In light of the clear

prejudice to Piazza and Vocarro, the district court did not abuse its discretion in dismissing Dotson's suit with prejudice.

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CONCLUSION

The March 26, 2020 Judgment of the District Court dismissing, with prejudice, Plaintiff-Appellant's suit as to the Gaming Commission, Lori Piazza, and "Ms. Vocarro" should be upheld. Plaintiff-Appellant failed to meet his burden of proving the existence of subject-matter jurisdiction. The district court lacked subject matter jurisdiction over the claims against the Gaming Commission, which has tribal sovereign immunity as an arm of the Tunica-Biloxi Tribe of Louisiana. Furthermore, Plaintiff-Appellant's lacks good cause for his failure to properly and timely serve Piazza and Vocarro. The indisputable record of delay and inactivity by Plaintiff-Appellant in attempting service, and the prejudice to Lori Piazza and Vocarro arising from that delay, warranted a dismissal with prejudice. The district court did not err or abuse its discretion in dismissal all three Defendant-Appellees with prejudice.

Respectfully submitted,

ADAMS HOEFER HOLWADEL, LLC

/s/ D. Russell Holwadel

D. RUSSELL HOLWADEL (#16975) T.A
Email: drh@ahhelaw.com
400 Poydras Street, Suite 2450
New Orleans, Louisiana 70130
Telephone: (504) 581-2606
Facsimile: (504) 525-1488
Attorneys for Appellees
Tunica-Biloxi Gaming Commission,
Lori Piazza, and Ms. Vocarro

CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically filed on the 29th day of July, 2020, using the court's CM/ECF system which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this brief was served on the *pro se* plaintiff at his most current address of record via First Class United States Mail postage prepaid.

/s/ D. Russell Holwadel
D. RUSSELL HOLWADEL

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of this document exempted by Fed. R. App. P. 32(f), this document contains approximately 6,220 words. This document was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ D. Russell Holwadel July 29, 2020
D. RUSSELL HOLWADEL **DATE**
Attorneys for Appellees
Tunica-Biloxi Gaming Commission,
Lori Piazza, and Ms. Vocarro