

1 Maria C. Roberts, SBN 137907
mroberts@greeneroberts.com
2 Ryan Blackstone-Gardner, SBN 208816
rbg@greeneroberts.com
3 GREENE & ROBERTS
402 West Broadway, Suite 1025
4 San Diego, CA 92101
Telephone: (619) 398-3400
5 Facsimile: (619) 330-4907

6 Attorneys for ***Specially Appearing*** Defendants Caesars
Enterprise Services, LLC and Caesars Entertainment,
7 Inc.

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 DARRELL PILANT,

12 Plaintiff,

13 v.

14 CAESARS ENTERPRISE
SERVICES, LLC, a limited
15 liability corporation; CAESARS
ENTERTAINMENT, INC., a
16 corporation; and DOES 1
through 20, inclusive,

17 Defendants.
18

Case No. 3:20-CV-2043-CAB-AHG
District Judge: Hon. Cathy Ann Bencivengo
Mag. Judge: Hon. Allison H. Goddard

Action Date: August 31, 2020

**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS BY ***SPECIALLY
APPEARING*** DEFENDANTS, CAESARS
ENTERPRISE SERVICES AND
CAESARS ENTERTAINMENT, INC.,
FOR FAILURE TO NAME AN
INDISPENSABLE PARTY AND
FOR LACK OF JURISDICTION**

[Pursuant to FRCP Rule 12(b)(2), Rule
12(b)(7) and Rule 19]

ACCOMPANYING DOCUMENTS:
OBJECTIONS TO EVIDENCE

Date: November 27, 2020
Courtroom: 15-A

**PER CHAMBERS RULES, NO ORAL
ARGUMENT UNLESS SEPARATELY
ORDERED BY THE COURT**

Greene & Roberts
402 West Broadway, Suite 1025
San Diego, CA 92101
(619) 398-3400

I.

INTRODUCTION

Contrary to the arguments in PILANT's opposition, this case is centered entirely on the decision by the Rincon Band to reopen its Casino on May 22, 2020. Every one of PILANT's claims is premised on the Rincon Band's decision to reopen its Casino, which is referenced in 23 paragraphs of the complaint. (Dkt. 1-5.) The effort to downplay the role of the Rincon Band and its decisions related to Casino operations, exposes the impropriety of PILANT's case and the strategy he is attempting to employ which violates Rule 19 and the rights and protections afforded to both the Rincon Band and *Specially Appearing* Defendants.

PILANT's assertion that this is an employment case between him and his former employer that does not involve the Rincon Band is false. The complaint does not genuinely involve an employment dispute between PILANT and either *Specially Appearing* Defendant. Caesars Entertainment, Inc. ("CEI") did not even exist until months after PILANT quit his job and had no relationship with PILANT. (Dkt. 3-5, ¶¶4-5.) As to Caesars Enterprise Services ("CES"), there is no evidence of any actionable conduct on its part at all. CES had no role whatsoever in the decision to reopen the Casino or in PILANT's decision to quit his job.

Despite the downplaying of the proverbial *elephant in the room*, PILANT's complaint is an attack on governmental decisions made by the Rincon Band to reopen its essential business, after it complied with the requirements of the federal government, acting through the National Indian Gaming Commission ("NIGC") and the Department of the Interior. The complaint is not only an assault on the Rincon Band's decision-making but an effort to use its own decisions against it for PILANT's personal economic gain. (Dkt. 3-7 [**"I fully expect that the company will honor the one year severance in my employment agreement (which is paid by the tribe as part of our management agreement.)"**].) In other words, as PILANT admits, he wants money from the Rincon Band, but seeks it indirectly by

1 suing *Specially Appearing* Defendants. This admitted end-run around the tribal
 2 sovereign immunity is not permissible and runs afoul of the laws that protect
 3 federally-recognized Indian tribes from suit.

4 Tellingly, in his opposition PILANT does not respond to the law or evidence
 5 cited in the moving papers, which mandate dismissal. Instead, he relies on unrelated
 6 authority and facts that are immaterial, such as the recent sale of Caesars, the profits
 7 of the Casino and “multi-billion corporation” [*sic*]. He also attempts to capitalize on
 8 the misfortune associated with the COVID pandemic, by making hollow statements
 9 about the health of the Casino, and he boasts about publicity garnered for his
 10 lawsuit. But, again, none of this has anything to do with the instant motion.

11 PILANT knows his case is improper and his hope is to avoid dismissal by
 12 misleading, misdirecting and playing the victim. This strategy is ill-considered and
 13 does not provide a basis to avoid dismissal of the case.

14 II.

15 LEGAL ARGUMENT

16 A. The Rincon Band is a Required Party Under Rule 19(a).

17 In his opposition, PILANT complains about the factual and legal background
 18 provided in the moving papers regarding the Rincon Band. However, the rights,
 19 responsibilities and protections afforded to the Rincon Band as a sovereign nation
 20 and as the owner of an Indian casino on its reservation, demonstrates that it is a
 21 required party to this lawsuit under Rule 19(a). This case is centered on the Rincon
 22 Band’s decision to reopen its Casino. PILANT seeks financial compensation from
 23 the Rincon Band as a result of that decision, but because he cannot sue the Rincon
 24 Band he has taken the indirect route to the relief he seeks. PILANT’s failure to sue
 25 the Rincon Band (which he admits he cannot do), does not mitigate the critical role
 26 of the decision to reopen the Casino in this case or the potential impact of the case
 27 on the Rincon Band’s sovereign authority, economic interests and fundamental
 28 right to manage its affairs, including through contractual relationships with others.

One of the most challenging decisions the Rincon Band has had to make in recent years involved the closing and planned reopening of its Casino due to the COVID-19 pandemic. (Dkt. 3-2, ¶¶12-15.) Like many tribal governments, the Rincon Band was faced with the compelling need to fund government services through revenue generation from its essential businesses, while balancing that need against providing a safe environment for all. (*Id.*) The Rincon Band developed a business and jobs recovery task force, followed governmental guidance, and worked in lockstep with the NIGC and CDC to establish a comprehensive plan for reopening the Casino. (*Id.*) As Governor Newsom recognized, the reopening of tribal casinos is left to tribal governments, not the state. (Dkts. 1-5, ¶18; 3-9 [**I am not asking that tribal governments receive authorization from the state or local governments prior to moving forward . . . However, in the spirit of sovereign-to-sovereign engagement . . .**].)

PILANT’s entire complaint is premised upon the Rincon Band’s decision to reopen, even though he carefully avoided alleging in his complaint who actually made that decision and now dismisses that decision as one that “does not really matter.” (Dkt. 4, p. 2:7.) But, that decision does matter. It forms the basis for all four claims pled by PILANT and is cited in 50% of his complaint. And, as PILANT admitted before he became a plaintiff: **“The tribe is planning to open this facility on Friday, May 22nd . . .”** (Dkt. 3-7.) PILANT also noted the decision to reopen the Casino was “against the *direction* and *guidance*” of county and state governments,” thereby acknowledging that the Rincon Band, is subject only to “*guidance*” and “*direction*,” and not to the mandates of State and local governments.

The decision to reopen the Casino is not subject to attack, directly or indirectly, given the sovereignty of the Rincon Band. *Michigan v. Bay Mills Indian Comm.*, 572 U.S. 782, 788 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57–58 (1978); *Tamiami Partners, LTD. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523

1 U.S. 751, 754 (1998); *Warburton Buttner v. Sup. Ct.* 103 Cal.App.4th 1170, 1182
 2 (2002). Congress long-ago recognized the need and right of Indian nations to self-
 3 govern and to do so free from interference (and liability) from outsiders, like
 4 PILANT.¹ *Williams v. Lee*, 358 U.S. 217, 223 (1959). The Supreme Court has
 5 consistently guarded the authority of Indian governments over their reservations, as
 6 Indian nations are a separate people with power to regulate internal and social
 7 relations and transactions involving their reservations. *Id.* at 223; *Santa Clara*
 8 *Pueblo, supra*, 436 U.S. at 54.

9 PILANT argues in the opposition the Rincon Band violated federal law by its
 10 decision to reopen, but argues any adverse judgment would not impact the Rincon
 11 Band because it must operate the Casino safely. (Dkt. 4, pp. 4, 9, 11-12). In fact, the
 12 opposite is true. The Rincon Band complied with the NIGC guidelines and
 13 followed the guidance of the CDC. (Dkt. 3-2, ¶¶ 13-14.) Nonetheless, PILANT’s
 14 claim that the Casino was not operated safely could expose the Rincon Band to a
 15 finding that it violated the Secretarial Procedures and NIGC regulations which
 16 could subject it to an enforcement action by the federal government. Thus, although
 17 PILANT’s assertions are unfounded and lack evidentiary support, they could still
 18 adversely impact the Rincon Band and any suggestion to the contrary is absurd.

19 This case simply cannot be litigated without trampling on the sovereignty of
 20 the Rincon Band and requiring it to explain/defend its decision to reopen its Casino.
 21 It undermines the ability of the Rincon Band to govern and make decisions for the
 22 well-being of tribal members and the Reservation. It interferes with the right of the
 23 Rincon Band to enter into contractual agreements, including with its NIGC-
 24 approved managing agent and exposes the Band to liability for PILANT’s claims
 25 for money which he contends must be “***paid by the tribe*** . . .” (Dkt. 3-7, emphasis
 26 added). Therefore, under Rule 19(a)(1)(B)(i), the Rincon Band is a required party.

27 ¹ PILANT submitted no evidence that he was “forced to resign,” was constructively discharged,
 28 “blew the whistle” on the public decision by the Rincon Band to reopen its Casino, or that
Specially Appearing Defendants breached an obligation to him. (Dkt. 4-6.)

1 Allowing this case to proceed in the absence of the Rincon Band will also put
 2 *Specially Appearing* Defendants at risk of double and/or inconsistent obligations.
 3 Fed. Rule Civ. Proc. 19(a)(1)(B)(ii). ***On the one hand***, the law requires the Rincon
 4 Band to act with “the sole proprietary interest and responsibility for the conduct of
 5 any gaming activity,” and ensure gaming revenue is used properly, including to
 6 provide support for tribal members. 29 U.S.C. §2701(4)(5) and *Specially Appearing*
 7 Defendants have no right or ability to interfere with such legal obligations. ***On the***
 8 ***other hand***, *Specially Appearing* Defendants are being sued by PILANT for not
 9 interfering with the Rincon Band’s exercise of its statutory authority and they face
 10 liability for decisions they did not make. CEI did not even exist when the Casino
 11 reopened and CES had no role in the decision to reopen. (Dkts. 3-5, ¶5; 3-6, ¶3.)

12 This case puts *Specially Appearing* Defendants in an untenable and
 13 indefensible position, that cannot be reconciled by law and mandates dismissal.

14 **B. The Rincon Band is An Indispensable Party That Cannot Be Joined.**

15 Under Rule 19(b), this case cannot proceed without the Rincon Band, as it
 16 effectively forces the Band to either defend its actions/decisions or leave the case
 17 without a defense, prejudicing it and *Specially Appearing* Defendants. The assertion
 18 that PILANT is not pursuing claims against the Rincon Band and the case outcome
 19 would not bind the Rincon Band is false and belied by the evidence, which prove
 20 his target is the Rincon Band. (Dkts. 3-7; 3-2, ¶17.) It is also contradicted by the
 21 complaint which is premised entirely on the Rincon Band’s decision to reopen.

22 PILANT’s position that he will have no adequate remedy if the case is
 23 dismissed is not material in a case involving the conduct and/or decisions of a
 24 sovereign nation. In fact, whether an adequate remedy or alternative forum exists is
 25 not even determinative in the Ninth Circuit, which has repeatedly held dismissal is
 26 required of cases in which sovereign tribes must but cannot be joined. *Quileute*
 27 *Indian Tribe v. Babbitt* 18 F.3d 1456, 1460 (9th Cir. 1994); *Makah Indian Tribe v.*
 28 *Verity*, 910 F.2d 555, 560 (9th Cir. 1990); *Confed. Tribes of Chehalis Indian Resv.*

1 *v. Lujan* 928 F.2d 1496,1498 (9th Cir. 1991); *Clinton v. Babbitt*, 180 F.3d 1081,
 2 1090 (9th Cir. 1999). PILANT’s interest in litigating his claims is not outweighed
 3 by the Rincon Band’s sovereign immunity. *Confed. Tribes of Chehalis, supra*, 928
 4 F.2d at 1500. Thus, Rule 19(b) also mandates dismissal of this action.

5 **C. There Was No Waiver of the Rincon Band’s Sovereign Immunity.**

6 In perhaps his most inventive argument, PILANT contends that “Caesars”
 7 waived the Rincon Band’s sovereign immunity. Not surprisingly, he has no
 8 authority for this position, as none exists. Sovereign immunity is a protection vested
 9 in the Rincon Band as a sovereign that cannot be waived by anyone other than the
 10 Rincon Band itself. *Bodi v. Shingle Springs Band of Miwok Indians* 832 F.3d 1011,
 11 1016 (9th Cir. 2016); *quoting Three Affiliated Tribes of Fort Berthold Reservation*
 12 *v. World Eng’g, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

13 Waiver of tribal sovereign immunity “cannot be implied but must be
 14 unequivocally expressed.” *Bodi, supra*, 832 F.3d at 1016; *Santa Clara Pueblo*, 436
 15 U.S. 49, 58 (1978). The intent to waive must manifest the tribe’s intent to surrender
 16 immunity in “clear” and unmistakable terms. *C & L Enters. v. Citizen Band*
 17 *Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Absent a clear waiver by a
 18 tribe or congressional abrogation, suits against tribes are barred. *Bodi, supra*, 832
 19 F.3d at 1071; *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe* 498 U.S. 505,
 20 509 (1991); *Michigan v. Bay Mills Indian Cmty.* 134 S.Ct. 2024, 2030–31 (2014).

21 Here, there is no evidence the Rincon Band waived its sovereign immunity
 22 with regard to PILANT or any aspect of his complaint. The fact that *Specially*
 23 *Appearing* Defendant CES entered into an agreement with PILANT does not by
 24 any measure constitute a waiver under the law, much less a “clear and unequivocal
 25 waiver” by the Rincon Band. Thus, the waiver argument is meritless.

26 **D. PILANT Failed to Address or Cite Any Binding Legal Authority.**

27 In his opposition, PILANT failed to discuss, analyze or distinguish any of the
 28 27 cases cited in the moving papers, which affirm dismissal of dozens of cases

under Rule 19 where Indian Tribes were a required and indispensable party, but could not be joined. *See, Conf. Tribes of Chehalis Indian, supra*, 928 F.2d 1496 (dismissal under Rule 19 proper as Quinault Indian Nation was a necessary party to the action); *Shermoen v. United States* 982 F.2d 1312, 1317 (9th Cir. 1992); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020) (Case challenging NIGC's approval of gaming ordinance cannot proceed in Tribe's absence); *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 852 (9th Cir. 2019) (Case challenging tribal business cannot proceed without Tribe); *Friends of Amador Cty v. Salazar*, 554 Fed. Appx. 562, 564 (9th Cir. 2014) (Case challenging eligibility of Tribe for tribal gaming cannot proceed in its absence); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018); (Case challenging fishing rights of a Tribe cannot proceed); *Am. Greyhound Racing, Inc. v. Hall*, 305 F.3d at 1022 (9th Cir. 2002) (Lawsuit to enjoin gaming compacts with tribes dismissed under Rule 19 as tribes had an interest in and were indispensable parties to the action); *Dawavendewa v. Salt River Project Agr. & Power Dist.*, 276 F.3d 1150, 1155-58 (9th Cir. 2002) (Tribe is necessary and indispensable party to employment case challenging job preferences for members); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989)(Tribe necessary party to action seeking to enforce lease agreement it signed); *Quileute Indian Tribe, supra*, 18 F.3d 1460; *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

In disregard of decades of binding precedent supporting the congressional intent to promote tribal self-governance and independence, PILANT cites a single case he argues refutes the application of sovereign immunity here. The case is factually and legally inapposite. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) involved a personal injury lawsuit against an individual who caused an accident while driving a casino vehicle on a state highway. The defendant, an employee of the Mohegan

1 Tribal Gaming Authority, moved to dismiss on the grounds that, as a tribal
 2 employee, he was entitled to sovereign immunity. *Id.* at 1286. On appeal, the
 3 United States Supreme Court held, because the tribe was not named nor a real
 4 party-in-interest, sovereign immunity did not apply and is not extended to those
 5 who otherwise do not fall under its protective cloak. *Id.* at 1287.

6 The issues here have nothing to do with personal injury claims against a
 7 casino employee for an accident on a state road and no argument has been made by
 8 *Specially Appearing* Defendants that they are protected by sovereign immunity.
 9 Rather, PILANT's lawsuit seeks money for his decision to quit his job at the Casino
 10 after the Rincon Band made the governmental decision that it be reopened. (Dkt. 1-
 11 5.) And, again, as PILANT made clear in his resignation letter when he demanded a
 12 year of pay after his resignation, he expected that amount to be "**paid by the tribe.**"
 13 (Dkts. 3-7.) This exposes the deceit in his claim that this case will not operate
 14 against or hurt the tribe's property and reveals his hope to force the Rincon Band to
 15 pay for its decisions.

16 **E. PILANT Failed to Establish Specially Appearing Defendants Are**
 17 **Subject to The Personal Jurisdiction of This Court.**

18 In order for the Court to exercise specific jurisdiction over *Specially*
 19 *Appearing* Defendants, PILANT was required to establish an affiliation between a
 20 specific defendant and the underlying controversy. *Bristol-Myers Squibb Co. v.*
 21 *Sup. Ct.*, 137 S.Ct. 1773, 1781 (2017). Without proof of such a connection, specific
 22 jurisdiction may not be asserted, regardless of the unconnected activities of a
 23 defendant in the forum state. *Id.*, citing *Goodyear Dunlop Tires Operations, S.A. v.*
 24 *Brown*, 564 U.S. 915, 918 (2011). Nonresident defendants, such as *Specially*
 25 *Appearing* Defendants, are also not subject to specific jurisdiction in a forum state,
 26 unless it is proven they purposefully availed themselves of forum benefits and the
 27 "controversy is related to or arises out of a defendant's contacts with the forum."
 28 *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1994).

1 Thus, for *Specially Appearing* Defendants to be subject to specific
 2 jurisdiction in California, PILANT had to prove: (1) they engaged in acts or
 3 transactions by which they purposefully availed themselves of the privilege of
 4 conducting activities in California; (2) this lawsuit arises out of these specific forum
 5 -related activities; and, (3) the exercise of jurisdiction over them is reasonable and
 6 fair. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993);
 7 *Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997).

8 Despite the obligation and opportunity to do so, PILANT did not make the
 9 required showing to justify the exercise of jurisdiction over *Specially Appearing*
 10 Defendants. There is no showing of specific acts or transactions engaged in by **each**
 11 of the *Specially Appearing* Defendants, that demonstrates purposeful availment by
 12 them of the privilege of conducting activities in California. He did not to establish
 13 specific “forum-related activities” that make the exercise of jurisdiction over
 14 *Specially Appearing* Defendants “fair and reasonable.” He improperly lumped them
 15 together, despite being separate legal entities, and refers to them as “Caesars,”
 16 making it impossible to determine which arguments he is making as to each.

17 As to *Specially Appearing* Defendant CEI, PILANT failed to explain how,
 18 under any fact or law, it could be liable to him when it did not even exist until
 19 months after PILANT quit his job. (Dkt. 3-5, ¶¶3-5.) As to *Specially Appearing*
 20 Defendant CES, he presented no evidence of actionable conduct by CES related to
 21 any claim pled. (Dkt. 4-6.) PILANT’s failure to meet his burden on specific
 22 jurisdiction is a separate ground for dismissal of his case.

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