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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

)	No.: CV 19-05133-PHX-JAT (JFM)
Dexter Delbert Loring,)	
)	
Plaintiff,)	DEFENDANTS' REPLY TO
v.)	PLAINTIFF'S RESPONSE TO
)	DEFENDANTS' MOTION TO
William Daly et al.,)	DISMISS
)	
Defendant)	

Defendants William Daly and Dean Lee ("Tribal Directors"), by and through undersigned counsel, hereby reply to Plaintiff's Response to Defendants' Motion to Dismiss. This Reply is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff has the burden of proof to establish subject matter jurisdiction. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F. 3d 1115 (9th Cir. 2010). The Court must dismiss this case because Plaintiff has failed to meet this burden. Critically, Plaintiff's Response fails to adequately address Tribal Directors' sovereign immunity, arguably conceding that Tribal Directors are entitled to its protection. The Response

1 also entirely fails to address the failure to state a claim arguments. The failure to
 2 address these arguments is a concession under the law. *See Travelers Cas. Ins. Co. of*
 3 *Am. v. Geragos & Geragos*, CV 20-3619 PSG (EX), 2020 WL 6156584, at *5 (C.D.
 4 Cal. Oct. 19, 2020); *Citizens for Free Speech, LLC v. County of Alameda*, 338 F. Supp.
 5 3d 995, 1005 (N.D. Cal. 2018), *aff'd*, 953 F.3d 655 (9th Cir. 2020) (“By failing to
 6 respond to the County's contention, Plaintiffs have effectively conceded its validity.”);
 7 *Hopkins v. Women’s Div., General Bd. Of Global Ministries*, 238 F. Supp. 2d 174, 178
 8 (D.D.C. 2002) (“It is well understood in this Circuit that when a plaintiff files an
 9 opposition to a motion to dismiss addressing only certain arguments raised by the
 10 defendant, a court may treat those arguments that plaintiff failed to address as
 11 conceded.”).

12 To be sure, this Court must “construe *pro se* filings liberally” and hold *pro se*
 13 prisoner complaints “to less stringent standards than formal pleadings filed by lawyers.”
 14 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). But once the Court has afforded the
 15 plaintiff the benefit of the doubt, *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.
 16 1985), even a *pro se* plaintiff should be required to comply with the rules and “show[]
 17 that [he] is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added); *Ashcroft v.*
 18 *Iqbal*, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter,
 19 accepted as true, to ‘state a claim to relief that is plausible on its face.’”). By failing to
 20 address substantive arguments in favor of tribal sovereign immunity and by failing to
 21 dispute that Plaintiff is not entitled to relief from Tribal Directors under federal law,
 22 Plaintiff has wholly conceded the merit of these arguments. The Court should grant the
 23 Motion to Dismiss for the reasons set forth below.

24 **I. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE** 25 **COURT LACKS SUBJECT MATTER JURISDICTION**

26 Sovereign immunity is a foundational issue which “involves a court’s power to
 27 hear a case[.]” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Thus, it “can never
 28 be forfeited or waived.” *Id.* If the Court does not have jurisdiction, it cannot adjudicate

1 the merits of a case and the case must be dismissed. *Id.*; Fed. R. Civ. P. 12(h)(3) (“If the
 2 court determines at any time that it lacks subject-matter jurisdiction, the court must
 3 dismiss the action.”) (emphasis added).¹

4 **A. Plaintiff concedes that tribal sovereign immunity bars the Complaint.**

5 Plaintiff’s Response fails to adequately address the substantive sovereign immunity
 6 arguments in the Motion to Dismiss, thus conceding its merit. The Motion to Dismiss
 7 established that this case should be dismissed under Fed. R. Civ. P. Rule 12(b)(1)
 8 because Tribal Directors have sovereign immunity, and no waiver permits this suit.
 9 (Motion to Dismiss 2–3, 5–10). Specifically, Tribal Directors established that as
 10 directors of a tribal government department, they are entitled to sovereign immunity
 11 under tribal and federal law. (Mot. Dismiss 2–3 (“*See e.g.*, Sec. 23-20, Tribal Code
 12 (noting that the “sovereign immunity of the Community, its divisions, agents, entities,
 13 instrumentalities, employees or officials” can only be waived by the SRPMIC); *see also*
 14 *Drake v. Salt River Pima-Maricopa Indian Cmty.*, 411 F. Supp. 3d 513, 520 (D. Ariz.
 15 2019).”). Tribal Directors also established that Plaintiff did not allege waiver of that
 16 immunity to permit this suit, (Mot. Dismiss 8–9), and in fact waiver does not exist.

17 Plaintiff’s Response does not contest these points. Plaintiff only makes
 18 conclusory arguments not supported by any law at all. Plaintiff first argues that the
 19 Court has subject matter jurisdiction over claims that arise on “tribal land when a crime
 20 is committed, or certain rights are violated[.]” (Plaintiff’s Response at 1). Plaintiff
 21 concludes that anyone’s rights should be a priority when a person of authority controls
 22 those rights in violation of laws like RLUIPA. (*Id.*) The Court should reject this
 23 argument. Plaintiff does not offer a shred of legal support for this argument and the
 24 limited circumstances where this Court may have subject matter jurisdiction over tribal
 25 government officials for conduct that arose on tribal land are simply not present here,
 26

27 ¹ Furthermore, “immunity entitles a [sovereign] not only to protection from liability, but
 28 also from suit, including the burden of discovery, as a party, within the suit.” *Univ. of*
Tex. at Austin v. Vratil, 96 F.3d 1337, 1340 (10th Cir. 1996).

1 nor were they alleged by Plaintiff (*see e.g.*, offenses subject to the Major Crimes Act,
2 18 U.S.C. § 1153).

3 Plaintiff's next argument is merely a statement of his belief that tribal sovereign
4 immunity should not protect Tribal Directors from this suit. (Pl.'s Resp. 3). The Court
5 should reject this assertion as well. It is well-established that Indian tribes enjoy tribal
6 sovereign immunity from suit which extends to the governmental activities of the tribe.
7 *See Kiowa Tribe of Oklahoma v. Manf. Tech. Inc.*, 523 U.S. 751, 760 (1998). The
8 immunity protects tribal government employees from suit where tribal employees are
9 sued in their official capacities for conduct taken within the scope of their tribal
10 authority. *See Pistor v. Garcia*, 791 F.3d 1104, 1114–15 (9th Cir. 2015); *Kiowa*, 523
11 U.S. at 754 (“[A]n Indian tribe is *only* subject to suit where Congress has authorized the
12 suit or the tribe has waived its immunity.”) (emphasis added). And any waiver of tribal
13 sovereign immunity must be clear and “unequivocally expressed.” *Santa Clara Pueblo*
14 *v. Martinez*, 436 U.S. 48, 59 (1978). Plaintiff's Response does not argue that Congress
15 has authorized, or the Salt River Pima Maricopa Indian Community (the “Community”)
16 has waived the Tribal Directors' sovereign immunity to permit this suit, or that an
17 express waiver exists.

18 Moreover, Plaintiff's Response again does not allege Tribal Directors acted in
19 their individual capacities. In fact, Plaintiff does not allege Tribal Directors took any
20 action outside of the scope of their tribal authority. Plaintiff's Response confirms that
21 Plaintiff seeks to hold the *Community* accountable for the conduct of its Tribal
22 Directors, and thus, this is an official capacity suit. *See Pistor*, 791 F.3d at 1113.
23 Plaintiff requests this Court award \$2 million in punitive damages and to compel the
24 Community to change its policies. In Plaintiff's own words, he seeks an “excessive”
25 amount in damages and “remodification of tribal policy that involve the Salt River
26 Department of Corrections.” (Pl's Resp. 4–5). The Community is not a party to this
27 case, yet Plaintiff seeks relief that would undoubtedly weigh on the public treasury and
28

1 interfere with the Community's administration. In cases such as the one at bar, tribal
2 sovereign immunity surely protects Tribal Directors in their official capacities.

3 In sum, Tribal Directors were acting within the scope of their official
4 government capacities as Salt River Department of Corrections ("Salt River DOC")
5 administrative directors at all times relevant to the allegations in the Complaint. As
6 officials of a tribal government department engaged in purely intramural matters of
7 public safety, Tribal Directors enjoy the same tribal sovereign immunity as the
8 Community. Plaintiff concedes "there are laws that protect the Defendant," (Pl.'s Resp.
9 3), but failed to allege that well-established tribal sovereign immunity has been waived.
10 Plaintiff failed to allege this fact because waiver simply does not exist and thus,
11 Plaintiff is barred from bringing suit against Tribal Directors.

12 **B. Plaintiff's Response fails to support that he has standing to sue.**

13 Plaintiff admits he is no longer incarcerated Salt River DOC, (Pl.'s Resp. 2), and
14 thus, he has conceded that he does not have standing to sue. Plaintiff's only argument
15 for standing is "the personal fact and witness, that Director Daly did not act accordingly
16 under tribal and Community law[.]" (Pl.'s Resp. 1-2). To support this argument,
17 Plaintiff makes new factual allegations in his Response not contained in the Complaint.
18 Plaintiff alleges, among other new facts, that throughout 2018 to 2020, he was not able
19 to participate in sweat lodge despite months of good behavior. He also claims that he
20 was prevented from sweat lodge because there was a staff shortage and that three
21 officers (Vaught, Gilardo, and Little) told Plaintiff there was an adequate number of
22 staff. (Pl.'s Resp. 1-2).

23 The Court should reject this argument for two reasons. First, Plaintiff's new
24 factual allegations are insufficient to confer Plaintiff with standing to sue Tribal
25 Directors. The issue of whether Plaintiff's rights to sweat lodge were violated and
26 whether Plaintiff can seek injunctive relief for said violations "become[s] moot if
27 Plaintiff is not properly retained in [prison confinement]." *Hernandez v. Schriro*, 357
28 Fed. Appx. 747, 749 (9th Cir. 2009) (unpublished); see *City of Los Angeles v. Lyons*,

461 U.S. 95, 102 (1983) (explaining that plaintiff must allege an actual case or controversy to bring a claim in federal court and “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”). Second, the Court should reject any new factual allegations because they are outside the scope of the Complaint. Thus, Plaintiff’s Response fails to establish standing, and the Court should dismiss the Complaint for lack of subject matter jurisdiction on this ground as well.

II. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFF CONCEDES THAT HE FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED

This case should be dismissed under Fed. R. Civ. P. Rule 12(b)(6) because Plaintiff has failed to state a claim. Plaintiff is not entitled to relief under any interpretation of facts as set forth in his Complaint for several reasons.

A. Plaintiff concedes that he failed to state a claim under 42 U.S.C. § 1983 (“Section 1983”) for violation of his exercise of religion based on tribal conduct without alleging state law was involved.

Section 1983, which forms the basis of Plaintiff’s Complaint, does not apply to Tribal Directors because Tribal Directors did not act under color of state law. The law is clear. To prevail in a Section 1983 claim, Plaintiff must show that (1) acts by the Tribal Directors (2) under color of state law (3) deprived him of federal rights, privileges or immunities and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163–64 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d 1278, 1284 (9th Cir. 1994)).

Plaintiff concedes that “Defendant Daly did not act accordingly under *tribal* and *community* law,” his conduct occurred “on tribal lands,” and the Community is a “sovereign nation.” (Pl.’s Resp. 1–2, 6 (emphasis added)). Tribal law applied to the conduct in question. Further, Plaintiff did not rely on any state law or action in his Response. Instead, Plaintiff argues that the Federal Bureau of Prisons and Arizona

Department of Corrections policies should apply to Salt River DOC operations. (Pl.'s Resp. 4). The Court should reject these assertions for many reasons. First, the question is whether Tribal Directors acted under state law or in concert with state actors; therefore, whether *federal* prison guidance applies to the operation of the Salt River DOC is irrelevant. Second, The Community fully controls its Law and Order Program including the Salt River DOC which was established by the Community's Council in 2000. (Mot. Dismiss 3). Salt River DOC is also located on the reservation. (*Id.*) Therefore, Arizona Department of Corrections policies do not apply to the operations of Salt River DOC. Finally, the Court should reject new factual allegations that the policies of outside jurisdictions apply to the purely internal operations of the Community over its members in its jail facility because they are outside the scope of the Complaint. Because Plaintiff's Response fails to allege applicable state law, Plaintiff concedes state law was not involved in this case. *See Hopkins*, 238 F. Supp. 2d at 178.

B. Plaintiff concedes that his requested policy reform is not narrowly tailored to ensure his participation in sweat lodge.

Plaintiff's Response fails to argue that his request for injunctive relief is narrowly tailored to ensure his participation in sweat lodge. Even if Plaintiff had standing to compel the Community to reform its policies, the Motion to Dismiss explained that Plaintiff's request must be narrowly tailored to ensure that he will be permitted to participate in sweat lodge at Salt River DOC. *See Nat. Res. Def. Council v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007). Plaintiff's Response fails to address this argument whatsoever and thus, Plaintiff concedes his request is not narrowly tailored for relief to be granted. *See Hopkins*, 238 F. Supp. 2d at 178.

C. Plaintiff concedes that he failed to state a claim under the Free Exercise Clause because the First Amendment does not apply to Tribal Directors or to a claim in federal court under the Indian Civil Rights Act.

1 Plaintiff's Response does not argue, much less provide legal support, that the
 2 Free Exercise Clause of the First Amendment and the Fourteenth Amendment applies
 3 to tribal government officials engaged in purely governmental functions of self-
 4 government (i.e., department of corrections administration). (Mot. Dismiss 16–17).
 5 Plaintiff's Response also failed to address any Indian Civil Rights Act (ICRA)
 6 claim. (*Id.*) For these reasons, Plaintiff concedes that he failed to state a claim under
 7 the First Amendment and the ICRA. *See Hopkins*, 238 F. Supp. 2d at 178.

8 Again, Plaintiff's wholesale failure to address the arguments of Tribal Directors
 9 concedes their merit. *See Hopkins*, 238 F. Supp. 2d at 178) (“[B]ecause the plaintiff has
 10 failed to address the defendants positions that certain claims in the complaint should be
 11 dismissed, the Court will treat those claims as conceded.”). Plaintiff has not disputed
 12 several facts, nor could these facts be credibly disputed, and thus, amendment of the
 13 Complaint would be futile. Accordingly, the Court should dismiss the entire Complaint
 14 under Fed. R. Civ. P. 12(b)(6) grounds as well.

15 **III. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE**
 16 **PLAINTIFF CONCEDES THAT TRIBAL DIRECTORS ARE IMMUNE**
 17 **FROM PLAINTIFF'S REQUEST FOR PUNITIVE AND**
 18 **COMPENSATORY DAMAGES.**

19 Plaintiff's Response does not provide a single argument that Plaintiff is entitled
 20 to punitive or compensatory damages against Tribal Directors. Plaintiff's Response
 21 fails to address these issues entirely. In fact, Plaintiff states that perhaps his request for
 22 \$2 million in punitive damages was “excessive,” (Pl.'s Resp. 4), and does not even
 23 mention his request, in the alternative, for compensation for the *in forma pauperis*
 24 application fee. Plaintiff cannot recover punitive damages or compensation for the *in*
 25 *forma pauperis* application fee from Tribal Directors who've acted in their official
 26 capacities. (*See* Mot. Dismiss 17). Therefore, Plaintiff concedes that he failed to state a
 27 claim for punitive or compensatory relief. *See Hopkins*, 238 F. Supp. 2d at 178.

1 **IV. DEFENDANT LEE SHOULD BE DISMISSED BECAUSE PLAINTIFF'S**
2 **RESPONSE DOES NOT ARGUE DEFENDANT LEE VIOLATED HIS**
3 **RIGHTS OR ACTED AT ALL.**

4 The Motion to Dismiss requested this Court dismiss the Complaint against both
5 Defendant Daly and Defendant Lee. (Mot. Dismiss 17). The Motion to Dismiss made
6 several arguments as to the reasons why both Defendants should be dismissed.
7 Plaintiff's Response ignores the alleged conduct of Defendant Lee and solely focuses
8 on arguments in support of his Complaint against Director Daly. The Response
9 references Director Daly by name several times but does not once mention Defendant
10 Lee or use inclusive identifiers such as "Defendants" or "Tribal Directors." Because
11 Plaintiff has failed to support any allegations against Director Lee, Director Lee should
12 be dismissed for this reason as well.

13 **V. CONCLUSION**

14 The Court lacks subject matter jurisdiction over this case which is barred by
15 tribal sovereign immunity and because Plaintiff lacks standing to sue for the relief
16 requested. Plaintiff's Response failed to allege any claim against Tribal Directors upon
17 which relief can be granted. In particular, Plaintiff fails to state a claim under Section
18 1983 because he does not allege Tribal Directors acted under color of applicable state
19 law. Plaintiff cannot correct the fatal deficiencies in the Complaint. Furthermore, this
20 Court has instructed Plaintiff on the rules to assist Plaintiff in his case. The Court has
21 also given Plaintiff opportunities to properly allege facts and cite applicable law in
22 order for this case to proceed if it had merit. Plaintiff has been unsuccessful at every
23 turn. Tribal Directors should not be required to continue to defend this case where
24 Plaintiff has not met his burden. For these reasons, Tribal Directors respectfully request
25 the Court dismiss Plaintiff's Complaint with prejudice pursuant to Rules 12(b)(1),
26 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B)(ii).

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28 ///

1 RESPECTFULLY SUBMITTED this 12th day of March, 2021.

2
3 By /s/ Glennas'ba Augborne Arents
4 Eric N. Dahlstrom (#004680)
5 Glennas'ba Augborne Arents (#033703)
6 **ROTHSTEIN DONATELLI LLP**

7 *Attorneys for Defendants*
8
9
10

11 **CERTIFICATE OF SERVICE**

12 I certify that on the 12th day of March, 2021, I caused a true and correct copy of
13 the foregoing Reply to Plaintiff's Response to Defendants' Motion to Dismiss to be
14 filed electronically through the CM/ECF system, which caused all counsel of record to
15 be served, as noted on the notice of electronic filing, and transmitted a copy via U.S.
16 Mail to the following:
17

18 Gila River Dept. of Rehabilitation and Supervision
19 ATTN: Dexter Loring
20 P.O. Box 399
21 Sacaton, Arizona 85147

22 By /s/ Glennas'ba Augborne Arents
23
24
25
26
27
28