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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

HENDRIK BLOCK,

Plaintiff,

v.

TULE RIVER TRIBAL COUNCIL, federally recognized Indian Tribe; TULE RIVER ECONOMIC DEVELOPMENT CORPORATION, dba EAGLE FEATHER TRADING POST #2,

Defendants.

Case No. 1:20-CV-01691-DAD-BAM

THE TRIBE DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Date: July 6, 2021
Time: 9:30 a.m.
Courtroom: 5, 7th Floor

Dist. Judge: Hon. Dale A. Drozd
Mag. Judge: Hon. Barbara A. McAuliffe

I. INTRODUCTION

Block does not dispute that tribes are immune from suit absent congressional authorization or waiver, that the Tribe Defendants did not waive sovereign immunity with respect to ADA claims, or that the Tribe's sovereign immunity extends to the Tribal Council or the TREDC. Rather, Block misstates the holdings of binding Supreme Court authority and relies on a non-persuasive and non-binding opinion predating *Bay Mills* by twelve years. Block also unpersuasively argues that tribes do not enjoy sovereign immunity with regards to suits brought by the federal government, and that he is essentially acting as a private attorney general to enforce the law.

As discussed below, sovereign immunity is not affected by whether the injury arises in contract or tort, or on or off reservation. Courts around the country routinely reject the arguments made by Block and reinforce the notion that in the face of any perceived unfairness in the application of tribal sovereign immunity – it is up to Congress, not the courts, to alter its nature and extent. Block has failed to meet his burden of establishing subject matter jurisdiction, and the Court should accordingly dismiss his complaint with prejudice.

II. ARGUMENT

A. Under *Kiowa*, Sovereign Immunity is Not Affected by Whether the Injury Arises in Contract or Tort, or On or Off Reservation

Although tribal immunity has been recognized for nearly two centuries, questions regarding the precise scope and reach of tribal immunity have generated a wealth of jurisprudence. Without exception, binding precedent universally upholds sovereign immunity for both tort and commercial activities, both on and off the reservation.

Block nevertheless contends the Supreme Court has never decided the applicability of sovereign immunity to non-contractual activity, and that it continues to leave this question open. He relies on the following passage from *Kiowa*:

> There are reasons to doubt the wisdom of perpetuating the doctrine [of sovereign immunity]. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by the States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. [Citations omitted]. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Kiowa, 523 U.S. at 758.

Although *Kiowa* involved a contract claim, the dissenting opinion noted that "nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships." *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting); *see also, Kiowa*, 523 U.S. at 758 (explaining that while policy considerations might suggest a need to abrogate tribal immunity as an overarching rule, it declined to do so and would instead "defer to the role Congress may wish to exercise.").

Indeed, since the Supreme Court handed down the *Kiowa* decision, plaintiffs have attempted to narrow the scope of its holding in the same manner proposed by Block here – namely, to limit its application to off-reservation, contract actions only. Where raised, this argument has been rightly rejected:

> Plaintiff first claims that torts…are not precluded by sovereign immunity citing the *Kiowa* decision – this interpretation is incorrect. ***Nothing in Kiowa could be construed to limit sovereign immunity to contractual claims in fact***, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities. [*Kiowa*, 523 U.S.] at 760. ***The court made no distinction between tort and contract claims in applying sovereign immunity to tort claims***. *Kiowa*, 523 U.S. at 754. To be sure, other courts have applied sovereign immunity to tort claims. *See e.g., Schantz* [*v. White Lightning*], 502 F.2d 67 (barring a tort action stemming from an automobile accident); *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F.Supp. 733 (E.D.Tex.1994) (holding sovereign immunity barred suit where plaintiff was "bilked out of $200,000").

Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council, 72 F.Supp.2d 717, 719 (E.D. Tex. 1999) (Emphasis added); *see also Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167 (Ct. App. 2006) (tribe held immune from suit arising from off-reservation accident); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, (1999) ("It appears to be settled that a tribe's sovereign immunity…extends to commercial activities…and that immunity applies to tort claims."); *Redding Rancheria v. Superior Ct.*, 88 Cal.App.4th 384 (2001) ("Tort suits are not excepted from the general immunity rule. Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) ***must come from Congress***.") (Emphasis added); *Sevastian v. Sevastian*, 73 Conn.App. 605 (2002) (same); *Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108 (2006) (immunity barred common-law negligence claims).

As the Supreme Court made clear in *Kiowa*, Congress has repeatedly indicated its continued support for the doctrine, and courts foreworn that they should be particularly cautious of substituting their policy judgment for that of Congress in this area. *Wright*, 159 Wash. 2d at 127 (Fairhurst, J. concurring) (citing *Kiowa*, 523 U.S. at 759 ["Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.' [Citation]]. It has not yet done so."]).

In response to *Kiowa*, then-United States Senator Slade Gorton proposed two bills that would have waived tribal immunity for most types of lawsuits. To provide for the enforcement of certain contracts made by Indian tribes, S. 2299, 105th Cong. § 2299 (1998) (conferring district court jurisdiction and waiving sovereign immunity for contract claims against tribes after noting that "the assertion of tribal immunity serves as a deterrent to economic development"); to provide for tort liability insurance

for Indian tribes, and for other purposes, S. 2302, 105th Cong. § 2302 (1998) (requiring tribes to maintain tort liability insurance and waiving sovereign immunity for claims by tort victims in order to protect " 'those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter' " (quoting *Kiowa*, 523 U.S. at 758). The bills did not pass.

B. Under *Bay Mills*, Sovereign Immunity is Not Affected by Whether the Injury Arises in Contract or Tort, or On or Off Reservation

Block contends the 2002 Northern District opinion in *Hollynn D'Lil v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 2002 WL 33942761 (2002) (*D'Lil*) somehow leaves the question open of immunity for non-contractual claims, notwithstanding the fact that *Bay Mills* is binding on this Court and was decided twelve years later in 2014.

In *Bay Mills*, the court declined to overturn *Kiowa* and held to its longstanding rule that, absent abrogation from Congress, tribal immunity would be upheld. *Bay Mills*, 572 U.S. at 800. The *Bay Mills* court was unequivocal in its unwillingness to create exceptions to the general rule of immunity. "The special brand of sovereignty the tribes retain – both its nature ***and its extent*** – rests in the hands of Congress." *Id.* (Emphasis added).

In *D'Lil*, the court's rationale for finding a waiver of sovereign immunity under the ADA is contrary to the holding in *Bay Mills*, especially the attempts to distinguish off-reservation commercial conduct. The court in *D'Lil* also engaged in the substitution of its policy judgment for Congress that the Supreme Court cautioned against. The *Bay Mills* court reiterated several times, there must be express Congressional language effectuating a waiver (or a clear and express waiver from the tribe itself), and the Court will not infer or imply Congressional intent to waive sovereign immunity from the circumstances.

Block further relies on a footnote in *Bay Mills*. *See Bay Mills*, 572 U.S. at 799 n.8 (noting the court has not decided, and declined to in the instant case, whether

immunity would apply to a tort victim if there was no alternative form of relief). However, in light of the federal cases interpreting tribal sovereign immunity as being applicable to tort claims, this argument is unpersuasive, and it has also been rejected by the Ninth Circuit:

> Plaintiffs cite a footnote in the U.S. Supreme Court's recent *Bay Mills* decision for the proposition that the doctrine of tribal sovereign immunity should not bar tort claims against an Indian Tribe at all. But in the cited footnote, the Court was discussing the principle of *stare decisis*, and expressly reserved decision on whether a case involving an unwitting "tort victim" "would present a 'special justification' for abandoning precedent," because that case was "not before [the Court]." [Citation]. ***We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law***. [Citation].
>
> Furthermore, as the Supreme Court also noted in *Bay Mills*, "it is fundamentally Congress's job, not [the federal courts], to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." [Citation].

Tohono O'odham Nation, 818 F.3d at 563 n. 8 (Emphasis added).

Accordingly, in the face of clear precedent from our highest court, this Court should not find *D'Lil* persuasive and find sovereign immunity applies to Block's claims.

C. <u>Block's Lawsuit is Not Akin to a Claim Filed by the United States</u>

Block's final argument, that sovereign immunity does not protect tribes from suits brought by the federal government and that his individual ADA claim should be viewed as one, is easily disposed of. Block's purported authority do not involve ADA claims asserted against an Indian tribe, they did not discuss issues of tribal sovereign immunity, and they did not discuss an individual's ability to enforce the ADA against an Indian tribe. The cases are wholly inapposite.

Block argues that he "is essentially acting as a private attorney general to enforce the federal law." This argument fails for two reasons. First, the "ADA does

not permit private plaintiffs to bring claims as private attorneys general to vindicate other people's injuries." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 69 (1st Cir. 2003); *see also, Jankey v. Lee*, 55 Cal.4th 1038, 1051 (same); *Furlong v. Miller*, No. CIV 10-CV-003-SM, 2010 WL 1633431, at *4 (D.N.H. Mar. 15, 2010) (same); *Rodriguez v. Barrita, Inc.*, 10 F.Supp.3d 1062, 1076 (N.D. Cal. 2014) (same); *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 960 (9th Cir. 2011) (N.R. Smith, J. concurring) (same).

Second, the Complaint belies his argument. Footnote 1 to Paragraph 25 states: "***Nothing within this Complaint should be construed as an allegation that Plaintiff is bringing this action as a private attorney general under either state or federal statutes***." Dkt. 1, p. 6, ¶ 25 n. 1 (Emphasis added). Nor could it.

III. CONCLUSION

As set forth above, Block does not contend that the Tribe Defendants have unequivocally waived their sovereign immunity to suit under the ADA, nor has he presented a persuasive argument that Congress has authorized private citizens to sue Indian tribes under the ADA. Thus, Block has failed to meet his burden to establish this Court's subject matter jurisdiction and he has not overcome the strong presumption in favor of tribal sovereign immunity. *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001). The Tribe Defendants respectfully request the Court grant their motion and dismiss the Complaint with prejudice for lack of subject matter jurisdiction.

DATED: June 29, 2021

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CERTIFICATE OF SERVICE

I certify that on June 29, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties registered to receive electronic notices through the Court's CM/ECF system. Parties may access this filing through the Court's PACER system.

DATED: June 29, 2021

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