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10 HARRAH'S ARIZONA CORPORATION

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Jie Xia, a married woman; Necy Sundquist,
a married woman; Mary Grace Abon, a
married woman; Susan Samons, a married
woman; Mariah Henry, a married woman,

Plaintiffs,

v.

Harrah's Arizona Corporation, a Nevada,

Defendant.

Case No. 2:23-cv-02086-GMS

**REPLY IN SUPPORT OF
HARRAH'S MOTION TO DISMISS**

I. INTRODUCTION

Defendant Harrah's Arizona Corporation ("Harrah's") has moved to dismiss Plaintiffs' Complaint under Rule 12(b)(1) because it lacks subject matter jurisdiction over this action under the doctrine of tribal sovereign immunity. Specifically, tribal immunity should apply here because Harrah's only function and purpose is to manage the Harrah's Ak-Chin Casino Resort in Maricopa, Arizona (the "Casino") for and on behalf of the Ak-Chin Indian Community (the "Community"), the Community exercises extensive control over Harrah's management of the Casino, and immunity would protect the Community's treasury from the expenses of litigation and/or settlement. Plaintiffs respond by contending that tribal sovereign immunity is inappropriate because the Community did not form Harrah's under tribal law, does not own Harrah's, and the undisputed control it exercises

1 over Harrah’s management of the Casino is purely contractual, which means that Harrah’s
2 voluntarily submitted to the Community’s control and the Community’s right to control its
3 operations would end if Harrah’s withdrew from its Management Agreement with the
4 Community.

5 Harrah’s agrees that whether an entity seeking immunity is owned and was formed
6 by a tribe under tribal law are among the factors that courts must consider in determining
7 whether that entity is entitled to tribal sovereign immunity as an arm of the tribe. They are
8 not, however, determinative factors in that analysis particularly not in this case given the
9 extensive nature of the Community’s control over Harrah’s management of the Casino,
10 including the employees it can hire and the policies it must follow. The Court should not
11 minimize the high level and degree of control that the Community exercises over Harrah’s
12 operations simply because it is derived from its Management Agreement with Harrah’s
13 rather than its ownership of Harrah’s. It is a tribe’s control over an entity’s operations, rather
14 than the source of that control, that is the most critical factor under Ninth Circuit precedent.
15 Consequently, when the Court considers the facts as they existed during Plaintiffs’
16 employment, and as they currently exist, rather than speculating about what could possibly
17 happen in the future to affect the Community’s control over Harrah’s, the evidence shows
18 that Harrah’s is acting as an arm of the Community for the Community’s benefit and under
19 its control and, as such, is entitled to tribal sovereign immunity.

20 **II. LAW AND ARGUMENT**

21 **A. The Community’s Control Over Harrah’s is the Key Factor**

22 Plaintiffs argues that “Harrah’s cannot be an arm of the Community because it isn’t
23 owned by the Community, formed by the Community, or formed under tribal law.” (Doc.
24 14 at 5.) They point out that in each of the three cases Harrah’s cited in its Motion, “the
25 entities entitled to tribal sovereign immunity were (1) owned by the tribe, (2) formed by the
26 tribe, and (3) formed under tribal law.” (Doc. 14 at 6.) Although that is true, the key issue
27 in determining whether tribal sovereign immunity applies is not whether the entity seeking
28 immunity was owned and formed by a tribe under tribal law. Rather, the analysis centers

1 on determining “whether the entity [claiming immunity] acts as an arm of the tribe so that
2 its activities are properly deemed to be those of the tribe.” *Allen v. Gold Country Casino*,
3 464 F.3d 1044, 1046 (9th Cir. 2006).

4 The Ninth Circuit’s decision in *Allen* perfectly illustrates this point. The casino that
5 employed the plaintiff in *Allen* was created to “enable the Tribe to develop self-sufficiency,
6 promote tribal economic development, and generate jobs and revenues to support the Tribe’s
7 government and governmental services and programs.” *Id.* at 1046-47. It is true that the
8 Tribe owned and operated the casino in *Allen*. As a result of the Tribe’s ownership, the
9 “economic and other advantages [of the casino] inure[d] to the benefit of the Tribe” and the
10 casino’s immunity directly protected “the sovereign Tribe’s treasury, which is one of the
11 historic purposes of sovereign immunity in general.” *Id.* at 1047 (citation omitted). Given
12 “the purposes for which the Tribe founded this Casino and the Tribe’s ownership and control
13 of its operations,” the Ninth Circuit held that “there can be little doubt that the Casino
14 functions as an arm of the Tribe” and, therefore, “enjoys the Tribe’s immunity from suit.”
15 *Id.*

16 There is nothing in *Allen*, or any other Ninth Circuit case, indicating that an entity
17 cannot be acting as an arm of a tribe *unless* the tribe owns and forms that entity under tribal
18 law. As the Ninth Circuit’s analysis in *Allen* makes clear, the key factors are whether the
19 entity seeking immunity promotes tribal self-sufficiency, economic development, and job
20 and revenue growth for the tribe, whether the tribe controls that entity, and whether
21 sovereign immunity protects the tribe’s treasury, which is one of the principal reasons for
22 tribal immunity. All these factors favor immunity here.

23 Just as was the case in *Allen*, the Community created the Casino to improve the
24 economic conditions of its members, to enable it to serve the social, economic, educational,
25 and health needs of the Community, to increase Community revenues, and to enhance the
26 Community’s economic self-sufficiency and self-determination. (See Kintner Decl. Ex. A
27 ¶ 5.) To maximize the Casino’s benefits to the Community and promote job growth among
28 its members, the Community *requires* Harrah’s (1) to give preference to qualified members

1 of the Community, their spouses, and their children in recruiting, training, and hiring and
2 (2) to submit quarterly reports to the Community Council regarding each such individual
3 undertaking training in all job categories of the Casino, including management categories.
4 (Kintner Decl. Ex. A ¶¶ 15-16.) All the expenses associated with defending and/or resolving
5 this lawsuit, including attorneys' fees, costs, expenses, settlements, and/or judgments, will
6 come from funds that would otherwise have gone to the Community to support its economic
7 self-sufficiency and self-determination. (Kintner Decl. Ex. A ¶ 22.) These are the critical
8 factors that led the Ninth Circuit to find that the casino operator was entitled to tribal
9 sovereign immunity in *Allen* and should similarly lead this Court to reach the same
10 conclusion here. *Allen*, 464 F.3d at 1046-47.

11 **B. The Management Agreement Gives the Community Legal Rights**

12 The *Allen* Court mentioned that the tribe owned and operated the casino in that case
13 not to say that a tribe must own and form an entity for that entity to be entitled to tribal
14 sovereign immunity, but to make the point that the tribe's ownership ensured that the
15 casino's revenues would inure to the tribe's benefit. *Id.* at 1047. Although the Community
16 did not form and does not own Harrah's, its Management Agreement with Harrah's gives
17 it legally enforceable rights and ensures that it receives the same benefits from the Casino
18 as if Harrah's had been formed by the Community under tribal law. Indeed, the Community
19 and Harrah's have been parties to a Management Agreement for well over two decades
20 beginning in December 2001. (*See* Doc. 14 Ex. G.)

21 Plaintiffs argue that Harrah's, an entity that the Community did not create and does
22 not own, cannot "be an arm of the tribe" because the Community's "right to control"
23 Harrah's exists only because Harrah's has voluntarily submitted itself to the Community's
24 control under the Management Agreement. (Doc. 14 at 7.) According to Plaintiffs,
25 "[b]ecause Harrah's can unilaterally withdraw from serving the purposes of the"
26 Community by withdrawing from the Management Agreement, "it is not an 'arm' or
27 'subordinate economic' entity of the Community." (Doc. 14 at 7.) This argument focuses
28

1 on speculative possibilities and ignores the facts as they currently exist and as they have
2 existed since December 2001.

3 Harrah's detailed the many instances in which the Community controls the
4 management of the Casino, including over Harrah's policies as they apply at the Casino,
5 the employees Harrah's may hire, the employees it must prefer, and the regulatory control
6 over the gaming licenses of Harrah's employees. (Doc. 11 at 3-4.) Plaintiffs do not, and
7 cannot, contest any of these facts. Rather, they seemingly dismiss them because they are
8 derived from the Management Agreement, which Harrah's can withdraw from under certain
9 circumstances, *i.e.*, the Community does not pay Harrah's management fee. (Doc. 14 at 3-
10 4.) In other words, according to Plaintiffs, "[t]he Community has no right to bind or obligate
11 Harrah's, except to the extent that Harrah's allows the Community to bind or obligate it."
12 (Doc. 14 at 4.) But this is not the case. The Community has a Management Agreement with
13 Harrah's that has existed, in one form or another, for over twenty years and binds Harrah's
14 to its terms and conditions. Thus, the Community has a legal right to continue exercising
15 the same level of extensive control it has exercised over Harrah's management of the Casino
16 since 2001.

17 The speculative possibility that the relationship between the Community and
18 Harrah's may change at some point in the future does not affect the facts as they currently
19 exist, or as they existed when Harrah's terminated Plaintiffs' employment, and should not
20 impact the Court's analysis. As long as the Management Agreement has been in effect, and
21 it certainly was in effect during Plaintiffs' employment, Harrah's sole function has been to
22 manage the Casino for the benefit of the Community, and it has been acting as an arm of
23 the Community in performing that function since 2001. Consequently, Harrah's is entitled
24 to tribal sovereign immunity.

25 **C. Harrah's Organization Under Nevada Law Does Not Destroy Immunity**

26 Plaintiff points out that Harrah's, by organizing under Nevada law and by registering
27 to do business as a foreign corporation in Arizona, subjected itself to lawsuits in any courts
28 in Nevada or Arizona. (Doc. 14 at 8.) Consequently, Plaintiff contends that "to the extent

1 the Community chose to operate its tribal business through Harrah’s, it accepted that tribal
2 sovereign immunity wouldn’t be available.” (Doc. 14 at 8.) Plaintiffs cite the Tenth
3 Circuit’s decision in *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144 (10th Cir.
4 2012) in support of their argument. *Somerlott* is distinguishable and there is no authority
5 for the proposition that a tribe waives its sovereign immunity by hiring an entity organized
6 under the laws of a state to manage a tribal business.

7 By organizing under Nevada law and registering as a foreign corporation in Arizona,
8 Harrah’s subjected itself to suits in the courts in those states unless it qualifies for tribal
9 sovereign immunity because it is acting as an arm of the Community in managing the
10 Casino for the Community. If, for example, Harrah’s was engaging in any other business
11 then it would be subject to suit in Nevada or Arizona. But Harrah’s only purpose and its
12 only function, at least since 2001, has been to manage the Casino for and on behalf of the
13 Community. Consequently, in acting as an arm of the Community since 2001, it qualifies
14 for tribal sovereign immunity. There is no authority for finding that the Community waived
15 immunity by contracting with Harrah’s to manage the Casino rather than forming some
16 other entity under tribal law to perform the same functions as Harrah’s has been performing
17 under the Management Agreement.

18 *Somerlott* does not change this analysis. The tribe owned the entity at issue there but
19 chose to incorporate it under Delaware law. *Id.* at 1146. Thus, the tribe decided to subject
20 an entity that it formed to suit in court and thereby waived its immunity. In addition, this
21 Court has held that the method of an entity’s creation is *one factor*, not a dispositive factor,
22 in the tribal immunity analysis. See *Tsosie v. N.T.U.A. Wireless LLC*, 2023 WL 4205127,
23 *3 (D. Ariz. June 27, 2023) (finding the method of creation of the entity at issue weighed
24 against immunity because the tribe did not own the entity and it was organized under
25 Delaware law rather than tribal law); *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's*
26 *Health Bd.*, 842 F.Supp.2d 1163, 1175–76 (D.S.D.2012) (concluding an entity's
27 organization under state law as opposed to tribal law was merely one consideration among
28 others in determining whether that entity was entitled to tribal sovereign immunity).

1 Consequently, Harrah's organization under Nevada law does not mean that it is
2 automatically disqualified from tribal sovereign immunity.

3 **D. The Ninth Circuits Factors Favor Immunity**

4 The parties agree that in considering whether an entity is an "arm of the tribe" for
5 the purposes of tribal sovereign immunity, the Ninth Circuit considers the "(1) the method
6 of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and
7 management, including the amount of control the tribe has over the entities; (4) the tribe's
8 intent with respect to the sharing of its sovereign immunity; and (5) the financial
9 relationship between the tribe and the entities." *White v. Univ. of California*, 765 F.3d 1010,
10 1025 (9th Cir. 2014). Plaintiffs argue that "[a]pplying these factors conclusively establishes
11 that Harrah's isn't an arm of the Community and isn't entitled to tribal sovereign
12 immunity." (Doc. 14 at 10.) While not all the factors favor immunity, on balance they show
13 that Harrah's functions as an arm of the Community in managing the Casino for the
14 Community's benefit and is entitled to immunity.

15 The first factor weighs against immunity because the Community did not create
16 Harrah's, but the other four factors strongly favor immunity. The second factor concerns
17 the purpose of the entity seeking immunity. Harrah's sole purpose and only function is to
18 manage the Casino for and on the Community's behalf as it has done since 2001. This factor
19 weighs heavily for immunity.

20 The third factor concerning the structure, ownership, and management of Harrah's,
21 including the amount of control the Community has over Harrah's, also favors immunity.
22 Although the Community does not own or manage Harrah's, it wields an enormous amount
23 of oversight and control over Harrah's management of the Casino. Plaintiffs do not dispute
24 the amount of control that the Community, the Community Council, and the TGA exercise
25 over Harrah's budget, employment policies, and the employees it hires. Nor do Plaintiffs
26 dispute that Community Inspectors have the right to immediate access to the Casino at any
27 time, to inspect all aspects of the Casino's operations, without notice to Harrah's, to
28 investigate problems relating to any aspect of the Casino's operations, and to perform any

1 other tasks as assigned by the Community Council. Indeed, the TGA regulates and controls
2 the gaming licenses of all Harrah's employees and has the authority to revoke those licenses,
3 which would prohibit Harrah's from continue to employ those employees.

4 The fourth factor concerns the Community's intent with respect to sharing its
5 immunity. The Management Agreement is silent on this point. Given that lawsuits are
6 expenses to the Community and impact its treasury, however, it makes more sense that the
7 Community intended to share its immunity with Harrah's. At worst, this factor is neutral
8 because there is no indication that the Community did not intend to share its immunity and
9 it would be against its best interests not to do so.

10 Finally, the financial relationship between the Community and Harrah's strongly
11 favors immunity because the funds necessary to defend this lawsuit and pay any settlement
12 or judgment are funds that would otherwise go to the Community. The Ninth Circuit
13 underscored the importance of this factor in *Allen* when it observed that the casino's
14 immunity directly protected "the sovereign Tribe's treasury, which is one of the historic
15 purposes of sovereign immunity in general." *Allen*, 464 F.3d at 1046-47. The same is true
16 here: Harrah's immunity will directly protect the Community's treasury by increasing the
17 funds that flow to that treasury as opposed to litigation and settlement. Thus, although the
18 Community does not own and did not form Harrah's under tribal law, at least three, and
19 possibly four, of the five factors the Ninth Circuit considers in determining whether tribal
20 sovereign immunity applies favor a finding of immunity here.

21 **E. Discovery is Unnecessary to Determine Whether Immunity Applies**

22 Plaintiffs ask the Court to allow it to engage is discovery "for the purpose of
23 obtaining information and documents to controvert Harrah's claim to sovereign immunity"
24 if the Court is not inclined to deny Harrah's Motion. (Doc. 14 at 15.) None of the documents
25 or information that Plaintiffs seek will, however, affect the Court's analysis.

26 If the Court allows discovery, Harrah's will, of course, produce the current
27 Management Agreement with the Community, but it is not materially different from the
28 agreement Plaintiffs attached to their Response. Harrah's does not contend that the

1 Community has any responsibility for governing Harrah's or that any corporate officers are
2 members of the Community. Thus, there is no reason to produce Harrah's Bylaws.
3 Similarly, Harrah's Articles of Incorporation are irrelevant because the business that
4 Harrah's can engage in sheds no light on the business it is engaging in, which is limited to
5 managing the Casino. Nor does Harrah's have any documents that would shed any light on
6 the Community's intent to share sovereign immunity. Finally, Harrah's can confirm that the
7 Community does not own it and it is wholly owned by Caesar's Resort Collection, LLC.

8 **III. CONCLUSION**

9 Given Harrah's purpose, the degree of control the Community has over Harrah's,
10 and the financial relationship between the Community and Harrah's, this Court must find
11 that, in managing the Casino, Harrah's is acting as an arm of the Community and is entitled
12 to share in its immunity from suit. Consequently, the Court should grant Harrah's Motion
13 and dismiss Plaintiffs' claims because it lacks subject matter jurisdiction over them.

14 DATED this 6th day of February 2024.

15 */s/ Peter C. Prynkiewicz*

16

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18 I hereby certify that I electronically
19 transmitted the attached document to
20 the Clerk's Office using the CM/ECF
21 System for filing and transmittal of a
22 Notice of Electronic Filing to the
23 following CM/ECF registrants, and
24 mailed a copy of same to the following
25 if non-registrants, this 6th day of
26 February, 2024, to:

23 John Dean Curtis, II
24 Aaron M. Duell
BURCH & CRACCHIOLO, P.A.
25 1850 North Central Avenue, Ste. 1700
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27 */s/ Tisha A. Davis*

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