UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS COOK AND LEIDRA COOK,

Plaintiffs-Appellants,

-vs-

AVI CASINO ENTERPRISE, INC., a corporation; IAN DODD; JUAN MEJIA; STEPHANIE SHAIK; DEBRA PURBAUGH; ANDREA CHRISTENSEN,

Defendants-Appellees.

No. 07-15088
D.C. No. CV-04-01079-PGR

APPELLANTS' OPENING BRIEF

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I. CORPORATE DISCLOSURE STATEMENT

The Plaintiffs-Appellants are individuals; therefore, no corporate disclosure statement is required.

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IV. JURISDICTIONAL STATEMENT

A. BASIS FOR DISTRICT COURT'S JURISDICTION

Jurisdiction in the District Court was based on diversity of citizenship under 28 U.S.C. §1332(a).

B. BASIS FOR COURT OF APPEALS' JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. 1291 because this is an appeal from a final order of a district court of the United States under Rule 54(b), Federal Rules of Civil Procedure.

C. FILING DATES RE: TIMELINESS OF APPEAL

This appeal is from a judgment entered December 13, 2006. The Notice of Appeal was filed on January 10, 2007.

D. APPEAL IS FROM FINAL ORDER

This appeal is taken from a judgment that was certified under Rule 54(b), Federal Rules of Civil Procedure, therefore, it is a final and appealable order.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does tribal sovereign immunity immunize a private casino corporation and its non-Indian employees---as distinguished from an Indian tribe and its members---from statutory and common law negligence and

gross negligence, where the private corporation is organized under a tribal business corporation ordinance?

Sovereign immunity was raised by Defendants-Appellees in their Motion to Dismiss Defendants Dodd and Purbaugh, which appears at page186 of the Excerpts of Record (hereafter ER ___). Plaintiffs-Appellants contested the issue in their Opposition to Defendants' Motion to Dismiss, which appears at ER 221. The district court decided the issue in Defendants-Appellees' favor in its Order and Opinion, which appears at ER 365-374. A district court's order on a motion to dismiss on subject matter jurisdiction is reviewed *de novo* for correctness, without deference to the district court's decision. *Stock West Corporation v. Taylor*, 964 F.2d 912 (9th Cir. *En Banc*, 1992).

2. Is a tribal corporation with a principal place of business in Nevada, whose registered office is in Nevada and whose articles of incorporation were executed in Arizona, a citizen of California for purposes of diversity jurisdiction because the tribe under whose laws it was incorporated (not the tribal corporation) has offices in California?

Lack of diversity jurisdiction was raised by Defendants-Appellees in their Motion to Dismiss for Lack of Diversity Jurisdiction on behalf of Defendants Avi Casino Enterprise, Inc., Mejia and Shaik. The motion

appears at ER 17-34. Plaintiffs-Appellants contested the issue in their Opposition to Defendants' Motion to Dismiss for Lack of Diversity Jurisdiction, which appears at ER 35-54. The district court decided the issue in Defendants-Appellees' favor in its Order and Opinion, which appears at ER 175-184. The district court's order on a motion to dismiss should be reviewed *de novo* for correctness, without deference to the district court's decision. *Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261 (9th Cir. 1999).

VI. STATEMENT OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

A. STATEMENT OF THE CASE

Defendant-Appellee Avi Casino Enterprise, Inc. is a commercial, for-profit corporation that operates the Avi Resort & Casino in the Laughlin, Nevada market on the Arizona/Nevada border. The registered office of the corporation is in Laughlin, Nevada. The corporation is organized under the Business Corporation Ordinance of the Fort Mojave Indian Tribe. At the time of the events described in the complaint, Defendants-Appellees Dodd, Mejia, Shaik, Purbaugh and Christensen were employees of Avi Casino Enterprise, Inc. and worked in liquor service at the Avi Resort & Casino. Plaintiffs are citizens of California.

During the late night and early morning hours of May 24/25, 2003, the Defendants held an after-hours birthday party at the casino for a casino employee. Drinks were served to partygoers, including Defendant Christensen, a cocktail waitress who had finished her shift but stayed to party. Christensen got very drunk and her intoxication was very apparent to everyone who saw her, but Defendants continued to serve her alcohol. By 4:30 AM, Christensen's blood alcohol level was at least .250%.

At the time, the casino operated a shuttle bus that took employees from the casino to their cars in an employee parking lot. At approximately 4:30 AM, fully aware of Christensen's obvious intoxication, the shuttle bus driver picked Christensen up at the employee entrance/exit and took her to her car, thereby enabling her to drive while under the influence of alcohol.

Within minutes, Christensen drove out of the casino parking lot under the influence of alcohol to a degree that rendered her incapable of safely operating her motor vehicle. Moments later and less than a mile away, Christensen drove her vehicle across the centerline along Aztec Road in Mohave County, Arizona---resulting in a near head-on collision with a motorcycle driven by Chris Cook.

Mr. Cook suffered grievous, near-fatal, and catastrophic personal injuries in the collision, including the loss of his left leg at the hip. He has

incurred medical expenses in excess of $1,000,000 and is still being treated for his injuries.

The Mohave County, Arizona Sheriff's Office, investigated the collision. More than two hours after the collision, Christensen had a blood alcohol of .247%. Christensen was convicted in the Superior Court of Mohave County of aggravated assault and felony DUI, and is now imprisoned in Arizona for those crimes.

B. COURSE OF PROCEEDINGS/DISPOSITION BELOW

Chris Cook and his wife sued Avi Casino Enterprise, Inc. and the employees involved in serving excessive alcohol on theories of statutory and common law dram shop liability under Arizona law, gross negligence, and statutory dram shop liability under tribal ordinance. Plaintiffs asserted jurisdiction in federal court based on diversity of citizenship.

Defendants-Appellees moved to dismiss the claims against Avi Casino Enterprise, Mejia and Shaik under Rule 12(b)(1) on grounds of lack of diversity jurisdiction. Defendants-Appellees moved to dismiss claims against Dodd and Purbaugh under Rules 12(b)(6) and 12(b)(7) on grounds that (a) Avi Casino Enterprise, Inc. has sovereign immunity that inures to the protection of its employees, and/or (b) Avi Casino Enterprise was an indispensable party to claims against Dodd and Purbaugh.

Plaintiffs, who are California citizens, argued that Avi Casino Enterprise, Inc. was not a sovereign and was not immune from suit. Plaintiffs conceded that Mejia and Shaik were California citizens, therefore, diversity was lacking as to them, but that the cases should be severed as to Mejia and Shaik and proceed against the remaining defendants.

Based solely on the complaint and motion papers, the district court found that Avi Casino Enterprise, Inc. had sovereign immunity that protected employees Dodd and Purbaugh and granted the "sovereign immunity" motion to dismiss as to Avi, Dodd and Purbaugh.[1] Based solely on the complaint and motion papers, the district court found that Avi Casino Enterprise, Inc. was a citizen of both Nevada and California for purposes of diversity jurisdiction, therefore, complete diversity was lacking, and granted the "diversity" motion to dismiss as to Avi. On December 13, 2006 the district court certified the orders of dismissal as final under Rule 54(b).[2]

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[1] Defendants-Appellees had also asserted that claims against Avi should be dismissed because the Arizona dram shop statute and common law dram shop rule were not applicable on the facts of the instant case. The district court did not reach this issue or Dodd and Purbaugh's "indispensable party" issue because it found the sovereign immunity issue to be dispositive. ER 365-374.

[2] Defendant Christensen was separately represented under the terms of her automobile liability policy and remains a party below.

VII. STATEMENT OF FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

1. Avi Casino Enterprise, Inc. is a private corporation. It is a separate and distinct legal entity from the Fort Mojave Indian Tribe. ER 2, 238. (Articles)

2. The articles of incorporation of Avi Casino Enterprise, Inc. were executed in Mohave County, Arizona before an Arizona notary, and not on the Fort Mojave Indian Reservation or before a tribal notary. ER 22-28, 238. Articles

3. The registered office of Avi Casino Enterprise, Inc. is in Laughlin, Nevada. ER 22-28, 238. Articles

4. Avi Casino Enterprise, Inc. owns and operates the Avi Resort & Casino. ER 245-284. (Website)

5. The Avi Resort & Casino is a part of the Laughlin, Nevada gaming market and home to "THE LARGEST BINGO HALL IN LAUGHLIN!" It offers "FULL LAS VEGAS STYLE GAMING" with all types of table games, a sports book, and movie theaters. The Avi features a "progressive jackpot" game that is *linked with other casinos* throughout the

25. Moments later, Defendant Christensen drove her car across the centerline along Aztec Road in Mohave County, Arizona, resulting in a near head-on collision with the motorcycle driven by Chris Cook. ER 5.

26. Chris Cook suffered grievous, near-fatal, and catastrophic personal injuries in the collision, including the ultimate loss of his left leg at the hip. As the direct and proximate result of the collision and the physical injuries sustained therein, Chris Cook has incurred medical bills in excess of $1,000,000, which continue to accrue, and he has suffered devastating psychological and emotional injuries, permanent scarring and disfigurement, and loss of enjoyment of life. ER 5-6.

VIII. SUMMARY OF THE ARGUMENT

A corporation that is organized solely and exclusively for commercial competition in a wholly non-Indian casino resort marketplace, and which is more than 75% staffed by non-tribal members, should not have sovereign immunity---because there is no nexus between the functions of a 21st century gaming corporation and the traditional functions and purposes of an Indian tribe. Such a corporation, even when organized under a tribal business corporation ordinance, should not be clothed in an immunity that historically exists for the sole purpose of protecting non-commercial tribal interests and traditional and cultural tribal functions. This is particularly so where the

gross negligence of non-Indian employees has caused catastrophic injury to a person, such as Plaintiff-Appellant Chris Cook, who had no intentional or purposeful contact with the tribal corporation, or with the tribe under whose laws the commercial casino corporation was created.

Regardless of the tribal corporation's immunity status, its individual non-Indian employees have no basis for claiming sovereign immunity. For these reasons, Avi Casino Enterprise, Inc. should be liable for torts committed by its non-Indian employees acting within the course and scope of their employment, and its employees should be held liable, as well. Accordingly, the district court erred in finding that sovereign immunity exists as to Avi Casino Enterprise, Inc. and its employees.

For diversity purposes, a tribal corporation is a citizen of the state in which it has its principal place of business. Avi Casino Enterprise, Inc.'s principal place of business is Nevada and its registered office is in Nevada. Avi Casino Enterprise's articles of incorporation were executed in Arizona. The corporation was created under tribal law---which has no situs in *any* state and is independent of *all* states, because the Tribe is a sovereign. Therefore, Avi was not incorporated in *any* state, for purposes of diversity jurisdiction.

If Avi was incorporated in *any* state, it is Arizona, where its articles of incorporation were executed and, if the corporation exists in *any* state, it is Nevada where its registered office is located. Accordingly, there is complete diversity between Plaintiffs, as citizens of California, and Defendants Avi, Dodd and Purbaugh---and the district court erred in dismissing for lack of diversity jurisdiction.

IX. ARGUMENT

1. The Casino Corporation Should Not Have Sovereign Immunity.

An Indian *tribe* is a sovereign. A tribal *corporation* is not an Indian tribe and it is not a sovereign. In fact, for nearly three decades, federal and state courts have held that tribal corporations, as opposed to Indian tribes themselves, are separate and distinct legal entities that do not possess the attributes that give rise to tribal sovereign immunity.

This distinction, and its rationale, was plainly and clearly explained in the early case of *R.C. Hedreen Company v. Crow Tribal Housing Authority*, 521 F. Supp. 599 (D. Montana, 1981)---the legally-significant principles of which are identical to those in the case at bar.

In *Hedreen*, pursuant to a Crow Tribal Ordinance, the Crow Tribe of Montana established the Crow Tribal Housing Authority, a tribal corporation. The Crow Tribal Housing Authority contracted with Hedreen,

a Washington (state) construction firm, to build houses on the Crow Indian Reservation in Montana. A dispute arose over non-payment under the contract.

Hedreen sued the Crow Tribal Housing Authority in federal court in Montana. The tribal corporation moved to dismiss, arguing that the Housing Authority was a public body created by the Crow Tribe and, as such, was not subject to suit. In rejecting that argument, the district court reasoned that the Crow Tribe and the Crow Tribal Housing Authority were separate and distinct entities that existed for different reasons and were, therefore, subject to different legal treatment:

> "The tribe is immune from suit as a result of its sovereign status, thus the tribe as an entity is not a citizen for diversity purposes. The Housing Authority was established as a corporate entity pursuant to Tribal Ordinance 64-17 so that the tribe could deal effectively as a business entity in the commercial community. That it has done; it hardly lies in its mouth to deny its existence as a commercial corporation with its principal place of business within the state of Montana."

521 F. Supp. at 602.

The district court went further to explain both the logical and practical reasons for treating a tribal *government* differently than a tribal *corporation*:

> "Both common sense and the legal practicalities of the commercial world dictate a contrary result. Regardless of the sovereign source from which a corporate entity derives its charter, when it is constituted with all of the required formalities it comes into existence as a legal entity. As a legal entity, it is susceptible to suit on its contracts in any court of competent jurisdiction unless it enjoys some legal excuse, e.g., sovereign immunity. <u>While the court recognizes that an Indian tribe is not a citizen of the state of Montana, it is not a tribe that is being sued</u>."

521 F. Supp. at 603. (Emphasis added).

Following that rationale, other federal courts have refused to extend tribal sovereign immunity to commercial tribal corporations. See, for example, *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983); *Stock West, Inc. v. Confederated Tribes of the*

Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. 1989), citing *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Parker Drilling Company v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978); *R.C. Hedreen Company v. Crow Tribal Housing Authority*, 521 F. Supp. 599, 602 (D. Montana, 1981); *Namekagon Development Co. Inc. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23, 29 (D. Minn. 1974), aff'd. 517 F.2d 508 (8th Cir. 1975); *Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993), citing *Enterprise Elec. Co. v. Blackfeet Tribe of Indians*, 353 F. Supp. 991 (D. Mont. 1973).

By way of an example in the tort context (as the instant case), in *Parker Drilling*, a plane struck a snow berm at an airport owned and operated by a tribal corporation that operated an aviation enterprise. Plaintiff sued the tribal corporation and the defendant moved to dismiss, arguing that it was not a "citizen" of any state. In rejecting that argument, the *Parker* court first commented on the practical commercial rationale for declaring tribal corporations to be "citizens," thereby subjecting such corporations to jurisdiction in federal courts:

> "[I]t is unlikely that a prospective customer would feel comfortable entering a business office or using a corporate product if the corporation were

> immune from tort liability. Only with the potential imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status."

451 F. Supp. at 1137.

A further rationale for imposing a rule of non-immunity for a tribal corporation in the instant context is explained in *Namekagon*, supra. *Namekagon* involved a breach of contract by a tribal corporation that had been created to build housing on a reservation. After first recognizing that tribal corporations were created for the economic advancement of tribal members---and that only the assets of tribal corporations and not the assets of tribes themselves---were at risk in tribal corporate enterprises, the *Namekagon* court explained the commercial necessity for the rule it followed:

> "The Reservation Business Committee purported to create an independent corporation which would be legally responsible for its promises. It invited outsiders to do business with it on a contractual basis, and the corporation promised the plaintiff

> over one million dollars in compensation. As was said by another Court in a related context:
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> * * * It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right * * *."

Namekagon, supra, 395 F. Supp. at 29.

Relying in part on *Namekagon*, the Arizona Supreme Court reached the same result eighteen years ago in *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989)---and the Arizona court's analysis is both insightful and instructive. In *Dixon*, an employee of a tribal corporation, driving a company dump truck while working on a tribal corporation construction job, rear-ended a driver who brought suit in the Superior Court of Maricopa County. The Salt River Pima-Maricopa tribe made an argument in *Dixon* that is identical to Avi Casino Enterprise, Inc.'s argument

below---that a tribal corporation and its employees are protected by sovereign immunity.

In rejecting that argument, the Arizona Supreme Court expressly noted the same material facts that are presented by the instant case: (1) the tribal corporation was incorporated as a separate entity to engage in commercial activity; (2) the tribal corporation was engaged in the construction business and not the functions of tribal government; and (3) the tribal corporation had insured itself against liability.[4] Based on these facts, the Court concluded that the tribal corporation was not a "subordinate economic organization" of the tribe and, therefore, was not entitled to tribal immunity. The Arizona court thoughtfully observed that:

> "Policies protective of tribal cultural autonomy and self-determination also remain unhindered by permitting jurisdiction here. Picopa's charter shows that it was established for purely commercial reasons and not in any effort to promote, develop, or protect the Community's culture. Cultural autonomy survives. *See* Note, *supra,* 88 COLUM.L.REV., at 186-87. Neither is

[4] Defendants in the instant case are also being defended under a liability insurance policy, per multiple representations made by their counsel.

> the Community's self-determination imperiled by our assertion of jurisdiction. This private action based on an off-reservation tort does not in any fashion limit the Community's powers nor the manner in which it exercises those powers. *See id.* at 187-88.□ In contrast, the federal government's policy promoting commercial dealings between Indian tribes and non-Indians is furthered by withholding immunity in this case. We realize that, here, Dixon did not voluntarily become involved with Picopa, but we believe that an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into contractual relationships with that Indian corporation or any other Indian corporation. Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit."

160 Ariz. at 258, 772 P.2d at 1111.

Despite this clear expression from the Arizona Supreme Court, Defendants-Appellees relied heavily below on a recent opinion by Arizona's intermediate appellate court, *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (App. Div. 2, 2006). Upon close reading, *Filer* provides no analytical support for a claim of sovereign immunity in the case at bar because *Filer* was decided on a dispositively different legal basis.

Specifically, in *Filer*, "The parties [did] not dispute that the Gaming Enterprise, as a subordinate economic enterprise of the Tohono O'odham Nation, is entitled to the same immunity as the Nation." 212 Ariz. at 169, 129 P.3d at 80. (Emphasis added).

Thus, the dispositive issue in *Filer* was whether the tribal gaming corporation's acquisition of a state of Arizona liquor license or the tribe's adoption of an alcohol ordinance acted as a waiver of sovereign immunity, either implicitly or by operation of law. In other words, the critical legal distinction between a tribal corporation and a Tribe was not raised, briefed, argued or decided in *Filer*. Here, Avi Casino Enterprise is not a subordinate economic enterprise[5] and such a finding would be directly contrary to *Dixon*.

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[5] Plaintiffs-Appellees asserted below that Avi Casino Enterprise, Inc. is not a "subordinate economic entity" of the Fort Mojave Tribe, and that it is instead a legally independent commercial enterprise engaged in the gambling and resort business.

Thus, the reasons for the no-immunity rule, whether expressed by federal courts or the highest court of the state in which the tragic events at issue occurred, are consistent across the case law. First, it is fundamentally unfair to allow tribes to create purely commercial corporations that can compete and derive income in the general commercial marketplace, while, at the same time, giving those corporations immunity from exposure to the legal liability that all other competitors in the marketplace must face. Second, tribal cultural autonomy, tribal self-determination, and tribal self-government are not affected by requiring that purely commercial enterprises bear legal responsibility for civil wrongs. Third, tribal corporations that engage in the general commercial marketplace can, and do, buy liability insurance to mitigate their risk of civil liability.[6] Fourth, the existence of immunity may deter third persons from doing business with tribal corporations and, thereby, act counter to the federal government's policy of promoting commerce between tribal corporations and non-Indians.

Each and all of these reasons apply to the instant case. The tribal corporation's Avi Resort & Casino competes vigorously in the non-Indian Laughlin, Nevada gaming and resort industry. Permitting the casino to

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[6] Defendants' counsel has represented to Plaintiffs that Avi maintains liability insurance that provides coverage to the Avi Casino Resort and to the defendant employees for this loss; therefore, neither the assets of the trial nor tribal self-government are at risk.

generate millions of dollars in tourist revenue without having to incur the usual, ordinary and necessary costs of risk assessment, management and mitigation---due to immunity from legal liability---creates a significant competitive advantage for the Avi and a corresponding competitive disadvantage for all other casino resorts in the Laughlin market.

There is nothing in the history of the doctrine of sovereign immunity or in the enactments of Congress to suggest that such a competitive advantage was ever intended. Likewise, there is nothing in judicial or legislative history to suggest that such an advantage is inherent in, or is a necessary part of, the protection that is the purpose of sovereign immunity.

Indeed, applying a rule of sovereign immunity in the instant case adds nothing to protection of the tribe because the risk at issue is fully insured. *At most*, if a measured rule of immunity were to be imposed, *it should provide immunity only for any recovery in excess of available insurance limits*---because that is the only *real* exposure that the tribal corporation faces.

It is a foregone conclusion that, if the Avi Resort & Casino were forced to survive on a customer base consisting only of the 1120 members of the Fort Mojave Tribe, and could not attract the millions of tourists who frequent the Laughlin area. If non-Indian tourists ceased to visit the Avi because they were made aware that they would have no legal recourse if

injured by the negligence of casino employees---the economic benefit of the casino to the tribe would be lost. With that loss would go the federal government's goal of integrating Indian and non-Indian commerce, at least for Avi Casino Enterprise, Inc.

Requiring Avi Casino Enterprise, Inc.'s insurance carrier to defend and indemnify against negligence claims arising from operation of the Avi casino business would not affect tribal traditions or tribal cultural freedom. To the contrary, a no-immunity rule would simply force Avi's insurance carrier to *earn* its premium dollars rather than enjoying a windfall.

Likewise, accepting liability for civil wrongs will not affect the right or ability of the Fort Mojave Tribe to govern itself, nor will if affect the right of the tribe's members to exercise self-determination. Avi Casino Enterprise, Inc. has---in *this* very case---purchased liability insurance that is providing its defense.

The Tribe is not, and will not be, adversely affected by having appropriate legal accountability for the mainstream economic benefits generated by its commercial gaming and resort operation. Indeed, even according to its own representations, agriculture---not gaming---is the basis

for the Fort Mojave economy,[7] so even the Tribe itself does not consider the resort and casino central to tribal autonomy or economy.

The Arizona Supreme Court came to this conclusion two decades ago in *Dixon*. That decision---also involving an insured loss---did not cause the Salt River Pima-Maricopa Indian Community tribe to fall into economic ruin. That decision did not result in loss or alteration of the tribe's cultural identity nor affect the tribe's right of self-governance. To the contrary, *Dixon* simply acknowledged the integration of the tribe into mainstream Arizona commercial reality. Indeed, since *Dixon* was decided, the Salt River Pima-Maricopa Indian Community has built and opened <u>two</u> new casinos of its own in the Greater Phoenix area.

As observed by the United States District Court for the District of Minnesota and affirmed by the United States Court of Appeals for the Eighth Circuit:

> * * * It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract

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[7] See ER 51.

with others, or to injure others, confident that no redress may be had against it as a matter of right * * * "

Namekagon, supra, 395 F. Supp. at 29.

2. The Corporation's Non-Indian Employees Have No Immunity.

In the district court, Defendants-Appellees relied exclusively on *Filer,* supra, for the contention that the casino corporation's non-Indian employees are immune from suit. Obviously, that argument depends wholly on the premise that the individual defendants' employer, Avi Casino Enterprise, Inc., is immune from suit. It is not, for the reasons shown above.

Moreover, even if the casino corporation were immune, it does not follow that its employees would *also* be immune. The individual defendants in this action are not Indian tribes and they are not tribal corporations. Indeed, they are non-Indians and they have no independent source of sovereign immunity, and there is no vicarious immunity.

As a result, the individual defendants have common law dram shop liability under *Ontiveros v. Borak*, 667 P.2d 200 (Ariz. 1983), the landmark Arizona case in which the state's Supreme Court rejected the common law rule of non-liability for servers of alcohol. In *Ontiveros*, the Arizona court quoted with approval and followed the Alaska Supreme Court, which had

Simultaneous inconsistent alternatives on the same analytical proposition are intrinsically wrong.

Below, Avi Casino Enterprise, Inc. asserted that it possesses the sovereign immunity that was conferred on the Fort Mojave Indian Tribe. As a matter of law, the Fort Mojave Indian Tribe is not a citizen of any state. The necessary corollary of Avi Casino Enterprise, Inc.'s claim of sovereign immunity, then, is that the tribal corporation was not created in any state.

In slightly different terms, because the Fort Mojave Indian Tribe is not a citizen of any state, the Fort Mojave Indian Tribe's official government actions do not occur or exist in any state. Avi Casino Enterprise, Inc.'s organizational document expressly states that the corporation was created under the terms of a legislative enactment of the Fort Mojave Indian Tribe---

> "by resolution of the Board of Directors, the undersigned do hereby restate the following Articles of Incorporation pursuant to the Fort Mojave Business Corporation Ordinance." ER 23.

Thus, the corporation's citizenship for diversity purposes must be determined by the location of its principal place of business, not the location of the Fort Mojave Indian Tribe's offices. The only logical alternatives are that---because the Avi Casino Enterprise's Articles of Incorporation were

executed in Arizona before an Arizona notary public (ER 27), the tribal corporation was incorporated in Arizona; or that---because the registered office of the corporation is in Laughlin, Nevada (ER 27), the corporation exists there.

A. The Principal Place of the Casino Corporation's Business Is Nevada---Where a "Substantial Predominance of Corporate Operations" Takes Place.

This Court applies one of two tests to determine a corporation's principal place of business. First, the "place of operations test" locates a corporation's principal place of business in the state that "contains a substantial predominance of corporate operations." *Industrial Tectonics, Inc. v. Aero Alloy,* 912 F.2d 1090, 1092 (9th Cir.1990), quoting *Co-Efficient Energy Systems v. CSL Industries,* 812 F.2d 556, 558 (9th Cir. 1987). Second, the "nerve center test" locates a corporation's principal place of business in the state where the majority of its executive and administrative functions are performed. *See id.* at 1092-93, citing *Inland Rubber Corp. v. Triple A Tire Service, Inc.,* 220 F.Supp. 490, 496 (S.D.N.Y.1963).

The "nerve center" test is used only when no state contains a substantial predominance of the corporation's business activities. Thus, where the majority of a corporation's business activity takes place in one

state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state. *Industrial Tectonics,* 912 F.2d at 1094.

Determining whether a corporation's business activity "substantially predominates" in one state requires a comparison of the corporation's business activity in that state to its business activity in other individual states. *See, e.g., Montrose Chemical Corp. v. American Motorists Ins. Co.,* 117 F.3d 1128, 1134-36 (9th Cir.1997); *Industrial Tectonics,* 912 F.2d at 1094. Thus, "substantial predominance" does not require that the majority of a corporation's total business activity be located in one state, rather, it requires only that the amount of corporation's business activity in one state be significantly larger than any other state in which the corporation conducts business.

This Court examines several factors to determine if a given state contains a substantial predominance of a corporation's activity, including the location of employees, tangible property, production activities, sources of income, and where sales take place. *Industrial Tectonics,* 912 F.2d at 1094.

Within this analytical framework, this Court has held that where a corporation engages in only one business activity, and substantially all of those operations occur in one state, the state of operations is the

corporation's principal place of business, even if policy and administrative decisions are made elsewhere. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834 (9th Cir. 1986). Expressed in slightly different terms, this Court has said that "[T]he bulk of corporate activity, as evidenced by the location of daily operating and management activities, governs the choice of a principal place of business." *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 776 (9th Cir. 1992); *Bialac v. Harsh Building Co.*, 463 F.2d 1185, 1186 (9th Cir.), *cert. denied,* 409 U.S. 1060, 93 S.Ct. 558, 34 L.Ed.2d 512 (1972).

Determining a corporation's principal place of business, for jurisdictional purposes, is a mixed question of law and fact, but is primarily a question of fact. *Quality Refrigerated Services, Inc. v. City of Spencer*, 908 F.Supp. 1471 (N.D. Iowa, 1995). It was fundamentally uncontroverted below that Defendant-Appellee Avi Casino Enterprise, Inc. engages in only one business activity---the casino resort business---and that Nevada is the sole location of that business. See, for example, ER 47.

For these reasons, *Industrial Tectonics* compels the conclusion that the "substantial predominance" test should be applied to determine the location of the casino corporation's principal place of business for diversity purposes. Further, the "nerve center" test has no application to the facts of

this case, because the casino corporation's business activity in one state---Nevada---is "significantly larger" than its business activity in any other state.

B. A "Substantial Predominance" of Avi Casino Enterprise, Inc.'s Business Operations Occur In Nevada.

This Court held in *Decker Coal*, supra, that where a corporation engages in only one business activity, and substantially all of its operations occur in one state, then that state is the corporation's principal place of business, even if policy and administrative decisions are made elsewhere. On the strength of this rule, the "substantial predominance" analysis for the Defendant-Appellee casino corporation need go no further for this Court to conclude, as a matter of law, that Nevada is the principal and only place of Avi's citizenship for diversity purposes.

Even if the factors this Court examines to determine "substantial predominance" are applied to the limited factual record, it is apparent that Avi Casino Enterprise is a citizen of Nevada for diversity purposes:

1. Location of employees:

The casino corporation has 645 employees in Nevada. Job applications are taken on the second floor of the casino in Nevada. ER 47.

2. Tangible property:

The registered office of the corporation is 10000 Aha Macav Parkway, Laughlin, Nevada. ER 27. The self-described "main attraction" of the Avi Resort & Casino is an "action-packed" casino featuring 125,000 square feet of gaming and entertainment, together with restaurants, a 455-room hotel, a 300-space RV park, and an 18-hole golf course, all in Nevada. ER 47-48. In addition, the casino corporation admits that the Avi Resort and Casino is physically located "entirely within the reservation on the 'Nevada side' of the river" (ER 58) and that "the business office is literally on the premises of the Avi Resort." ER 58.

3. Production activities:

The casino corporation's "product" is gaming and entertainment, which, by its own description, is "Strategically situated" to "compete for Laughlin's (Nevada) visitors with resort casinos" and features "THE LARGEST BINGO HALL IN LAUGHLIN!" ER 47

4. Sources of income:

The only conclusion that can presently be drawn as to the source of the casino corporation's income is the inference that arises from the written and graphic evidence of gaming and resort activity described at ER 47. Because the Avi Resort & Casino is entirely "on the Nevada side of

the river" (ER 58) the logical inference is that virtually 100% of the income of the casino corporation's income is derived from Nevada.[9]

5. Where sales take place:

As with sources of income, the only reasonable inference that can presently be drawn is that all of the casino corporation's sales are made at the 125,000 square feet of gaming and entertainment, restaurants, 455-room hotel, 300-space RV park, and an 18-hole golf course, all in Nevada. ER 47-48. Nothing proffered below refutes this claim or suggests otherwise.

C. Other Factors Concerning Avi Casino Enterprise, Inc.'s Business in Nevada.

Defendant-Appellee Avi Casino Enterprise, Inc. operates the Avi Resort & Casino pursuant to an "Intergovernmental Agreement" with the State of Nevada, acting by and through the Nevada Gaming Commission. ER 131-144. By virtue of this agreement, Defendant-Appellee is subject to the regulatory authority of the state of Nevada in all matters (except taxation) related to operation of the Avi Resort & Casino. ER 131-144.

Further, the casino corporation operates the Avi Resort & Casino pursuant to a "Liquor Licensing Intergovernmental Agreement" with Clark

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[9] The Fort Mojave Indian Tribe website (ER 47-52) indicates that the tribe operates a casino with 125 slot machines in Arizona, but there seems little genuine dispute that the level of business activity in Nevada is "significantly larger" for purposes of the "substantial predominance" test set forth in *Industrial Tectonics.*

County, Nevada, a political subdivision of the state of Nevada. (See Exhibit 5 hereto). By virtue of this agreement, Defendant-Appellee adopts and agrees to abide by the liquor licensing laws of Clark County, Nevada. ER 147-166.

The necessity for, existence and operation of these agreements supports the conclusion that a "substantial predominance" of the casino corporation's business occurs in Nevada. Moreover, Defendant-Appellee's knowing and intentional cession of legal authority to the Nevada Gaming Commission and to Clark County, Nevada seems a clear *quid pro quo* to enable tribal members to enjoy the economic benefits of casino resort operation within the state of Nevada, invoking the rationale expressed in *Namekagon*, *Parker* and other cases cited above.

D. The Casino Corporation's Business Activities Have No Connection to California, Even Under The "Nerve Center" Test.

It is undisputed that Plaintiffs-Appellees are citizens of California. The casino corporation argued below that its principal place business is in California, because that is the only argument that would defeat diversity jurisdiction---but there was no legally significant evidence presented below to support the contention that the corporation's principal place of business is California, to controvert the substantial body of information showing that its

principal place of business is in Nevada, or to show that it was incorporated in California.

For example, under this Court's "nerve center" test, the location of executive and administrative functions could be considered under certain limited circumstances to determine principal place of business for diversity purposes. However, the very most that the casino corporation claimed below is that tribal headquarters---*not the offices or headquarters of Avi Casino Enterprise, Inc.*---are in Needles, California. ER 19. For the reasons shown above, the location of tribal headquarters is of no legal significance to analyzing the citizenship of a tribal corporation for diversity purposes. Even if the location of tribal headquarters mattered to the analysis, the casino corporation made no claim and offered no evidence below that executive or administrative functions of Avi Casino Enterprise, Inc. take place at tribal headquarters.[10]

Notably, nowhere in Defendant-Appellee's pleadings did the casino corporation state, much less present evidence to show, where its principal place of business <u>is</u>--arguing only where it is <u>not</u>. Clearly, Avi Casino Enterprise, Inc.'s principal place of business is not in California and the

[10] Defendant-Appellee chose its words very carefully below in arguing that "tribal headquarters" are in Needles, California, but failed to proffer evidence that Avi Casino Enterprise, Inc. is operated from or by the "tribal headquarters" and failed to offer evidence or even to describe what business *is* conducted at "tribal headquarters."

corporation has no existence in California, the only place where diversity jurisdiction would be defeated.

X. CONCLUSION

Avi Casino Enterprise, Inc.---a commercial, for-profit corporation that was created for the sole and express purpose of competing in the non-Indian casino/resort industry in Laughlin, Nevada---does not and should not, as a matter of law, have sovereign immunity from the negligence and gross negligence of its non-Indian employees, when that conduct causes catastrophic injury to a person who has no intentional or purposeful contact with the tribal corporation, with its employees, or with the tribe under whose ordinance the corporation was created. There is no historical, inherent or rational basis for extending tribal sovereign immunity, beyond its traditional limits, to a tribal corporation, particularly in the factual context here presented. Indeed, extending tribal sovereign immunity in this context is contrary to the federal government's policy of integrating Indian and non-Indian economies and may have the unintended consequence of acting as a deterrent to the growth of Indian commercial opportunities.

Even if tribal sovereign immunity is extended to Avi Casino Enterprise, Inc., it should not be extended to the individual non-Indian

employees of the tribal corporation, who have no independent legal basis to assert sovereign immunity.

A tribal corporation is a citizen *only* of the state in which its principal place of business is located because, as a tribal corporation, its enabling laws do not have a situs in *any* state. Avi Casino Enterprise, Inc.'s principal place of business is Nevada. If consideration were given to the place of Avi Casino Enterprise, Inc.'s incorporation, that place is Arizona, where its articles of incorporation were executed and notarized. If considered is given to the location of the corporation's registered office, that place is Nevada. Accordingly, there is complete diversity of citizenship between Plaintiffs-Appellants Cook, who are citizens of California, and Defendants-Appellees Avi, Dodd and Purbaugh.

XI. CERTIFICATE OF COMPLIANCE

I CERTIFY THAT: Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has the typeface of 14 points or more and contains 8699 words.

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XII. STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases presently pending in this Court.

Dated this 28th day of April 2007.

Bradley L. Booke

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2007, I served 2 copies of Appellant's Opening Brief by first class mail, postage prepaid, to the following:

Theodore Julian
702 East Osborn Road
Phoenix, Arizona 85014

Barbara J. B.