No. 07-15088

In The United States Court Of Appeals for the Ninth Circuit

CHRISTOPHER COOK and LEIDRA COOK, Plaintiffs-Appellants, vs. AVÍ CASINO ENTERPRISES, INC., a corporation; IAN DODD; JUAN MEJIA; STEPHANIE SHAIK; DEBRA PURBAUGH, Defendants-Appellees.	)	APPEAL (United States District Court, District of Arizona No. CIV-04-01079-PHX-PGR)

APPELLEES' ANSWERING BRIEF

BURCH & CRACCHIOLO, P.A.
Theodore A. Julian, Jr., SBA #012765
Daryl Manhart, SBA #005471
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
Telephone: (602) 274-7611
Attorneys for Appellees

RULE 26.1(a) STATEMENT OF CORPORATION OWNERSHIP

Appellee Aví Casino Enterprise, Inc., has no parent corporation nor any publicly held corporation which owns more than 10% of its stock. It is wholly owned by the Fort Mojave Indian Tribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ISSUES ON APPEAL

1. Are Aví Casino Enterprise, Inc., a Tribal entity formed under Tribal law and wholly owned and operated by the Fort Mojave Indian Tribe, and its casino employees, protected from suit by the Tribe's inherent sovereign immunity?

2. To the extent diversity of citizenship jurisdiction applies to a tribal corporation operating a casino on its reservation, does the "dual citizenship" of the corporation, which was "incorporated" at the tribal headquarters on the reservation in California and which has its principal place of business on the reservation in Nevada, destroy diversity with plaintiffs who are citizens of California?

CROSS-ISSUES ON APPEAL

1. Is dismissal required because Aví Casino Enterprise, Inc. (or the Tribe) is an "indispensable" party that cannot be joined due to its sovereign immunity and the lack of diversity of citizenship?

2. Does the application of Nevada law bar a dram shop claim?

STATEMENT OF THE CASE

The Complaint was filed in United States District Court for the District of Arizona ("District Court") on May 24, 2004 for injuries that

plaintiff/appellant Christopher Cook ("Cook") received in a car-motorcycle collision with Andrea Christensen. C.R. 1.[1] Plaintiff sued Aví Casino Enterprise, Inc., a tribal corporation owned and operated by the Fort Mojave Indian Tribe, and individual tribal employees, Ian Dodd, Juan Mejia, Stephanie Shaik and Debra Purbaugh (collectively "Tribal Defendants"), as well as the driver that caused the accident, Andrea Christensen. *Id.* Although a defendant below, Christensen is not a party to this appeal. The sole basis for jurisdiction was diversity of citizenship under 28 U.S.C. §1332(a). *Id.*

On March 31, 2005 the Tribal Defendants moved to dismiss the Complaint for lack of diversity of citizenship jurisdiction because plaintiffs are citizens of California and defendants Mejia and Shaik are citizens of California. C.R. 13. After plaintiffs requested that defendants Mejia and Shaik be dismissed so that they would not destroy diversity, the District Court ordered additional briefing on the dispositive jurisdictional issue of "whether ACE [Aví Casino Enterprise] is a non-diverse defendant because it also can be considered to be a California corporation." C.R. 23.

---

[1] References to C.R. # are to the District Court Docket for case # 3:04-CV-01079-PGR.

There was supplemental briefing and oral argument on March 7, 2007. The District Court granted, in part, the motion to dismiss, and ordered that defendants Aví Casino Enterprise, Juan Mejia, and Stephanie Shaik be dismissed for lack of subject matter jurisdiction. C.R. 38.

On July 26, 2006, the remaining Tribal Defendants, Ian Dodd, and Debra Purbaugh, filed a separate motion to dismiss on the basis that they are protected from suit by the sovereign immunity of the Fort Mojave Indian Tribe and its subordinate business enterprise, Aví Casino Enterprise. C.R. 47. These defendants also raised the dispositive issues that Aví Casino Enterprise is an indispensable party that cannot be joined, and that the application of Nevada law would otherwise bar plaintiffs' dram shop claims. *Id.*

By order dated October 26, 2006, the District Court granted the motion to dismiss, holding that the sovereign immunity of Aví Casino Enterprise shielded Dodd and Purbaugh from suit while acting in the course and scope of their employment. C.R. 60. Because sovereign immunity was dispositive of its subject matter jurisdiction, the District Court declined to reach the issues of failure to join an indispensable party or choice of law. *Id.* A Fed. R. Civ. P. 54(b) final judgment of dismissal in favor of Aví Casino Enterprise, Inc., Ian Dodd, Juan Mejia, Stephanie Shaik, and Debra Purbaugh was entered

December 13, 2006. C.R. 66. Plaintiffs filed a Notice of Appeal on January 10, 2007. C.R. 69.

STATEMENT OF FACTS

◆ Introduction

This is a dram shop/liquor liability action stemming from the alleged overserving of alcohol to Andrea Christensen at the Aví Resort & Casino, located on the Fort Mojave Indian Reservation (the "Reservation") near Laughlin, Nevada. C.R. 1. The Aví Resort & Casino is owned and operated by the Fort Mojave Indian Tribe (the "Tribe") as permitted by a gaming compact between the Tribe and the State of Nevada. C.R. 25, Exhibit 4. Aví Casino Enterprise, Inc. is the tribal entity created under tribal law to operate the Aví Resort & Casino. C.R. 25, Exhibit 2.

In the early morning hours of May 25, 2003, Christensen had been drinking at the casino after completing her shift as a waitress, and had allegedly taken a casino shuttle bus out to the parking lot to her car. C.R. 1 at ¶1; C.R. 38. As she was driving home, Christensen crossed the center line and collided with the motorcycle driven by Cook, who was driving across the Reservation on his way home to California. Cook suffered serious and permanent injuries. C.R. 1 at ¶ 21-23.

issue in this case, and plaintiffs have never alleged that the Tribe or Aví Casino Enterprise ever waived sovereign immunity.

◆ **The District Court Order of Dismissal for Lack of Diversity**

In considering the original motion to dismiss for lack of diversity of citizenship, the District Court concluded that there was no dispute that defendants Juan Mejia and Stephanie Shaik should be dismissed because they, like the plaintiffs, are citizens of California, and their presence destroys diversity of citizenship jurisdiction. C.R. 23. The District Court ordered supplemental briefing, however, regarding the "citizenship" of Aví Casino Enterprises [or ACE], noting that ACE is a tribal corporation operating a casino on the Reservation, but that a portion of the Reservation is located within California: "The dispositive jurisdictional issue regarding ACE, as the Court sees it, is whether ACE is a non-diverse defendant because it can also be considered to be a California corporation." C.R. 23 at 2. Supplemental briefing was directed because in the 9th Circuit "[t]here is authority for the proposition that for purposes of diversity jurisdiction, an Indian corporation is a citizen of the state in whose borders the reservation is located,"[3] and because

[3] *Quoting Stock West, Inc. v. Consolidated Tribes of the Colville Reservation,* 873 F.2d 1221, 1226 (9th Cir. 1989).

in this case the Fort Mojave Indian Reservation is "located" in three different states, including California. C.R. 23 at 2-3.

While it might be said that diversity would be destroyed because the Reservation itself is located, at least in part, within California, the District Court concluded that "the resolution of the issue of ACE's citizenship is more appropriately resolved using traditional corporate citizenship analysis," meaning that a corporation has "dual citizenship" and is considered to be a citizen of the state in which it was incorporated and the state where it has its principal place of business.[4] The District Court, therefore, granted the motion to dismiss as to defendants Aví Casino Enterprises, Inc., Juan Mejia and Stephanie Shaik for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and 21 and set a rule 16 scheduling conference as to the remaining defendants, Dodd, Purbaugh, and Christensen. *Id.*

◆ **The District Court Order of Dismissal on Sovereign Immunity**

On July 26, 2006, the remaining Tribal Defendants, Ian Dodd and Debra Purbaugh, filed a motion to dismiss on the basis that (1) Tribal sovereign immunity applied to the claims against them; (2) the Tribe and Aví Casino

---

[4] *Citing American Vantage Companies, Inc. v. Table Mountain Rancheria,* 292 F.3d 1091, 1099 n.8 (9th Cir. 2002); *Industrial Techtronics, Inc. v. Aero Alloy,* 912 F.2d 1090, 1092 (9th Cir. 1990); *Bank of California Nat'l Ass'n v. Twin Harbors Lumber Co.,* 465 F.2d 489, 491 (9th Cir. 1972).

Enterprise are "indispensable" parties who cannot be joined; and (3) the application of Nevada law precludes plaintiffs' dram shop claims. C.R. 47. The District Court focused on sovereign immunity, because it was jurisdictional and dispositive of all claims, such that the court did not reach the other grounds for dismissal.

The District Court noted that the plaintiffs did not dispute that the Tribe is immune from suit and that Aví Casino Enterprise is a corporation chartered by, wholly owned by and controlled by the Tribe. C.R. 60 at 3-4. The "gist" of plaintiffs' argument, as summarized by the District Court, is that tribal corporations, as distinguished from Indian tribes, do not possess tribal sovereign immunity, and that if Aví Casino Enterprise does not have sovereign immunity, the individual employees do not have immunity either. *Id.*

The District Court denied plaintiffs' request for oral argument and soundly rejected plaintiffs' theories. The court concluded that "plaintiffs' position is incorrect as a matter of law," given the controlling federal law which unequivocally extends tribal immunity to business entities that function as an arm of the tribe. *Id.* at 4. The court quoted at length from the recent 9th Circuit decision in *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), in rejecting the argument that the commercial nature of the casino has

any impact on sovereign immunity, and concluded "that the record and federal law establish that ACE clearly functions as an arm of the Fort Mojave Indian Tribe and thus shares its sovereign immunity." C.R. 60 at 5.

The District Court was also "unpersuaded" by the argument that further discovery might reveal that the individual employees were acting outside the course and scope of their employment, given that the plaintiffs specifically alleged in the Complaint that each of the Tribal employees were acting in the course and scope of their employment. *Id.* at 6. Finally, to put to rest any potential argument that Ian Dodd and Debra Purbaugh are not entitled to immunity because they are non-Indian or are not "tribal" employees, the District Court concluded:

> To the extent that the plaintiffs may be arguing that there is a distinction between an employee of a tribal corporation and an employee of an Indian tribe for tribal immunity purposes, the Court concludes as a matter of law from the undisputed record before it that Dodd and Purbaugh, as ACE employees, are deemed to be employees of the Fort Mojave Indian Tribe for tribal immunity purposes. Although the plaintiffs did not raise the issue, the Court further concludes that Dodd and Purbaugh are covered by tribal immunity notwithstanding that they were not high-level tribal officers or officials performing discretionary governmental functions at the relevant time.

C.R. 60 at 6 n. 5. In holding that Aví Casino Enterprise and its employees were entitled to sovereign immunity, the District Court concluded by saying

"[w]hile the court certainly understands, and is not unsympathetic to, the plaintiffs' perception that this result is fundamentally unfair to them given the facts of this case, the equities of tribal sovereign immunity is an issue for Congress, not the federal courts." *Id.* at 8.

STANDARD OF REVIEW

Motions to dismiss under Federal Rules of Civil Procedure rule 12(b) are reviewed *de novo* with respect to questions of sovereign immunity, subject matter jurisdiction, diversity jurisdiction, and personal jurisdiction. *E.g.*, *Skokomish Indian Tribe v. United States*, 332 F.3d 551 556 (9th Cir. 2003), *Harris Rutsky & Co. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128 (9th Cir. 2003); *Blaxland v. Commonwealth Dir. of Public Prosecutions*, 323 F.3d 1198, 2003 (9th Cir. 2003); *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002); *Breitman v. May Co.*, 37 F.3d 562, 563 (9th Cir. 1994). The foregoing includes the issue of whether sovereign immunity of an Indian tribe is applicable. *See Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991).

The District Court may be affirmed upon any ground supported by the record, including the cross-issues raised below, but which the District Court

did not reach in making its decision. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005); *Welch v. Fritz*, 909 F.2d 1330, 1331 (9th Cir. 1990). Whether joinder of a party as indispensable is mandated is reviewed *de novo*, as is the question of whether a party's interest is impaired by the failure to join an allegedly indispensable party. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996); *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996); *United States ex rel. Morongo Band of Indians v. Rose*, 34 F.3d 901, 907 (9th Cir. 1994). Choice of law questions are also reviewed *de novo*. *E.g.*, *Alvarez-Machain v. United States*, 331 F.3d 604, 632 (9th Cir. 2003); *Jorgensen v. Cassiday*, 320 F.3d 906, 913 (9th Cir. 2003).

SUMMARY OF ARGUMENT

On the issue of sovereign immunity, the plaintiffs do not even pretend to seek a modification or reversal of existing law, perhaps cognizant of the fact that sovereign immunity can only be abrogated by an act of Congress. Instead, the plaintiffs continue to parrot lengthy quotes and *dicta* from inapposite cases for the false premise that tribal corporations do *not* have sovereign immunity. *See* Appellants' Opening Brief at 15-28; *but see Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006); *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz.

167, 129 P.2d 78 (Ct. App. 2006)(all contradicting plaintiffs' position). Aví Casino Enterprise is wholly-owned by the Fort Mojave Indian Tribe and functions as an arm of the Tribe for the legitimate purpose of operating a casino on tribal land for the benefit of the Tribe. As such, Aví Casino Enterprises and its employees share the Tribe's inherent sovereign immunity, which has not been abrogated by Congress nor expressly waived by the Tribe.

Addressing the issue of the "citizenship" of Aví Casino Enterprises for purposes of diversity jurisdiction, the plaintiffs continue to ignore the dispositive issue of the place of incorporation, and instead provide a detailed and unnecessary analysis of the undisputed fact that the "principal place of business" is on the Reservation within Nevada. Again, with complete disregard to controlling authority that a tribal business "incorporated by tribal ordinance is the equivalent of a corporation created under state or federal law for diversity purposes,"[5] and the District Court's ruling that Aví Casino Enterprise is a California corporation, for purposes of diversity, the plaintiffs blindly advocate a new rule where diversity is determined only by a corporation's principal place of business. Other than the *non sequitur* that the signatures on the articles of incorporation were notarized in Mohave County,

---

[5]*American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 n. 8 (9th Cir. 2002).

Arizona, plaintiffs do not dispute that Aví Casino Enterprise was formally incorporated under Tribal law by filing the articles with the Tribal Secretary who issues the certificate of incorporation, all of which occurred at the seat of government, namely the Fort Mojave Tribal Headquarters, which is located on the Reservation near Needles, California. In addition to the dispositive jurisdictional issue of sovereign immunity, the fact that Aví Casino Enterprise is deemed a citizen of California destroys diversity and compels dismissal.

Finally, there are the alternative grounds raised below (C.R. 47) which the District Court did not reach because sovereign immunity and diversity of citizenship issues were dispositive. The District Court may also be affirmed as reaching the correct result based on these cross-issues on appeal. Because the Tribe and Aví Casino Enterprise, Inc. are indispensable parties, whose presence would be required for a just resolution of the case with respect to the other parties, but which cannot be joined due to lack of jurisdiction, dismissal as to all defendants is warranted. Additionally, the natural extension of the reasons advanced by plaintiffs for treating Aví Casino Enterprise as a Nevada entity for diversity purposes, would also lead to the conclusion that Nevada substantive law should govern. Under Nevada law, however, there is no dram

shop liability and plaintiffs' claims against all of these defendants would be dismissed.

ARGUMENT

I. THE TRIBAL/CASINO DEFENDANTS HAVE SOVEREIGN IMMUNITY

A. Aví Casino Enterprise Has Sovereign Immunity.

The attack on sovereign immunity begins with the flawed premise that sovereign immunity simply does not extend to tribal corporations. *See* Appellants' Opening Brief at 15-28. Not surprisingly, the plaintiffs do not cite any case in any jurisdiction that actually stands for this proposition. Instead, the plaintiffs rely upon lengthy quotes and *dicta* from cases where the corporation was *not* wholly-owned and operated by a tribe, or where a tribe *waived* its sovereign immunity. In every other case, the law is clear that a tribe's subordinate commercial organizations, such as wholly-owned tribal corporations and economic "enterprises," do share the tribe's sovereign immunity. *See In re: Green*, 980 F.2d 590 (9th Cir. 1992)(business corporation created under tribal law is clothed with the tribe's sovereign immunity); *Elliot v. Capital Int'l. Bank & Trust*, 870 F. Supp. 733, 735 (E.D. Tex. 1994)(sovereign immunity for limited liability bank chartered, governed and owned by Indian tribe); *See also White Mountain Apache Tribe v. Shelley*, 107

Ariz. 4, 480 P.2d 654 (1971); *White Mountain Apache Tribe v. Industrial Commission*, 144 Ariz. 129, 696 P.2d 223 (Ct. App. 1985).

Sovereign immunity is not affected by whether the tribe or its business entity is engaged in "commercial activities," either on or off the reservation. *Kiowa Tribe v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998)(sovereign immunity from suit on promissory note executed off the reservation); *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006)(Indian casino functions as an arm of the tribe and has sovereign immunity). The key is whether the entity is wholly-owned and operated by the tribe, not whether it is a "for profit" corporation. *Allen v. Gold Country Casino,* 464 F.3d 1044 (9th Cir. 2006).

The record here establishes that Aví Casino Enterprise, Inc. is a Tribal corporation, formed under Tribal law, governed by the Tribal Council for the benefit of the Tribe, and that the revenue is deposited into the Tribal treasury.

> With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. . . . **In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.** *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous.*

> *Auth.*, 207 F.3d 21, 29 (1st Cir.2000) (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Marceau*, 455 F.3d at 978 (recognizing that tribal sovereign immunity "extends to agencies and subdivisions of the tribe").

Allen v. Gold Country Casino, 464 F.3d at 1047 (emphasis added); *See also Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz. 167, 129 P.3d 78 (Ct. App. 2006).

Ignoring the state and federal authorities directly on point, plaintiffs cite to only one Arizona case, *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989), as purported authority for the notion that tribal corporations engaged in "commercial activity" are not entitled to sovereign immunity. *See* Appellants' Opening Brief at 20-22. In *Dixon*, the central question was whether the construction company was even a subordinate business of the tribe. In fact, the *Dixon* court first recognized the well-established law that subordinate economic organizations are clothed with tribal immunity, but noted that the construction company in *Dixon* was not owned or operated by the tribe, the officers or directors were not members of the tribal government (and were not even required to be enrolled members of the tribe), and that the corporation's own charter established that it was purely commercial and did not provide any other protection or benefit to the tribe.

Dixon, 160 Ariz. at 256, 258, 772 P.2d 1109, 1111. Thus, because the corporation was not a "subordinate economic enterprise," it did not share the tribe's sovereign immunity. *Id.*

The plaintiffs also quote liberally from the *Dixon* case regarding the "policy considerations" and "historic rationale" as to why sovereign immunity supposedly does not apply to tribal corporations. Again, these selected quotes are out of place. As the Arizona Court of Appeals noted in the *Filer* case:

> As does the Gaming Enterprise, we question the applicability of Dixon's policy discussion in this context. Dixon addressed whether the defendant construction company, Picopa, was a subordinate economic organization of the tribe, not whether tribal immunity barred a particular cause of action. The court held "Picopa [was] not a subordinate economic organization . . . and hence may not assert the Community's tribal immunity." 160 Ariz. at 259, 772 P.2d at 1112. This case presents no such issues.

Filer v. Tohono O'Odham Nation Gaming Enterprise, 212 Ariz. 167, 172 n. 8, 129 P.3d 78, 83 n. 8 (Ct. App. 2006).

The creation of Aví Casino Enterprise not only stands in sharp contrast to what amounted to a *non*-tribal entity in the *Dixon* case, it fits the model for a subordinate economic organization entitled to immunity. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). The articles of incorporation specifically state that "[t]his corporation shall be owned by the Fort Mojave Indian Tribe," and that "[t]he members of the Fort Mojave Tribal

Council, on behalf of and for the benefit of the Fort Mojave Indian Tribe, shall perform the customary functions of shareholders of the corporation." C.R. 25, Exhibit 3. Furthermore, the articles specifically provide that "all capital surplus of the corporation, whether in cash or property, shall be deposited in the general fund of the Fort Mojave Indian Tribe." *Id.* The bylaws of Aví Casino Enterprise also confirm that Aví Casino Enterprise is a subordinate business enterprise by stating that the corporation "shall be owned by the Fort Mojave Indian Tribe" and that the Tribal Council shall perform the customary functions of shareholders for the benefit of the Tribe. *See* Restated Bylaws, Section 1.1, C.R. 54, Exhibit A. Finally, the plaintiffs cannot legitimately question whether the Tribe intended that Avi Casino Enterprise share its sovereign immunity when the bylaws include a section entitled "**Sovereign Immunity**" and provide that Aví Casino Enterprise can only waive its sovereign immunity in a contract or written obligation, and that "**[t]he corporation retains its sovereign immunity** to the extent not expressly waived within said instrument, contract or other written obligation." *See* Restated Bylaws, Section 5.6, C.R. 54, Exhibit A (emphasis added).

Thus, not only does Aví Casino Enterprise have sovereign immunity by virtue of being owned and operated by the Tribe, with all assets being held for

the benefit of the Tribe, the corporate bylaws explicitly provide that Aví Casino Enterprise intends to retain that sovereign immunity unless expressly waived in writing. The plaintiffs in this case have never claimed that the Fort Mojave Indian Tribe or Aví Casino Enterprise have expressly waived sovereign immunity. Thus, the trial court below correctly applied the law in granting the motion to dismiss on sovereign immunity. "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize." *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

The balance of the cases cited by the plaintiffs-appellants are quoted for the "policy" arguments favoring claims against Indian tribes or tribal corporations, but have no application to this case. First, plaintiffs cite *R.C. Hedreen Co. v. Crow Tribal Housing Authority,* 521 F. Supp. 599 (D. Mont. 1981), for the false statement that tribal corporations are distinct legal entities that do not possess sovereign immunity. The court in *R.C. Hedreen* did not even reach the issue of the tribal corporation's immunity, but instead focused on whether a tribal corporation might be considered a "citizen" of the state in which it is doing business for purposes of exercising federal diversity of citizenship jurisdiction. *Id.* at 602. In fact, the court acknowledged that a

B. Sovereign Immunity Protects the Tribal/Casino Employees.

Plaintiffs implicitly agree that if Aví Casino Enterprise has sovereign immunity then it would protect the employees in the course and scope of their duties. *See Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (Ct. App. 2006)(sovereign immunity of casino enterprise extends to individual employees who allegedly overserved alcohol to a patron who caused an accident). Thus, the only attempt to distinguish *Filer* is to point out that the *Filer* plaintiffs conceded – as they were bound to do — that a wholly-owned tribal entity shares the same sovereign immunity as the tribe itself, whereas the plaintiffs in this case still refuse to do so.

The *Filer* case was a wrongful death dram shop claim against a triba casino and the employees who allegedly overserved the patron that caused th accident. In recognizing the immunity of the casino and its employees, th court noted that "[t]he parties do not dispute that the Gaming Enterprise as subordinate economic enterprise of the Tohono O'Odham Nation, is entitl to the same immunity as the Nation" and that "[t]hey also agree on the we settled principle that 'tribal immunity is a matter of federal law and is subject to diminution by the States.'" *Filer v. Tohono O'Odham Na Gaming Enterprise*, 212 Ariz. 167, 169-70, 129 P.3d 78, 80-81 (Ct. A

casino's dependency on Arizona residents and continuous advertising were sufficient to confer jurisdiction).

The purpose of the requirement that the state in which a diversity action is brought must be able to assert jurisdiction over the defendants is to prevent forum shopping. This case presents the classic example. The plaintiffs deliberately avoided naming the Fort Mojave Indian Tribe as a defendant and chose not to file suit against Aví Casino Enterprise in Tribal court. In selecting a federal court based on diversity of citizenship, plaintiffs did not file in Nevada for fear that the district court would apply Nevada law to a casino which has its gaming compact with the State of Nevada, knowing that there is no dram shop liability in Nevada. Arizona is the closest state that recognizes liquor liability, but it has no sufficient nexus to these parties or the accident.

VI. THE TRIBE AND THE TRIBAL CORPORATION (ACE) ARE INDISPENSABLE PARTIES THAT CANNOT BE JOINED.

When the District Court directed the plaintiffs to brief whether Aví Casino Enterprise could be considered to be a California corporation which would therefore destroy diversity of citizenship, it also requested that plaintiffs further explain whether or not Aví Casino Enterprise would be an indispensable party under rule 19. C.R. 23 at 3. The plaintiffs also ignored this directive in their supplemental brief, and when it was raised by defendants

Dodd and Purbaugh in their motion to dismiss, the District Court declined to rule upon it because sovereign immunity was dispositive. C.R. 38, 60.

It is clear that complete relief cannot be afforded to the parties, and that a judgment without the Tribe or Aví Casino Enterprise will impose multiple or otherwise inconsistent obligations. This is further evidenced by the fact that the plaintiffs filed an identical lawsuit against the same defendants in Mohave County Superior Court. The Tribe and Aví Casino Enterprise are not only "necessary" parties whose presence is needed for a just resolution of the case, they are truly "indispensable," meaning that the court, in any event, must dismiss the entire case. *See* Fed. R. Civ. P. 19(b).

A. The Tribe and Aví Casino Enterprise are Necessary Parties.

Rule 19(a) defines the persons or entities needed for a just adjudication that should be joined as parties if feasible.[6] There is no precise formula, but the rule itself highlights the general policies of avoiding multiple litigation,

---

[6] **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder would not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be afforded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. *See* Wright, Miller, Kane, Federal Practice & Procedure §1604 at 39 (2001). The standard also furthers the interest of the public in judicial economy by avoiding repeated lawsuits involving essentially the same subject matter. *Id.* at 47.

In this analysis, the interests of the Tribe and Aví Casino Enterprise are the same because the Tribe and Aví Casino Enterprise are legally one in the same. The Tribe was never named as a party and, even though Aví Casino Enterprise was originally the "target defendant," in separate Orders the District Court concluded that it has sovereign immunity and that it cannot be joined because it would destroy diversity. Clearly the Tribe and Aví Casino Enterprise are "necessary parties" to be joined if feasible under rule 19(a). Looking first to the fact that adequate relief cannot be afforded to the individual Tribal defendants remaining in the action (Dodd and Purbaugh), the plaintiffs cannot obtain a complete recovery when there is no direct or vicarious liability against the Tribe or Aví Casino Enterprise. For that matter, even if Arizona law applied, dram shop liability would only apply to a licensed provider of alcohol (the Tribe/Aví Casino Enterprise), and most likely would

not afford any relief against defendant Purbaugh, a cocktail waitress, who is believed to have served only one drink and defendant Dodd, a night manager, who did not serve any alcohol whatsoever. C.R. 54. The vast majority of the allegations in the Complaint have nothing to do with the conduct and alleged negligence of these two individual defendants. Of course, consideration must also be given to the rights of the existing parties to the lawsuit, including defendants Dodd and Purbaugh.

The rights of the absent parties and the remaining defendants is addressed in rule 19(a)(2). To the extent there is any allegation of negligence or determination of liability of any employees other than Dodd and Purbaugh, it would affect the interests of the Tribe and Aví Casino Enterprise as absent parties. In addition, although they are truly nominal parties, Dodd and Purbaugh would face a substantial risk of multiple or otherwise inconsistent obligations because they are named defendants in an identical lawsuit brought by the same plaintiffs in state court. Any determination of fault is certain to impair the rights of all parties and non-parties due to the unavoidable inconsistencies of dual lawsuits arising out of the same accident. *See, e.g., Owens-Illinois, Inc. v. Meade*, 186 F.3d 435 (4th Cir. 1999)(suits in both state and federal courts would likely result in conflicting legal obligations). Thus,

the question is not whether the Tribe and Aví Casino Enterprise are necessary parties who should be joined if feasible, but rather if the action should proceed against the existing parties, or if it must be dismissed, because the Tribe and Aví Casino Enterprise are considered "indispensable." *See* Fed. R. Civ. P. 19(b).

B. <u>The Tribe and Aví Casino Enterprise are Indispensable Parties</u>.

A motion to dismiss for failure to join a party should be granted if (1) joinder of the party is not possible, and (2) the party is "indispensable". *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). Because the Tribe and Aví Casino Enterprise cannot be joined in this action, the Court must determine whether, in equity and good conscience, the action should proceed against the remaining parties or if it should be dismissed. *See Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 fn. 5 (9th Cir. 2004); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 633-634 (1st Cir. 1989)(joinder destroying diversity); *see also Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150 (9th Cir. 2002)(joinder not feasible due to tribal sovereign immunity); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002)(interest

in tribal immunity overcomes lack of alternative forum or remedy for plaintiffs).

The factors to be considered by the Court include: the extent to which a judgment may prejudice the absent party or those already before the Court; the extent to which such prejudice may be lessened or avoided by protective provisions in the judgment or shaping of the relief; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. *See* Fed. R. Civ. P. 19(b). None of the listed factors is determinative, nor is the list exclusive.

1. Judgment Without the Tribe and ACE Would Be Prejudicial to Parties and Non-Parties Alike.

The first factor under rule 19(b) when joinder is not feasible is "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties." A judgment without the Tribe or ACE would be prejudicial to the named parties, including the *plaintiffs* who cannot get complete relief, and the existing defendants who face multiple and inconsistent obligations.

To some extent, these factors parallel the considerations in rule 19(a)(2) regarding why the party should be joined if feasible, and the reasons outlined

be no judgment or claim against ACE in this case because joinder would destroy diversity, there simply is no way to fashion a judgment or court order that would provide complete relief and eliminate the prejudice to current and former parties in this case. *See Kickapoo Tribe v. Lujan*, 728 F. Supp. 791 (D.C.D.C. 1990); *See also Cherokee Nation v. Babbitt*, 117 F.3d 1489 (C.A.D.C. 1997).

3. A Judgment Rendered Without the Necessary Parties Will Not Be Adequate

The third factor, whether a judgment rendered in the person's absence will be adequate, involves many of the same considerations as addressed above. Here again, plaintiffs misconstrue the rationale of the rule and suggest that the judgment will be adequate because the remaining individual defendants have liability insurance. Even if plaintiffs obtained a judgment against Dodd and Purbaugh individually, the fact remains that it would be inadequate because it would be incomplete unless ACE was a defendant and vicariously liable for the conduct of other non-parties who allegedly caused or contributed to plaintiffs damages. *See, e.g., Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76 (1st Cir. 1982)(action by subsidiary corporation could not go forward without joinder of parent company which would destroy diversity). Of course, equal consideration must be given to the fact that ACE and the

remaining defendants face multiple and inconsistent obligations because there is an identical lawsuit in Mohave County in which they are being sued for the same conduct.

4. Will Plaintiffs Have an Adequate Remedy if the Case is Dismissed?

It is unlikely that plaintiffs would have an "adequate remedy" or alternate forum if this case is dismissed for non-joinder, only because plaintiffs chose the wrong state and the wrong forum to bring suit in the first place. To the extent a state or federal court in Nevada could have exercised jurisdiction over some or all of the same defendants there still is no remedy under the law because the Tribe and ACE have sovereign immunity and Nevada law does not allow dram shop liability anyway. Where the Tribe and Aví Casino Enterprise should be joined if feasible, but cannot be joined based on lack of jurisdiction and sovereign immunity, the action must be dismissed. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1307 (Indian tribe's interest in maintaining sovereign immunity made it indispensable party mandating dismissal despite lack of alternative forum); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002)(interest in tribal immunity overcomes lack of alternative forum or remedy for plaintiffs); *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76 (1st Cir. 1982)(action by subsidiary corporation could not go forward without joinder

of parent company which would destroy diversity); *see also Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992)(suit which affected tribe's legal entitlements must be dismissed because the tribe was an indispensable party that could not be joined due to its sovereign immunity); *See Owens-Illinois, Inc. v. Meade*, 186 F.3d 435,441 (4th Cir. 1999)(pending action in state court against the same parties required dismissal of federal action because all the same parties could not be joined without destroying diversity).

Virtually all the factors outlined in rule 19 compel the dismissal of the action, as it relates to the tribal/casino defendants. As "unfair" as it may seem that plaintiffs cannot pick and choose a forum that has jurisdiction over all defendants, and law that is favorable to the plaintiffs' position, it is no justification for allowing this case to go forward.

V. NEVADA SUBSTANTIVE LAW BARS THE CLAIM

The plaintiff went to great pains to shop for a nearby forum where dram shop liability is recognized, but given that the plaintiffs are non-residents and both the alleged negligence and the accident itself occurred entirely within the boundaries of the Fort Mojave Indian Reservation, either Tribal law or Nevada law would govern this case. In *Schwartz v. Schwartz*, the Arizona Supreme Court adopted the "grouping of contacts" or "most significant relationship"

approach of the Restatement (Second) of Conflict of Laws as the rule for determining choice of law issues in multi-state tort litigation. 103 Ariz. 562, 565, 447 P.2d 254, 257 (1968), *overruled on other grounds*, *Fernandez v. Romo*, 132 Ariz. 447, 646 P.2d 878 (1982). Other Arizona cases have consistently followed the multi-factor analysis encompassed by §§ 6(2), 145 and 146 of the Restatement in resolving such issues. *See, e.g.*, *Bates v. Superior Court*, 156 Ariz. 46, 49-51, 749 P.2d 1367, 1370-72 (1988); *Wendelken v. Superior Court*, 137 Ariz. 455, 457-60, 671 P.2d 896, 898-901 (1983).

Restatement § 145 sets forth the standards, with reference to the general factors listed in Restatement § 6(2),[7] which are to be considered in tort cases. Factors to be taken into account in applying the principles of § 6 to determine

---

[7]Restatement § 6 lists the general factors to be considered in resolving all choice of law questions. It states: (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

the "most significant relationship" to the occurrence and the parties include the following [with specific reference to this case enclosed in brackets]:

(a) **the place where the injury occurred** [Fort Mojave Indian Reservation],

(b) **the place where the conduct causing the injury occurred** [Fort Mojave Indian Reservation],

(c) **the domicile, residence, nationality, place of incorporation and place of business of the parties**, [Plaintiff: California; Defendants Dodd and Purbaugh: Arizona residents/tribal employees; Defendant Aví Casino Enterprise: Fort Mojave Indian Reservation, California and Nevada] and;

(d) **the place where the relationship, if any, between the parties is centered** [Fort Mojave Indian Reservation; Nevada].

See Restatement (Second) of Conflict of Laws §145. Arizona has virtually no relationship to the parties or the occurrence. Restatement § 146 adds a more precise rule regarding personal injury tort cases, namely that the local law of the state where the injury occurred governs, unless some other state has a more significant relationship. Here again, the accident occurred on Tribal land, and the state with the most significant relationship based on the casino operation

would be Nevada. *See generally Bates*, 156 Ariz. at 48-49, 749 P.2d at 1369-70 (applying Restatement §§ 6(2), 145 & 146); *See also Bryant v. Silverman*, 146 Ariz. 41, 703 P.2d 1190 (1985)(state where injury occurred does not have strong interest in compensation if plaintiff is a non-resident). The place where the injury occurred also loses significance if the location is merely fortuitous. *See* Restatement § 145 cmt. e.

In the District Court the plaintiffs misconstrued the holding in *Hoeller v. Riverside Resort Hotel*, emphasizing only that it was a dram shop action against a Nevada casino in which the court of appeals ultimately concluded that Arizona law should apply. 169 Ariz. 452, 820 P.2d 316 (Ct. App. 1991). Actually, the *Hoeller* case illustrates why Arizona law would not apply in this case. In *Hoeller*, the court concluded that Arizona had an interest in the parties and the occurrence because four Arizona residents were injured by an Arizona resident while driving on an Arizona highway. 169 Ariz. at 457, 820 P.3d at 321. Thus, the fact that all the parties were Arizona residents and the accident itself occurred in the forum state "tipped the scales" in favor of applying Arizona law, even though the negligence occurred at a Nevada casino. *Id.* at 455, 820 P.2d at 319.

In this case, by contrast, the plaintiffs are residents of California and the accident occurred on Tribal land. The defendants are all Tribal employees and the alleged negligence all stems from the operations of the Tribe's casino. The Aví Resort and Casino is operated by the Tribe pursuant to a gaming compact with the State of Nevada, and even its liquor license was issued by Clark County, Nevada. The fact that two Tribal/casino defendants (Dodd and Purbaugh) are residents of Mohave County may subject them to personal jurisdiction, but it has little to do with the choice of law analysis.

To the extent tribal law would not otherwise apply to bar this claim, a qualitative analysis of the choice of law factors favors Nevada law and the well-settled principle that a "tavern keeper" cannot be liable for injuries arising from the sale or consumption of alcohol. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Yoscovitch v. Wasson*, 98 Nev. 250, 645 P.2d 975 (1982); *Bell v. Alpha Tau Omega*, 98 Nev. 109, 642 P.2d 161 (1982); *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981); *Mills v. Continental Parking Corp.*, 86 Nev. 724, 475 P.2d 673 (1970). If the Court were to consider that the plaintiffs are residents of California or that Aví Casino Enterprise is a "California" corporation, at least for purposes of diversity of citizenship jurisdiction, the choice of California law would

likewise bar the dram shop claim. *See* Cal. Bus. & Prof. Code §25602 (legislative abrogation of dram shop liability); *See also Cable v. Sahara Tahoe Corporation*, 93 Cal. Rptr. 770, 93 Cal. App. 384 (1979)(Under choice of law principles, Nevada law barred dram shop claim brought by California resident against Nevada casino). Based on the application of Nevada law, all dram shop and negligence claims against the tribal defendants would be dismissed.

CONCLUSION

Tribal sovereign immunity precludes subject matter jurisdiction over the defendants-appellees. Congress has not abrogated such immunity nor has it been waived here. Sovereign immunity is case-dispositive and warrants affirmance of the District Court. The District Court also correctly determined that diversity of citizenship jurisdiction was lacking between the plaintiffs, who are citizens of California, and defendants Mejia and Shaik, who were also California citizens. In addition, because Aví Casino Enterprise is an Indian tribal corporation, for diversity purposes, it may be considered a citizen of the state where its reservation is located, and Aví Casino Enterprise was incorporated at the Tribe's headquarters on the Reservation within the State of California, diversity is destroyed.

The District Court dismissal may be affirmed on the additional grounds advanced below, but not reached by the District Court, namely that the Tribe and Aví Casino Enterprise are indispensable parties which may not be joined, because of sovereign immunity and lack of diversity, and because the application of Nevada law bars plaintiffs' claims because there is no dram shop liability under Nevada law. For all of the foregoing reasons, the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of May, 2007.

BURCH & CRACCHIOLO, P.A.

By _____

Theodore A. Julian, Jr., SBA #012765
Daryl Manhart, SBA #005471
702 East Osborn Road, Ste. 200
Phoenix, AZ 85014
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I, Theodore A. Julian, Jr., do hereby certify that Appellees' Answering Brief is in compliance with the type-volume limitation and typeface requirements of Federal Rules of Appellate Procedure, rule 32(a)(7),and Ninth Circuit rule 32-1, because this brief contains 11,360 words, excluding parts of the brief exempted by rule 32, and has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

Date: 5/29/07

Theodore A. Julian, Jr.
Attorney for Appellees

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, THEODORE A. JULIAN, JR., do hereby certify that I am an attorney for the Appellees and that I caused to be mailed on this date to the Appellants, two (2) copies each of the foregoing Appellees' Answering Brief as follows:

Bradley L. Booke
Moriarity, Badaruddin & Booke
10161 Park Run Drive, #150
Las Vegas, Nevada 89145
Attorneys for the Appellants

THEODORE A. JULIAN, JR.

SUBSCRIBED AND SWORN to before me this 29th day of May, 2007, by Theodore A. Julian, Jr.

Notary Public

My Commission Expires:

January 20, 2009

OFFICIAL SEAL
SHELLY L. MONDAVI
Notary Public - STATE OF ARIZONA
MARICOPA COUNTY
My Commission Expires January 20, 2009

CIRCUIT RULE 28-2.6
STATEMENT OF RELATED CASES

Appellees are not aware of any other cases pending in this court which are deemed related. There is pending a related case in the Arizona Court of Appeals as case number 1 CA-CV 07-0110.