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10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 Christobal Munoz,

15 Plaintiff,

16 v.

17 **BARONA BAND OF MISSION**
18 **INDIANS**

19 Defendant.

) Case No. 17CV2092-BAS-AGS

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **BARONA BAND OF MISSION**
) **INDIANS' MOTION TO DISMISS**
) **[Rule 12(b)(1 and 6)]**

) **Hearing Date: December 11, 2017**
) **NO ORAL ARGUMENT UNLESS**
) **REQUESTED BY THE COURT**

) Dept. 4B
) Hon. Cynthia Bashant

20 **INTRODUCTION**

21 The Barona Band of Mission Indians is a federally-recognized Indian tribe
22 (the "Tribe"), which occupies the Barona Indian Reservation north of Lakeside,
23 California in San Diego County.
24

25 The Tribe provides self-funded Workers Compensation Insurance, with
26 appeals to the Barona Workers Compensation Appeals Board, to compensate
27 injured employees.
28

1 The Tribe also has a Tort Claims Ordinance that requires tort claims to be
2 filed within 180 days of the injury. If the claimant is rejected by the insurer or an
3 impasse is reached, he/she may appeal to the Barona Tribal Court. Appeals must
4 be filed within thirty days of the denial or impasse.
5

6 Plaintiff, Christobal Munoz, was employed by the Tribe. He claimed that
7 he fell at work and injured his left knee on October 21, 2015. He denied any
8 prior treatment of his knee. As a result, Mr. Munoz received workers'
9 compensation benefits while his claim was investigated.
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12 During the investigation, Mr. Munoz's medical records were obtained.
13 They revealed that Mr. Munoz had a pre-existing condition. As a result, his
14 workers compensation benefits ceased.
15

16 On April 21, 2016, Mr. Munoz was notified that his claim was denied based
17 on a pre-existing condition. The letter further included a generic statement that
18 knowingly making false or fraudulent statements to obtain workers compensation
19 benefits is unlawful.
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22 Mr. Munoz was further advised that pursuant to the Barona Band of
23 Mission Indians Workers Compensation Ordinance, appeals must be filed within
24 thirty (30) days of receipt of the denial. Mr. Munoz did not appeal the decision
25 and it became final on or about May 21, 2016.
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1 Mr. Munoz did not return to work. On or about September 15, 2016, he
2 was offered a modified position; however, he refused and his employment was
3 subsequently terminated.
4

5 In December, 2016, Plaintiff's counsel contacted the Tribe. He was advised
6 that his client sat on his rights and was now too late to file a claim. Despite this,
7 three separate claims were filed on Plaintiff's behalf on or about January 20, 2017,
8 for FEHA & Title VII disability discrimination.
9

10 The claims were denied by the Tribe's insurer and pursuant to the Tribe's
11 Tort Claims Ordinance were appealed to the Barona Tribal Court, where they
12 were also denied.
13

14 On May 18, 2017, Plaintiff filed three more claims attempting to appeal the
15 prior Tribal Court decision. The Tribe's Tort Claims Ordinance does not allow
16 for appeals, so these claims were summarily rejected.
17

18 On June 22, 2017, an additional claim was received alleging that the appeal
19 denial violated the Indian Civil Rights Act. This claim was also summarily
20 rejected.
21

22 Counsel for Plaintiff stated on more than one occasion that he was going to
23 file suit in federal court. He was advised that this court lacks jurisdiction and that
24 the only remedy for violations of the Indian Civil Rights Act is habeas corpus.
25

26 The present suit was then filed.
27
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1 *Band of Diegueno Mission Indians*, 201 F3d 1256, (9th Circ, 1999); *Santa Clara*
2 *Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

3
4 Plaintiff claims violations of due process because he is not happy with the
5 Tribe's designated statute of limitations. Even if these time frames were
6 unconscionable as Plaintiff claims, "inadequacy of tribal remedies does not effect
7 a waiver of the Tribe's sovereign immunity" and the Indian Civil Rights Act does
8 not waive a tribe's sovereign immunity. *Demontiney v. U.S.*, 255 F.3d 801, 814
9 (9th Circ., 2001).
10

11
12 The Ninth Circuit Court of Appeals addressed a due process claim in *Pink*
13 *v. Modoc Indian Health Project, Inc.* 157 F. 3d. 1185, 1189 (9th Cir. 1998). The
14
15 Pink court said:

16 ICRA only provides a basis for an individual to bring a habeas
17 corpus civil claim. See *Santa Clara Pueblo v. Martinez*, 436
18 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *R.J.*
19 *Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 981
20 (9th Cir.1983). This court therefore rejects Pink's contention,
21 raised for the first time on appeal, that her due process rights
22 under ICRA were violated.

23 The only instance in which the Indian Civil Rights Act waives sovereign
24 immunity is in a habeas corpus action. Since plaintiff's suit seeks money
25 damages, with no allegations that would give rise to a habeas corpus petition, the
26 matter is not properly before this court and should be dismissed.
27
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1 The *Demontiney* court stated:

2 But, we have generally found federal court
3 jurisdiction for alleged violations of ICRA only in habeas
4 corpus actions, not in civil actions. See 25 U.S.C. § 1303;
5 see also *Santa Clara Pueblo*, 436 U.S. at 69-72, 98 S.Ct.
6 1670; *Pink*, 157 F.3d at 1189. Moreover, *Demontiney*
7 provides no support for the proposition that the Tribe's
8 incorporation of ICRA into its constitution and bylaws shows
9 an intent to waive sovereign immunity in federal court.
10 Implying such an intent here would improperly undermine
11 sovereign immunity for many Indian nations. We hold that
12 ICRA does not waive the Tribe's sovereign immunity.

13 *Demontiney v. U.S.* 255 F.3d 80, 814 (9th Circ., 2001)

14 This is consistent with U.S. Supreme Court precedent:

15 It is settled that a waiver of sovereign immunity "cannot be implied
16 but must be unequivocally expressed." *United States v. Testan*, 424
17 U.S. 392, 399 (1976), quoting, *United* [436 U.S. 49, 59] *States v.*
18 *King*, 395 U.S. 1, 4 (1969). Nothing on the face of Title I of the
19 ICRA purports to subject tribes to the jurisdiction of the federal
20 courts in civil actions for injunctive or declaratory relief. Moreover,
21 since the respondent in a habeas corpus action is the individual
22 custodian of the prisoner, see, e.g., 28 U.S.C. 2243, the provisions
23 of 1303 can hardly be read as a general waiver of the tribe's
24 sovereign immunity. In the absence here of any unequivocal
25 expression of contrary legislative intent, we conclude that suits
26 against the tribe under the ICRA are barred by its sovereign
27 immunity from suit. *Santa Clara Pueblo v. Martinez* 436 U.S. 49
28 (1978).

29 **FAILURE TO PROVIDE A FORUM IS NOT A BASIS** 30 **FOR FEDERAL COURT JURISDICTION**

31 Plaintiff claims that Barona did not provide a forum for adjudication of his
32 claims. A forum was in fact provided, but the Tribe has no appellate forum.

1 Even if there were no forum at all to hear Plaintiff's civil claims, this would not
2 constitute a waiver of sovereign immunity. The Ninth Circuit said:

3
4 Because Demontiney's claims are civil and he does not pursue a
5 habeas action under ICRA, inadequacy of tribal remedies does not
6 effect a waiver of the Tribe's sovereign immunity. *See Johnson v.*
7 *Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th Cir.1999). As
8 we explained in *Johnson*:

9
10 As sovereign nations, Indian tribes possess common
11 law immunity from suit in federal court.
12 Accordingly, the district court correctly dismissed
13 Johnson's claims against the Tribe pursuant to the
14 Indian Civil Rights Act (ICRA), 25 U.S.C. §§
15 1302(5) and 1302(8). The only recognized
16 exception to a sovereign immunity defense under
17 the ICRA is a habeas corpus action. Because
18 Johnson does not seek such relief, and the Tribe has
19 not waived its sovereign immunity defense, the
20 district court properly dismissed Johnson's claims
21 against the Tribe. *Demontiney v. U.S.*, 255 F.3d 801
22 (9th Cir. 2001).

23
24 Limitations on a waiver of sovereign immunity by a sovereign, such as
25 those asserted by Barona, must be respected and strictly construed. Citing *Lane*
26 *v. Peña*, 518 U.S. 187, 116 S.Ct. 2092, (1996), the U.S. Supreme Court stated
27 that a waiver of sovereign immunity "will be strictly construed, in terms of its
28 scope, in favor of the sovereign." *Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct.
1651, 1662 (2011).

1 The only waiver of sovereign immunity granted by Barona is in
2 tribal court. This Court therefore lacks subject matter jurisdiction to
3 hear this case.
4

5 **THIS MOTION TO DISMISS IS PROPER**
6 **UNDER FRCP RULE 12(b)**

7 This motion is proper under Rule 12 (b)(1,2, and 6) of the
8 Federal Rules of Civil Procedure.
9

10 This court lacks subject matter jurisdiction to hear this claim.
11 This motion under Rule 12(b)(1) is therefore appropriate.
12

13 The Barona Band of Mission Indians is a federally-recognized
14 Indian tribe. As such, it is immune from suit. Courts have held that
15 such immunity precludes subject matter jurisdiction in an action
16 brought against an Indian tribe. *Alvarado v. Table Mountain*
17 *Rancheria*, 509 F.3d 1008, 1015-1016 (9th Cir., 2007). See also *E.F.W.*
18 *v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-1303 (10th
19 Cir., 2001).
20
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22 Despite Plaintiff's claim, the Indian Civil Rights Act does not
23 waive Barona's sovereign immunity except for habeas corpus suits.
24 This is a civil suit seeking money damages, Barona is therefore immune
25 from suit.
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Even if personal and subject matter jurisdiction existed, Plaintiff has not demonstrated a violation of federal law. Therefore, Plaintiff has failed to state a claim on which relief can be granted.

For the reasons noted above, the Barona Band of Mission Indians urges this Court to dismiss this action.

Dated: November 7, 2017

Respectfully submitted,

s/Kathryn Clenney
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