UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SICHENZIA ROSS FERENCE, LLP and WELTZ LAW P.C.

Plaintiffs,

vs.

SKULL VALLEY BAND OF GOSHUTE INDIANS OF UTAH,

Defendant.

Case No. 1:23-cv-6415

MOTION TO DISMISS AND BRIEF IN SUPPORT

The Skull Valley Band of Goshute Indians of Utah (the Band) moves to dismiss this suit based upon tribal sovereign immunity from suit. Dismissal is required because Plaintiffs have failed to meet their burden to plead a basis for claiming waiver of tribal sovereign immunity. Plaintiffs also would not be able to establish a waiver of sovereign immunity sufficient to enjoying the federal court which is hearing the underlying suit between the parties.

INTRODUCTION

To plead a claim in this court of limited jurisdiction against a tribe or other government, a plaintiff must plead the statute or constitutional provision which provides for jurisdiction AND a waiver or exception to governmental immunity.

This Court is required to dismiss because Plaintiff did not plead any waiver or exception to tribal sovereign immunity.

Although this Court should not need to proceed beyond that simple and obvious failure to plead waiver, Plaintiffs also would not have been able to plead a waiver for their current claims.

DISCUSSION OF MATERIAL FACTS

1. The Skull Valley Band of Goshute Indians is a federally recognized Indian Tribe. Ex. 1 (Hereinafter Pl. Admissions).

2. The Band has sovereign immunity from unconsented suit. Pl. Admissions 13, 20.

3. The Band has not waived its sovereign immunity for any suit by the Plaintiff law firms. *Id.* (In fact, the Band has affirmatively and correctly asserted, consistent with federal court case law, that tribal sovereign immunity bars Plaintiffs from enforcing any attorney lien, and Plaintiffs have affirmatively admitted in the CFRC that at all material times Plaintiffs knew the Band's sovereign immunity bars them from enforcing an attorney lien!). *Id.*

4. On or about December 1, 2021, the Band filed suit in the Court of Federal Claims for the Western Region (CFRC) against Plaintiffs for a declaratory judgment to resolve a dispute regarding the terms of the consensual agreement between the Band and Plaintiffs.

5. The Band does not operate the CFRC, and has no authority to direct the actions of the judges in that Court, save through adoption of statutes of general applicability for the Band. 25 C.F.R. Part 11.

DISCUSSION OF LAW

I. THIS COURT MUST DISMISS THIS SUIT BECAUSE PLAINTIFFS HAVE NOT ALLEGED AND INDEPENDENTLY BECAUSE PLAINTIFFS COULD NOT PROVE A WAIVER OF OR EXCEPTION TO THE BAND'S SOVEREIGN IMMUNITY FROM THIS SUIT.

To bring a cause against a tribal government, a plaintiff must plead and then prove facts establishing: (1) subject-matter jurisdiction **and** (2) a waiver of sovereign immunity. "[T]ribal sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 22 F.4th 892, 906 (10th Cir. 2022). Indeed, the question of subject matter jurisdiction is "wholly distinct" from the defense of

sovereign immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-87 n. 4 (1991). *See also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) (to bring a claim against a government, a plaintiff must plead and provide 1) a cause of action; 2) subject matter jurisdiction and 3) a waiver of sovereign immunity); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 923-924 (9th Cir. 2009) ("sovereign immunity and subject matter jurisdiction present distinct issues."); A*lvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, *in addition to* a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction.") (emphasis added); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1574-75 (Fed. Cir. 1995) ("The inquiry … is not whether there is one, jurisdiction, or the other, a waiver of immunity, but whether there is both….").

A plaintiff has the duty to plead, and then to prove, that this Court has jurisdiction **and** that there is a waiver of the tribe's sovereign immunity from suit.

> The doctrine of sovereign immunity prohibits any suit to be maintained against the United States without its consent. Thus, the jurisdictional allegations in an original action or a counterclaim against the United States must include a reference to the statute containing an express or implied waiver of the government's immunity from suit. It is the consent to be sued that defines the federal court's jurisdiction to entertain a suit against the United States.

Charles Alan Wright and Arthur A. Miller, *Fed. Prac. & Proc. Civ.* § 1212 (3rd ed.) Pleading Jurisdiction—When the United States Is a Party. *See also* Robert L. Haig, *Bus. & Com. Litig. in Fed. Cts.* §120.29 (3rd ed.) ("The plaintiff must allege that the governmental entity's sovereign immunity has been waived as per the applicable statutory provisions. [] As to the existence of immunity, plaintiffs must either allege in the complaint that the immunity does not apply, that it has been waived, or that a specific statutory exception to governmental immunity applies.").

> As a sovereign, the United States "is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's

> jurisdiction to entertain the suit." *United States v. Testan,* 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)). The plaintiff in a suit against the United States is therefore required to set forth in the complaint the specific statute containing a waiver of the government's immunity from suit. *Reeves v. United States,* 809 F. Supp. 92, 94 (N.D. Ga. 1992), *aff'd without op.,* 996 F.2d 1232 (11th Cir. 1993); *see Swift v. United States Border Patrol,* 578 F. Supp. 35, 37 (S.D. Tex. 1983) ("[I]t is incumbent upon the Appellant to state in his complaint the grounds upon which the sovereign consented to [the] suit."), *aff'd without op.,* 731 F.2d 886 (5th Cir. 1984); 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1212 at 126 (1990).

Warminster Twp. Mun. Auth. v. United States, 903 F. Supp. 847, 849 (E.D. Pa. 1995). *See also McCord v. Alabama*, 364 Fed. Appx. 590, 591 (11th Cir. 2010) (affirming dismissal of a civil rights claim against the state where the plaintiffs "did not allege that the state consented to suit or that Congress had abrogated the state's immunity").

"When determining whether a plaintiff pled jurisdiction and waiver, the court does not accept the truthfulness of any legal conclusions contained in the complaint when assessing a facial attack on subject matter jurisdiction under Rule 12(b)(1)." *Payne v. U.S. Bureau of Reclam.*, No. CV1700490ABMRWX, 2017 WL 6819927, at *2 (C.D. Cal. Aug. 15, 2017) (citing *Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1139 (9th Cir. 2003). A plaintiff cannot avoid that rule by attempting to state legal conclusions as if they are factual allegations. *W. Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981).

A. THIS CASE MUST BE DISMISSED BECAUSE PLAINTIFFS DID NOT PLEAD A WAIVER OF TRIBAL SOVEREIGN IMMUNITY.

When reviewing whether a plaintiff has met its burden to plead jurisdiction or waiver of immunity, the Court looks solely to the allegations in the complaint. "Jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quoting *Shipping Fin. Servs. Corp v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). *See also Rice v. Off. of Servicemembers'*

Grp. Life Ins., 260 F.3d 1240, 1245 (10th Cir. 2001) ("The party asserting jurisdiction must allege facts essential to show jurisdiction." Plaintiffs in the current case have not met their burden.

Plaintiffs failed to meet their burden. Plaintiffs simply did not plead a waiver or exception to the Band's sovereign immunity from suit. The only references to tribal sovereign immunity in the Plaintiffs' complaint are to the Band asserting its sovereign immunity in the CFRC. Plaintiffs asserted that the scope of tribal court subject matter jurisdiction is a question of federal law, but as discussed above, the Plaintiffs also had to plead a basis for alleged waiver. They simply failed to even plead a waiver, and their suit therefore must be dismissed.

B. PLAINTIFFS ALSO HAVE NO LEGAL BASIS FOR PLEADING A WAIVER OR EXCEPTION TO THE BAND'S SOVEREIGN IMMUNITY FROM SUIT.

The Band is a necessary defendant in this suit and is the sole named defendant. The Band has sovereign immunity from suit unless: 1) the Band has waived its sovereign immunity or 2) there is a congressionally imposed exception to the Band's sovereign immunity.

Tribal immunity is in all material respects analyzed the same as federal immunity. Tribal sovereign immunity applies to all lawsuits, *e.g.*, *Kiowa Tribe* (sovereign immunity applies to claims for money); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 782 (2014) (sovereign immunity to a state's claim for an injunction). It applies to claims on- or off-contract, *e.g.*, *Kiowa Tribe* (vacating judgment issued for breach of contract); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713 (W.D. Mich. 2017) (dismissing tort claims); *Arizona v.*

Tohono O'odham Nation, 818 F.3d 549 (9th Cir. 2016) (dismissing multiple off-contract claims based upon tribal immunity).[1]

Tribes have sovereign immunity because they are "separate sovereigns pre-existing the Constitution," *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Because of that, they have "the common law immunity from suit traditionally enjoyed by sovereign powers." *Id.* 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

"Tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). *See also Spurr v. Pope,* 936 F.3d 478, 483 (6th Cir. 2019); *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006); *Hagen,* 205 F.3d at 1043 (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)); Unless a tribe has waived its immunity, a court lacks authority to do anything other than dismiss the case. *Colville Confederated Tribal Enter. Corp. v. Orr*, (Colv. App. Dec. 4, 1998)[2] (citing *United States v. U.S. Fidelity & Guarantee*, 309 U.S. 506, 513 (1940)

---

1 It also applies to attorney liens, as Plaintiffs have admitted in the underlying CFRC suit. Therefore, ultimately Plaintiffs will not obtain anything through litigation, regardless of the court in which litigation were to occur. *Yankton Sioux Tribe v. Bernard* is instructive. In *Bernard*, a law firm performed services for a tribe on a contingent fee, solely for filing and prosecution of a case in the federal court in the District of Columbia and/or a related case in the Court of Federal Claims. It withdrew from the case in 2012 and attempted to assert an attorney lien, and rejected offers from the Tribe to resolve the matter. It litigated from 2012 until 2020. The federal court held that because the contract did not waive the Tribe's sovereign immunity from suit, the firm could not assert an attorney lien. D.D.C. case 03-01603. The law firm appealed, but the appeal was dismissed as moot after payment was made to the Tribe. D.C. Cir. case 15-5099, and the case was closed in 2020, with the law firm not being permitted to assert a lien and receiving no payment. *See also Elam v. Monarch Life Ins. Co.*, 598 A.2d 1167 (D.C. Cir. 1937); *Watters v. WMATA*, 295 F.3d 36 (D.C. Cir. 2002); *Peterson v. Islamic Republic of Iran*, 724 Fed. App'x 1 at 4 (D.C. Cir. 2018).; *Knight v. United States*, 982 F.2d 1573, 1578-79 (Fed. Cir. 1993) (because there was no waiver of federal sovereign immunity, a law firm could not assert a lien against the United States); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (tribal sovereign immunity barred law firm's suit on a contingent fee contract).

2 Available at http://www.tribal-institute.org/opinions/1998.NACC.0000009.htm.

and *American Indian Agricultural Credit Consortium* in support of the Court's holding that sovereign immunity "is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation").

Because it is a threshold issue, a court "must address it first and resolve it irrespective of the merits of the claim." *Chemehuevi Indian Tribe v. Cal. St. Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd. on other grounds*, 474 U.S. 9 (1985). *See also Spurr,* 936 F.3d at 483 (holding that tribal sovereign immunity is a threshold issue and "that means we must address it—and must do so first."). A court therefore cannot consider the merits of a claim unless it first determines that the Band has waived sovereign immunity for the claim.

This is so because sovereign immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). "The Band's full enjoyment of its sovereign immunity is irrevocably lost once the Band is compelled to endure the burdens of litigation." *Kiowa Indian Tribe of Oklahoma v. Hoover,* 150 F.3d 1163, 1172 (10th Cir. 1998).

The Band's immunity is only waived by specific, clear and unequivocally expressed waiver.

Applying the sovereign immunity law discussed above to the current case is simple. Here, we do not have nuances of whether a waiver applies to the suit. Instead, there simply is no waiver applicable to the current suit.

Dated: August 10, 2023

PATTERSON EARNHART REAL BIRD & WILSON LLP

/s/ Jeffrey S. Rasmussen
Jeremy J. Patterson
Jeffrey S. Rasmussen
1900 Plaza Drive
Louisville, Colorado 80027

Phone: (303) 926-5292
Facsimile: (303) 926-5293
Email: jpatterson@nativelawgroup.com
Email: jrasmussen@nativelawgroup.com