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12 Indian Community, Martin Harvier, and Phillip LaRoche

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF ARIZONA

15 Juan-Carlos Preciado, et al.,

16 Plaintiffs,

17 vs.

18 Great Wolf Lodge, at al.,

19 Defendants.

No. CV22-01422-PHX-DLR

**MOTION TO DISMISS ALL
CLAIMS AGAINST SALT RIVER
DEFENDANTS**

20 Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants Salt River Pima-
21 Maricopa Indian Community (the “Community”), Martin Harvier, and Phillip LaRoche
22 (collectively, the “Salt River Defendants”) move to dismiss all claims against them in
23 Plaintiffs’ First Amended Complaint (the “Complaint”) for lack of subject matter
24 jurisdiction and for failure to state a claim upon which relief may be granted. The
25 following Memorandum of Points and Authorities supports this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

26 The Community is a sovereign Indian nation. (Doc. 8 ¶ 277.) See Bureau of Indian
27 Affairs, 87 Fed. Reg. 4636, 4639 (Jan. 28, 2022). Defendant Martin Harvier is the elected
28 President of the Community, and Defendant Phillip LaRoche is a Community police



1 officer. (Doc. 8 ¶¶ 28, 30.) As alleged in the Complaint, on March 2, 2021, Plaintiffs
2 Juan-Carlos Preciado and Bianca Bautista-Preciado had a hotel reservation at the Great
3 Wolf Lodge (the “Lodge”), which is a private business located within the boundaries of
4 the Community. (*Id.* ¶¶ 25, 46.) On that day, Plaintiffs entered the lobby of the Lodge
5 with Plaintiff Juan-Carlos wearing a “Vendetta” costume face mask and Plaintiff Bianca
6 wearing a face shield. (*Id.* ¶¶ 44, 48, pp. 42–43.) At the time, the Community and Lodge
7 each had their own face-mask policies because the COVID-19 pandemic was ongoing.
8 (*Id.* ¶ 61, p. 38.)

9 When Lodge staff saw Plaintiff Juan-Carlos, they informed him that his costume
10 mask did not comply with the Lodge’s mask policies, independent from any Community
11 mask directives that were applicable at the time. (*Id.* ¶¶ 58, 61.) In response, Plaintiff
12 Juan-Carlos claimed that he was not their “property” and not an employee and, therefore,
13 the Lodge’s policies did not apply to him. (*Id.* ¶¶ 62–68.) After Plaintiff argued with
14 Lodge staff and refused to comply with the Lodge’s mask policies, Lodge staff called the
15 Salt River Police Department. (*Id.* ¶¶ 72, 74, 205.)

16 Officer LaRoche was dispatched to the Lodge. (*Id.* ¶ 74.) At that time, Lodge Staff
17 again asked Plaintiffs to comply with the Lodge’s mask policies, and Plaintiffs again
18 claimed that those policies did not apply to them.¹ (*Id.* ¶¶ 76–77.) At some point, Officer
19 LaRoche explained to Plaintiffs that “this is a private business” and “they don’t want you
20 to wear the vendetta mask, that is the policy they have.” (*Id.* ¶¶ 94, 102.) Officer LaRoche
21 further explained that “if you don’t abide by the policy, this is a private business and they
22 can ask you to leave, if they ask you to leave then you got to leave.” (*Id.* ¶ 105.) Plaintiff
23

24 ¹ In the Complaint, Plaintiffs also make the improper legal conclusion that they were
25 “exempt” from the Lodge’s mask policies, without any supporting factual allegations.
26 (Doc. 8 at ¶ 166.) The Court should ignore this legal conclusion. *See Whitaker v. Tesla*
27 *Motors, Inc.*, 985 F.3d 1173, 1176 (9th Cir. 2021) (plaintiff must provide “well-pleaded
28 facts, not legal conclusions”). The Court also should disregard the many other legal
conclusions in the Complaint. *See, e.g.*, ¶¶ 79, 91 (concluding that Officer LaRoche
“harassed, trespassed, discriminated, attempted to intimidate Plaintiffs” and “arrested the
free movement of Plaintiffs.”).

1 Juan-Carlos responded, “I am fine with leaving.” (*Id.* ¶ 106.) Officer LaRoche replied
2 “okay, I am just here because they have an issue with your mask.” (*Id.* ¶ 107.)

3 After arguing further with Lodge staff and gathering their belongings from their
4 hotel room, Plaintiffs eventually made their way to the lobby where Officer LaRoche was
5 waiting. (*Id.* ¶¶ 128–219, 211, 220.) Lodge staff then refunded Plaintiffs’ money, and
6 Plaintiffs proceeded to leave without any direct involvement by Officer LaRoche. (*Id.* ¶¶
7 237, 261.)

8 **II. ARGUMENT**

9 Plaintiffs assert several federal and common-law causes of action against the Salt
10 River Defendants. (*Id.* ¶¶ 283–334.) For the reasons that follow, each one fails as a matter
11 of law and the Court should dismiss all claims against the Salt River Defendants.

12 **A. Tribal Sovereign Immunity Bars Plaintiffs’ Claims Against the Salt** 13 **River Defendants.**

14 Plaintiffs’ claims are precluded by well-established principles of sovereign
15 immunity. “As a matter of federal law, an Indian tribe is subject to suit *only where*
16 *Congress has authorized the suit or the tribe has waived its immunity.*” *Kiowa Tribe of*
17 *Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (emphasis added); *see also Cook v.*
18 *AVI Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008) (“Tribal sovereign immunity
19 protects Indian tribes from suit absent express authorization by Congress or clear waiver
20 by the tribe.”). The Supreme Court has “time and again treated the doctrine of tribal
21 immunity as settled law and dismissed any suit against a tribe absent congressional
22 authorization (or a waiver).” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030–
23 31 (2014) (cleaned up). This sovereign immunity deprives a federal court of subject
24 matter jurisdiction and requires dismissal under Fed. R. Civ. P. 12(b)(1). *See Alvarado v.*
25 *Table Mountain Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007).

26 Here, neither congressional authorization nor a waiver exists as to any of the claims
27 Plaintiffs have asserted against the Salt River Defendants, and Plaintiffs have not alleged
28 otherwise. For this reason alone, Plaintiffs’ causes of action against the Community are

1 barred by sovereign immunity.

2 Tribal sovereign immunity extends to tribal officials acting in their official
3 capacity and within the scope of their authority. *Linneen v. Gila River Indian Cmty.*, 276
4 F.3d 489, 492 (9th Cir. 2002) (citing *United States v. Oregon*, 657 F.2d 1009, 1013 n.8
5 (9th Cir. 1981)). In official-capacity suits against tribal officials, “the sovereign entity is
6 the ‘real, substantial party in interest and is entitled to invoke its sovereign immunity from
7 suit even though individual officials are nominal defendants.’” *Cook*, 548 F.3d at 727
8 (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). Plaintiffs “cannot
9 circumvent tribal immunity by merely naming officers or employees of the Tribe when
10 the complaint concerns actions taken in defendants’ official or representative capacities
11 and the complaint does not allege they acted outside the scope of their authority.”
12 *Chayoon v. Chao*, 355 F.3d 141, 143 (2nd Cir. 2004); *see also Cook*, 548 F.3d at 727.

13 In this case, Plaintiffs’ claims against President Harvier and Officer LaRoche are
14 premised *entirely* on actions taken in their official capacities as Community officials. In
15 the Complaint caption, Plaintiffs purport to bring claims against President Harvier in his
16 “official capacity” and against Officer LaRoche in his “professional capacity.” (Doc 8 at
17 1.) In Paragraph 28 of the Complaint, Plaintiffs allege that “[a]t all times material to this
18 lawsuit, Martin Harvier, being a natural person, was the man and individual, acting in the
19 office of President for the Salt River Pima-Maricopa Indian Community/(SRPMIC).” In
20 many places in the Complaint, Plaintiffs allege that President Harvier was “acting as
21 President for (SRPMIC).” (Doc. 8 ¶¶ 30, 37, 40, 42, 271, 274, 337.) As to Officer
22 LaRoche, Plaintiffs allege that “[a]t all times material to this lawsuit, P. Laroche, being a
23 natural person, was the man and individual, acting in the office of Police Officer, badge
24 number 276, for The Salt River Police Department hereinafter know as (SRPD).” (*Id.* ¶
25 30; *see also id.* ¶ 74 (Allegation that Officer LaRoche was “acting in the office of Police
26 Officer for The Salt River Police Department.”))

27 Plaintiffs seek to challenge the mask directive that President Harvier issued
28 pursuant to the President’s authority under the Community’s Code of Ordinances “to

1 protect the health and welfare” of individuals on Community land . (Doc. 8 at ¶ 271 and
2 pp. 38–39.) With respect to Officer LaRoche, Plaintiffs allege merely that Officer
3 LaRoche, acting as a Police Officer of the Salt River Police Department, investigated the
4 reason he was called by talking to Plaintiffs and Lodge staff and subsequently observed
5 Plaintiffs leaving the Lodge after being asked to do so by Lodge staff. (*Id.* ¶¶ 74, 85, 94–
6 125, 210, 261.) President Harvier and Officer LaRoche unquestionably were acting in
7 their official capacity, as the Complaint concedes. *See United States v. Cooley*, 141 S. Ct.
8 1638, 1643–44 (2021) (noting tribes have inherent sovereign authority to protect “health
9 or welfare of the tribe,” including by engaging in “policing”).

10 Thus, sovereign immunity bars all of Plaintiffs’ claims, and the Court should
11 dismiss, with prejudice, all causes of action against the Salt River Defendants for lack of
12 subject matter jurisdiction.

13 **B. In the Alternative, Plaintiffs Lack Standing to Assert Their Claims**
14 **Against the Salt River Defendants.**

15 Standing is a limitation on a District Court’s subject matter jurisdiction and is
16 properly addressed in a Rule 12(b)(1) motion. *See Catacean Cmty. v. Bush*, 386 F.3d
17 1169, 1174 (9th Cir. 2004). To establish standing, Plaintiffs must show that their alleged
18 injuries were caused by the Salt River Defendants—that is, “the injury is fairly traceable
19 to the challenged action of the defendant.” *Id.* To meet this burden, Plaintiffs must allege
20 “well-pleaded facts, not legal conclusions.” *Whitaker*, 985 F.3d at 1176.

21 Here, Plaintiffs failed to plead allegations showing that the Salt River Defendants
22 caused Plaintiffs’ alleged injuries or tying the Community’s directive on masks or Officer
23 LaRoche’s actions to any harm. Plaintiffs were asked to leave by Lodge staff for a
24 violation of “GWL [Great Wolf Lodge]” policies. (Doc. 8 at ¶¶ 61, 76, 128, 170, 210,
25 261.) Rather than enforcing the Community’s mask directive, Officer LaRoche simply
26 investigated the purpose for the call and observed Plaintiffs leave the Lodge. (*Id.* ¶¶ 210,
27 220, 261.) In addition, Plaintiffs’ allegation that Defendants “conspired” to violate
28 Plaintiffs’ rights is a legal conclusion and statement of a claim and, therefore, is

1 insufficient to prevent dismissal. (*Id.* ¶ 303.) *See Whitaker*, 985 F.3d at 1176. Because
2 Plaintiffs do not and cannot allege that their injuries stem from any actions by the Salt
3 River Defendants, the Court should dismiss Plaintiffs’ claims against the Salt River
4 Defendants for lack of subject matter jurisdiction on this ground as well.

5 **C. Plaintiffs Fail to State a Cognizable Claim Against the Salt River**
6 **Defendants.**

7 **1. Constitutional Claims Pursuant to Section 1983**

8 In Counts One and Six of the Complaint, Plaintiffs allege violations of their First,
9 Fifth, and Fourteenth Amendment rights under the United States Constitution, pursuant
10 to 42 U.S.C. § 1983. (Doc. 8 at ¶¶ 283, 326.) Indian tribes, however, are not bound by the
11 United States Constitution. *See R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719
12 F.2d 979, 982 (9th Cir. 1983) (dismissing § 1983 claim and noting that “Indian tribes are
13 separate and distinct sovereignties and are not constrained by the provisions of the
14 fourteenth amendment”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978)
15 (collecting cases specifically holding that tribes are not bound by the First, Fifth, and
16 Fourteenth Amendments); *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005)
17 (“Indian tribes are not bound by the United States Constitution[.]”); *Talton v. Mayes*, 163
18 U.S. 376 (1896) (Fifth Amendment right to indictment by grand jury does not apply to
19 prosecutions in tribal court). Accordingly, the Court should dismiss, with prejudice,
20 Plaintiffs’ claims brought under § 1983 and the United States Constitution.

21 **2. Section 1985(3) Claim**

22 In Count Two, Plaintiffs assert a cause of action under 42 U.S.C § 1985(3),
23 alleging that Defendants conspired to deprive Plaintiffs of their constitutionally protected
24 rights. (Doc. 8 at ¶¶ 303, 306.) Because tribes are not constrained by the United States
25 Constitution, Plaintiffs cannot state a claim under 1985(3) for alleged violations of such
26 rights. *See Santa Clara Pueblo*, 436 U.S. at 56–57 & n.7; *Gallegos v. Jicarilla Apache*
27 *Nation*, 97 Fed. App’x 806, 812 (10th Cir. 2003) (“The alleged due process and equal
28 protection violations cannot serve as predicate violations for a § 1985(3) claim because

1 those provisions of the United States constitution do not constrain tribes and their
2 officials.”); *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 376 (1979)
3 (§1985 “is a purely remedial statute” and requires a predicate constitutional violation).

4 Even if § 1985 was applicable to a tribe or its officials, a plaintiff must allege facts
5 showing “some racial, or perhaps otherwise class-based, invidiously discriminatory
6 animus behind the conspirators’ actions” to state a § 1985 claim. *Griffith v. Breckenridge*,
7 403 U.S. 88, 102 (1971). Plaintiffs fail to plead allegations showing that the Salt River
8 Defendants acted with a discriminatory purpose against Plaintiffs. Indeed, Lodge staff
9 asked Plaintiffs to leave because Plaintiffs refused to comply with the Lodge’s mask
10 policies that were applicable to everyone. (Doc. 8 ¶¶ 76, 172.) The Court should dismiss,
11 with prejudice, Plaintiffs’ 1985(3) claim against the Salt River Defendants.

12 **3. Common Law Conspiracy Claim**

13 In Count Three, Plaintiffs allege a common law conspiracy claim. (Doc. 8 at ¶
14 311.) As with their § 1985(3) conspiracy claim, Plaintiffs allege that their constitutionally
15 protected rights were violated. (Doc. 8 at ¶ 313.) Again, however, the United States
16 Constitution does not constrain Indian tribes. *See Santa Clara Pueblo*, 436 U.S. 49, 56 &
17 n.7. Accordingly, a tribe’s violation of constitutionally protected rights cannot as a matter
18 of law be alleged to be “unlawful,” a necessary component of a conspiracy claim. *See*
19 *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306 (App. 1988) (to state common
20 law conspiracy claim, “two or more persons must agree to accomplish an unlawful
21 purpose”). In addition, no well-pleaded factual allegations show that the Salt River
22 Defendants agreed to violate any of Plaintiffs’ rights. Plaintiffs’ recitation of the elements
23 of a conspiracy claim and legal conclusion that the Salt River Defendants “conspired” to
24 violate Plaintiffs’ rights are utterly insufficient. (Doc. 8 at ¶¶ 303, 312.) *See Whitaker*,
25 985 F.3d at 1176. The Court should dismiss, with prejudice, Plaintiffs’ common law
26 conspiracy claim against the Salt River Defendants.

27 **4. Claim for Denial of Service at Place of Public Accommodation**

28 In Count Four, Plaintiffs allege discrimination in violation of 42 U.S.C. § 2000a,

1 asserting that they are of Mexican and Philippine national origin, have “sincerely held
2 religious beliefs,” and were treated as “a lower class of citizens than that of the tribe
3 members.” (Doc. 8 at ¶¶ 317–19.)

4 Section 2000a prohibits places of public accommodation from “discriminat[ing]
5 or segregat[ing] on the ground of race, color, religion, or national origin.” 42 U.S.C. §
6 2000a. Plaintiffs’ allegations, however, fail to show that the Salt River Defendants denied
7 Plaintiffs access to the Lodge on the basis of their race, color, religion, or national origin.
8 First, Plaintiffs’ allegations show that Plaintiffs left the Lodge when Lodge staff asked
9 them to leave due to their ongoing refusal to comply with the Lodge’s mask policies.
10 (Doc. 8 at ¶¶ 76, 210, 212, 261.) Thus, the Salt River Defendants never denied Plaintiffs
11 access to the Lodge. Second, even if the Salt River Defendants’ actions were at issue (and
12 they are not), the Complaint contains no factual allegations that the Salt River Defendants
13 acted to discriminate against Plaintiffs on the basis of their race, color, religion, or
14 national origin. *See Dragonas v. Macerich*, CV-20-01648-PHX-MTL, 2021 WL
15 3912853, at *4 (D. Ariz. Sept. 1, 2021) (citing *Crumb v. Orthopedic Surgery Med. Grp.*,
16 No. 07-CV-6114-GHK-PLAx, 2010 WL 11509292, at *3 (C.D. Cal. Aug. 18, 2010),
17 *aff’d*, 479 F. App’x 767 (9th Cir. 2012)) (noting Plaintiffs must allege facts showing that
18 the services denied to them “were available to similarly situated persons outside his
19 protected class who received full benefits or were treated better”). Accordingly, the Court
20 should also dismiss this cause of action with prejudice.

21 **5. Claim for “Infliction of Emotional Stress”**

22 In Count Five, Plaintiffs allege a claim for what they call infliction of emotional
23 stress. (*Id.* ¶¶ 321–322.) It appears Plaintiffs are asserting a claim for negligent infliction
24 of emotional distress (*Id.*)

25 “A negligent infliction of emotional distress cause of action requires the plaintiff
26 to: (1) witness an injury to a closely related person, (2) suffer mental anguish manifested
27 as physical injury, and (3) be within the zone of danger so as to be subject to an
28 unreasonable risk of bodily harm created by the defendant.” *Pierce v. Casas Adobes*

1 *Baptist Church*, 162 Ariz. 269, 272 (1989). Here, the Complaint is completely devoid of
2 allegations of direct bodily harm to a closely related person or an unreasonable risk of
3 bodily injury. Nor do Plaintiffs’ general references to “physical symptomatologies” allege
4 the required physical injury. Plaintiffs also fail to tie the required elements of the claim
5 to any or all of the Salt River Defendants. The Court should dismiss this claim with
6 prejudice as well.

7 **III. CONCLUSION**

8 Sovereign immunity and Article III standing principles preclude Plaintiffs’ claims
9 and deprive this Court of subject matter jurisdiction. In addition, even accepting
10 Plaintiffs’ well-pleaded factual allegations as true, they fail to state a claim upon which
11 relief may be granted. Accordingly, the Court should grant this motion and dismiss all
12 causes of action against the Salt River Defendants, with prejudice, under Rules 12(b)(1)
13 and 12 (b)(6). Because any further amendment of their pleading would not cure its fatal
14 defects, the Court also should deny any request for leave to amend. The Salt River
15 Defendants further request their attorneys’ fees and costs to the extent permitted by law,
16 including as authorized by the statutes asserted by Plaintiffs in the Complaint.

17 DATED this 14th day of October, 2022.

18 OSBORN MALEDON, P.A.

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20 By /s/ Brandon T. Delgado
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 12.1(C)

Pursuant to Local Rule of Civil Procedure 12.1(c), undersigned counsel certifies that before filing this motion, counsel notified Plaintiffs about the issues asserted in the motion and asked them if they were willing to voluntarily dismiss any claims in the Amended Complaint. Because Plaintiffs have not listed an email address or a telephone number on their pleadings, counsel hand delivered the draft motion to dismiss to Plaintiffs’ residence asking them to contact counsel if they were willing to dismiss any of their claims voluntarily. Plaintiffs did not contact counsel in response to that request.

/s/ Brandon T. Delgado

CERTIFICATE OF SERVICE

A copy of the foregoing was electronically transmitted using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants this 14th day of October, 2022, and mailed to the following:

Juan-Carlos Preciado and Bianca Bautista-Preciado
c/o 3280 East Milky Way
Gilbert, Arizona 85295

Plaintiffs Pro Per

/s/ J. Rial
