

1 Scott W. Rodgers, 013082
2 Jeffrey B. Molinar, 018512
3 Brandon T. Delgado, 035924
4 OSBORN MALEDON, P.A.
5 2929 North Central Avenue, 21st Floor
6 Phoenix, Arizona 85012-2793
7 (602) 640-9000
8 srodgers@omlaw.com
9 jmolinar@omlaw.com
10 bdelgado@omlaw.com

11 *Attorneys for Defendants Salt River Pima-Maricopa
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
**REPLY IN SUPPORT OF MOTION
TO DISMISS ALL CLAIMS
AGAINST THE SALT RIVER
DEFENDANTS
-and-
RESPONSE TO PLAINTIFFS’
MOTION TO STRIKE AND
MOTION FOR ORDER TO SHOW
CAUSE**

20 Defendants Salt River Pima-Maricopa Indian Community (the “Community”),
21 Martin Harvier, and Phillip LaRoche (collectively, the “Salt River Defendants”) hereby
22 file this Reply in Support of their Motion to Dismiss All Claims Against the Salt River
23 Defendants (“Motion to Dismiss”). The Salt River Defendants simultaneously file this
24 Response to Plaintiffs’ “Motion to Strike” and “Motion to Show Cause.”

25 For the reasons that follow, the Court should grant the Salt River Defendants’
26 Motion to Dismiss and deny Plaintiffs’ “Motion to Strike” and “Motion to Show Cause.”

27 **I. CONSTRUING PLAINTIFFS’ “MOTIONS”**

28 In the Motion to Dismiss, the Salt River Defendants moved to dismiss all claims
against them in Plaintiffs’ First Amended Complaint (the “Complaint”) for lack of subject



1 matter jurisdiction and for failure to state a claim upon which relief may be granted. (Doc.
2 23.) When Plaintiffs did not timely respond, the Court allowed Plaintiffs additional time
3 to respond to the Motion to Dismiss. (Doc. 25.) Rather than properly responding to the
4 pending Motion to Dismiss, Plaintiffs filed two “Motion[s] to Strike Defendants Motion
5 to Dismiss,” two supporting memoranda, and two “Motion[s] to Show Cause.”¹ (Docs.
6 26, 27, 28, 29, 30, 31.)

7 Plaintiffs’ “motions” raise responsive arguments on the merits to the Salt River
8 Defendants’ Motion to Dismiss, and therefore the Court should construe the “motions”
9 as a response to the Motion to Dismiss. *See Labate v. Bush*, No. CV12-0421-PHX-DGC,
10 2021 WL 1831531, *3 (D. Ariz. May 18, 2012) (construing plaintiffs’ “motion” as a
11 response to the pending motion to dismiss). Accordingly, the Salt River Defendants first
12 reply to Plaintiffs’ responsive arguments. To the extent the Court determines that the
13 “motions” to strike and show cause are appropriate stand-alone motions, however, it
14 should deny them on their merits.

15 **II. REPLY IN SUPPORT OF THE SALT RIVER DEFENDANTS’ MOTION** 16 **TO DISMISS**

17 **A. Tribal Sovereign Immunity Bars Plaintiffs’ Claims Against the Salt** 18 **River Defendants.**

19 As discussed in the Motion to Dismiss, “an Indian tribe is subject to suit *only where*
20 *Congress has authorized the suit or the tribe has waived its immunity.*” *Kiowa Tribe of*
21 *Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (emphasis added). (Doc. 23 at 3–5.)
22 This immunity deprives a federal court of subject matter jurisdiction and requires
23 dismissal under Fed. R. Civ. P. 12(b)(1). *See Alvarado v. Table Mountain Rancheria*, 509
24 F.3d 1008, 1015-16 (9th Cir. 2007).

25 Plaintiffs acknowledge that a tribe is subject to suit only where Congress has

26 ¹ The duplicative filings are substantially similar. In this brief, the Salt River
27 Defendants cite to the memorandum and motions that are specifically addressed to the
28 Salt River Defendants in the Certificate of Service. (*See* Doc. 26 at 7; Doc. 29 at 7; Doc.
31 at 8.)

1 authorized the suit or the tribe has waived its sovereign immunity. (Doc. 29 at 2.)
2 Plaintiffs, however, fail to point to any congressional authorization or waiver of sovereign
3 immunity for the claims they have asserted.² (See Docs. 26, 29, 31.) For this reason alone,
4 Plaintiffs’ causes of action against the Community should be dismissed.

5 With respect to President Harvier and Officer LaRoche, Plaintiffs admit that tribal
6 sovereign immunity applies to bar claims against them relating to actions taken in their
7 official capacities. (Doc. 29 at 2–3.) Plaintiffs argue that tribal officials sued in their
8 individual capacities are not entitled to sovereign immunity. (*Id.* at 3–4.)

9 To determine whether tribal officials are sued in their official or individual
10 capacities, *i.e.*, whether the tribe is the real party in interest, courts “must determine in the
11 first instance whether the remedy sought is *truly* against the sovereign.” *Lewis v. Clarke*,
12 137 S. Ct. 1285, 1290 (2017) (emphasis added). If the plaintiff seeks a remedy against
13 the sovereign and the lawsuit is only “nominally” directed against the individual officer,
14 then “the sovereign is the real party in interest” and sovereign immunity bars the suit. *Id.*;
15 *see also Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 688 (1949) (noting
16 that where the claims are “nominally directed against the individual officer . . . suit is
17 barred . . . [f]or the sovereign can act only through agents and, when the agents’ actions
18 are restrained, the sovereign itself may, through him, be restrained.”)

19 In this case, Plaintiffs’ claims are against the Community and are only nominally
20 directed at President Harvier and Officer LaRoche. In Plaintiffs’ request for relief, they
21 seek to have this Court declare that the Community’s mask mandate is unconstitutional.
22 (Doc. 8 at ¶ 337.) Plaintiffs also seek to enjoin the Community from enforcing its mask
23 mandate. (*Id.* at ¶ 338.) Relief in the form of declaratory and injunctive relief against

24
25 ² Plaintiffs cite to the Indian Civil Rights Act (ICRA), but make no argument related
26 to ICRA. *See In re Sanders*, 417 B.R. 596 (D. Ariz. 2009) (noting that “while this Court
27 construes the arguments of pro se litigants liberally,” it cannot “make their arguments for
28 them”). In any event, ICRA only waives sovereign immunity in actions that seek habeas
corpus relief. *See Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1035 (9th Cir.
1999). Plaintiffs do not seek such relief in their Complaint, nor could they under these
circumstances.

1 President Harvier and Officer LaRoche is effectively a restraint on the tribe itself. *See*
2 *Larson*, 337 U.S. at 688 (“the sovereign can act only through agents”). With respect to
3 Plaintiffs’ request for monetary relief, Plaintiffs do not allege that the demand for
4 monetary damages is directed at President Harvier or Officer LaRoche in their
5 “individual” capacities. (Doc. 8 at ¶¶ 314, 340–44.) In fact, throughout the Complaint,
6 and as argued in the Salt River Defendants’ Motion to Dismiss, Plaintiffs allege that
7 President Harvier and Officer LaRoche were acting in their official capacities, and that is
8 exactly what they were doing. (Doc. 23 at 4–5.) Because Plaintiffs’ complaint is truly an
9 official-capacity action, Plaintiffs’ claims against President Harvier and Officer LaRoche
10 are also barred by sovereign immunity.

11 In addition, Plaintiffs’ reliance on cases discussing tribal employees’ individual
12 capacity is misplaced. Those cases involved claims of negligence related to “low-ranking
13 tribal employees” performing their jobs. *See Maxwell v. Cnty. of San Diego*, 708 F.3d
14 1075, 1087–88 (9th Cir. 2013); *Lewis*, 137 S. Ct. at 1291 (tort action against casino driver
15 involving conduct off-reservation not barred by sovereign immunity). They did not
16 implicate a tribe’s right to self-governance. Here, by contrast, the actions involved include
17 the Community acting, through its agents, “to protect the health and welfare” of its
18 members on the reservation. (Doc. 8 at 38, Exhibit A.) Under such circumstances,
19 sovereign immunity applies. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,
20 478–79 (9th Cir. 1985) (holding that the plaintiffs’ claims against the tribal officials were
21 barred by sovereign immunity, and the tribe had the “civil powers” to enact ordinances to
22 “protect the health and safety of tribal members”); *Pistor v. Garcia*, 791 F.3d 1104, 1113
23 (9th Cir. 2015) (noting that sovereign immunity barred the plaintiff from litigating a case
24 against tribal officials individually because “[t]o hold otherwise, we ruled, would interfere
25 with the tribe’s internal governance”); *Larson*, 337 U.S. at 688 (“the sovereign can act
26 only through agents and, when the agents’ actions are restrained, the sovereign itself may,
27 through him, be restrained”).

28 For the foregoing reasons, tribal sovereign immunity bars all of Plaintiffs’ causes

1 of action against the Salt River Defendants. The Court should dismiss with prejudice
2 Plaintiffs' Complaint against the Salt River Defendants.

3 **B. Plaintiffs Lack Standing to Assert Their Claims Against the Salt River**
4 **Defendants.**

5 The Salt River Defendants also argued in the Motion to Dismiss that Plaintiffs
6 must allege "well-pleaded facts, not legal conclusions," to sufficiently allege that the Salt
7 River Defendants caused Plaintiffs' alleged injuries. *See Whitaker v. Tesla Motors, Inc.*,
8 985 F.3d 1173, 1176 (9th Cir. 2021) (plaintiff must provide "well-pleaded facts, not legal
9 conclusions"). (Doc. 23 at 5–6.) Specifically, the Salt River Defendants explained that
10 Plaintiffs' allegations affirmatively establish that Plaintiffs' injuries stem from "GWL
11 [Great Wolf Lodge's]" mask policies, and not the Community's mask mandate. (*Id.*) In
12 addition, the Salt River Defendants argued that Plaintiffs' legal conclusions that all
13 defendants "conspired" and that causation existed were insufficient to state cognizable
14 claims. (*Id.*)

15 In response, Plaintiffs again make conclusory assertions that the Community's
16 mask mandate establishes causation and that defendants were "acting in concert." (Doc.
17 29 at 1-2; Doc. 26 at 2, 5.) For the same reasons explained in the Motion to Dismiss,
18 Plaintiffs completely fail to allege any facts suggesting that their injuries were caused by
19 the Salt River Defendants or the Community's mask mandate. (Doc. 23 at 5–6.)
20 Accepting Plaintiffs' factual allegations as true, their injuries were caused by the Great
21 Wolf Lodge's own mask policies. (*Id.*) Because Plaintiffs do not and cannot allege that
22 their injuries stem from any actions taken by the Salt River Defendants, the Court should
23 dismiss Plaintiffs' claims against the Salt River Defendants for lack of subject matter
24 jurisdiction on this ground as well.

25 **C. Plaintiffs Fail to State a Cognizable Claim Against the Salt River**
26 **Defendants.**

27 In the Motion to Dismiss, the Salt River Defendants addressed each cause of action
28 and noted that Plaintiffs are relying on alleged United States Constitutional violations for

1 Counts 1, 2, 3, and 6. (Doc. 23 at 6–7.) Relying on binding precedent, the Salt River
2 Defendants argued that because Indian Tribes are not bound by the United States
3 Constitution, Plaintiffs fail to state a claim under each of these causes of action. (*Id.*)
4 Plaintiffs do not address this argument, let alone cite any precedent to the contrary. (Doc.
5 26 at 6.) In addition, the Salt River Defendants argued that Plaintiffs failed to allege well-
6 pleaded facts supporting their legal conclusions and recitation of the elements establishing
7 the causes of action. (Doc. 23 at 6–7.) Plaintiffs again assert only legal conclusions in
8 response. (Doc. 26 at 6.) Accordingly, the Court should dismiss, with prejudice, Counts
9 1, 2, 3, and 6.

10 In Counts 4 and 5, Plaintiffs allege claims for “Infliction of Emotional Stress” and
11 under Section 2000a. (Doc. 23 at 7–9.) In the Motion to Dismiss, the Salt River
12 Defendants established that Plaintiffs failed to state valid claims for various reasons. (*Id.*)
13 In response, Plaintiffs assert that they have alleged, with specificity, every essential
14 element required. (Doc. 26 at 5.) Although Plaintiffs do state the legal elements for their
15 claims, the Complaint does not contain well-pleaded facts supporting their claims, and
16 their recitation of the legal elements is insufficient for the reasons stated in the Motion to
17 Dismiss. (Doc. 23 at 7–9.) *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive
18 a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,
19 to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when
20 the plaintiff pleads factual content that allows the court to draw the reasonable inference
21 that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the
22 elements of a cause of action, supported by mere conclusory statements, do not suffice.”)
23 (citations omitted). Accordingly, the Court should dismiss, with prejudice, Counts 4 and
24 5.

25 **III. RESPONSE TO PLAINTIFFS’ “MOTIONS”**

26 **A. Motion to Strike Salt River Defendants’ Motion to Dismiss**

27 To the extent Plaintiffs are seeking a Court Order to strike the Motion to Dismiss,
28 the request should be denied. (Doc. 26) “The Court may strike from a pleading an

1 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
2 Fed. R. Civ. P. 12(f). The defenses asserted in the Motion to Dismiss are well-established
3 by binding precedent, and Plaintiffs do not meet the standard for a motion to strike. (Doc.
4 23 at 3–9.) Accordingly, the Court should deny Plaintiffs’ request to strike the Motion to
5 Dismiss.

6 **B. Motion to Show Cause**

7 The Court should also deny Plaintiffs’ Motion to Show Cause. (Doc. 31.) Plaintiffs
8 seek an order requiring the Salt River Defendants to further explain their defenses and to
9 provide admissible evidence supporting their defenses. (*Id.*) The arguments raised in the
10 Motion to Dismiss are legal defenses (*e.g.*, sovereign immunity and failure to state a
11 claim), and do not require the submission of any evidence for the Court to decide those
12 legal questions. (Doc. 23 at 3–9.) In addition, for purposes of the Motion to Dismiss, all
13 of the well-pleaded factual allegations are accepted as true, and the Court need not resolve
14 any potential factual disputes. (Doc. 23 at 1–3.) Accordingly, the Salt River Defendants
15 need not produce any evidence at this stage of the proceedings and have sufficiently
16 asserted the legal grounds on which the Complaint should be dismissed.

17 Accordingly, the Court should deny the motion.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court should grant the Salt River Defendants’
20 Motion to Dismiss and deny Plaintiffs’ Motion to Strike and Motion to Show Cause.

21 DATED this 12th day of December, 2022.

22 OSBORN MALEDON, P.A.

23 By /s/ Brandon T. Delgado

24 Scott W. Rodgers

25 Jeffrey B. Molinar

26 Brandon T. Delgado

27 2929 North Central Avenue, 21st Floor

28 Phoenix, Arizona 85012-2793

*Attorneys for Defendants Salt River Pima-
Maricopa Indian Community, Martin
Harvier and Phillip LaRoche*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 12th day of December, 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