STEVEN D. SANDVEN
LAW OFFICE PC

PRINCIPAL
STEVEN D. SANDVEN

Admitted in South Dakota, Minnesota & Washington D.C.

3600 SOUTH WESTPORT AVENUE, SUITE 200
SIOUX FALLS, SOUTH DAKOTA 57106-6344
TELEPHONE (605) 332-4408
FACSIMILE (605) 332-4496
SSANDVENLAW@AOL.COM

March 7, 2014

Clerk of Court
Oglala Sioux Tribal Court
P.O. Box 280
Pine Ridge SD 57770

Re: George Dreamer v. Prairie Wind Casino, Loris Welch, General Manager
File No. 14-0056

Dear Clerk of Court:

Please find for filing the attached Notice of Motion and Motion to Dismiss, Memorandum of Law in Support of Motion to Dismiss and Certificate of Service.

Please contact me if there are any questions.

Sincerely,

STEVEN D. SANDVEN
Attorney for Prairie Wind Casino

Enclosures

Cc: Russell D. Blacksmith, P.O. Box 1664, Pine Ridge SD 57770

STEVEN D. SANDVEN, Law Office PC
Steven D. Sandven, Esq.
3600 South Westport Ave., Ste. 200
Sioux Falls, South Dakota 57106
TEL: (605) 332-4408
FAX: (605) 332-4496

ATTORNEY FOR THE DEFENDANTS

OGLALA SIOUX TRIBAL COURT)
OGLALA SIOUX TRIBE)
PINE RIDGE INDIAN RESERVATION)

IN TRIBAL COURT

GEORGE DREAMER,

Plaintiff,

v.

PRAIRIE WIND CASINO, LORIS WELCH, GENERAL MANAGER.

Defendants.

FILE NO: 14-0056

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that the Prairie Wind Casino and Loris Welch, General Manager for the Prairie Wind Casino, on behalf of itself and its officials, make an appearance before this Court to respectfully request this Court dismiss the above-captioned matter. Attached to this Notice of Motion and Motion to Dismiss is the Defendants' legal memorandum in support of its Motion. The undersigned counsel will make an appearance before the Court in the event it is determined that a hearing is necessary.

March 7, 2014

STEVEN D. SANDVEN, Law Office, PC

By:

STEVEN D. SANDVEN,
3600 South Westport Ave, Ste. 200
Sioux Falls SD 57106
Telephone: 605 332-4408
Facsimile: 605 332-4496

STEVEN D. SANDVEN, Law Office PC
Steven D. Sandven, Esq.
3600 South Westport Ave., Ste. 200
Sioux Falls, South Dakota 57106
TEL: (605) 332-4408
FAX: (605) 332-4496

ATTORNEY FOR DEFENDANTS

OGLALA SIOUX TRIBAL COURT) **OGLALA SIOUX TRIBE)** **PINE RIDGE INDIAN RESERVATION)**	**IN TRIBAL COURT**
GEORGE DREAMER, Plaintiff, v. PRAIRIE WIND CASINO, LORIS WELCH, GENERAL MANAGER. Defendants.	**FILE NO: 14-0056** **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

Come now, the Defendants, the Prairie Wind Casino (hereinafter the "Casino") and Loris Welch, General Manager for the Prairie Wind Casino (hereinafter the "General Manager"), by and through their attorney, Steven D. Sandven, and hereby submit this Memorandum of Law in Support of their Motion to Dismiss for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted based upon Plaintiff's failure to allege any statutory basis for his purported claims that the Oglala Sioux Tribe, and more specifically the Casino and the General Manager, have waived their sovereign immunity to this action. Further, the Plaintiff has failed to obtain proper and complete service on the Defendants as required by Chapter Two, Section 20.3 of the Oglala Sioux Tribe's Law and Order Code and has failed to exhaust his

administrative remedies as mandated by Chapter Two, Section 20.1 of the Oglala Sioux Tribe's Law and Order Code.

STATEMENT OF FACTS

The Oglala Sioux Tribe (hereinafter the "Tribe") is a federally recognized Indian Tribe, 79 Fed. Reg. 4748-02 (2014), which possesses and exercises all inherent sovereign powers of a Tribal government. The Tribe operates under a federally approved Constitution and Bylaws and is governed by a Tribal Council consisting of Tribal members elected from their respective Districts. **Exhibit 1.** The Tribal Council exercises authority to create Tribal businesses and Committees as they see fit to undertake Tribal purposes. Specifically, Article IV – POWERS, §1(o) of the Constitution authorizes the Tribal Council "[t]o charter subordinate organizations for economic purposes and to regulate the activities of associations thus chartered by the tribal council, or any other associations of members of the tribe, which are indebted to the tribe." The Tribal Council has broad legislative and administrative powers in managing the official affairs of the Oglala Sioux Tribe.

Pursuant to the Tribal Council's broad authorities, the Tribe's Casino was established on Indian Land that is eligible for gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721.[1] In compliance with same, the Tribe adopted a gaming ordinance to regulate the operation of gaming facilities within its jurisdiction. **Exhibit 2.** Section 3(b) of said

[1] In 1988, Congress enacted the IGRA as "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands", if certain conditions are met. *Id.* at §2701(5). Congress further provided that "[n]othing in this Chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction…" *Id.* at 2713(d). Congress expressly intended the IGRA to "preempt the field in the governance of gaming activities on Indian lands." S.Rep. No. 446, 100th Cong., 2d Sess., 6 (1988). *See also Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001).

Ordinance provides that "[a]ll gaming activities shall be conducted under the exclusive control and responsibility of the Oglala Sioux Tribe." If Section 3(b) was not sufficiently clear, Section 40 of the Ordinance reiterates that "[t]he Oglala Sioux Tribe shall have the sole proprietary interest and responsibility for the conduct of gaming activity within the jurisdiction of the Oglala Sioux Tribe." Pursuant thereto, the Tribe created the Casino as a Tribal enterprise to be wholly owned and operated by the Tribe. It is an arm and instrumentality of the Tribe and is the means through which the Tribe engages in lawful gaming activities in compliance with the IGRA. The Tribal Council establishes the Casino's budgets, salaries, benefits, and determines employees' general working conditions. The Casino is and has been operated by Tribal members since its inception. In fact, Tribal members are involved in every facet of the gaming operations. As an entity wholly owned by the Tribe and created under Tribal law, the Casino shares the Tribe's sovereign powers.

On February 2, 2014, the Plaintiff filed a complaint for replevin with this Court thereby alleging the following:

1. Plaintiff was falsely accused by a Casino employee of presenting a counterfeit fifty dollar ($50.00) bill;
2. Plaintiff was confronted by Casino employees regarding the alleged counterfeit bill in front of other Casino patrons;
3. This incident caused Plaintiff unneeded stress, embarrassment and humiliation; and
4. Plaintiff seeks compensation for the loss he suffered, punitive damages, and mitigated damages.

Affidavits of Service were submitted with the Court for OST Secretary Rhonda Two Eagle but not the General Manager or the Casino.

STANDARD OF REVIEW

A motion to dismiss will be granted in cases where the court finds it lacks subject matter jurisdiction over plaintiff's claims. The court may look at matters outside the pleadings on a

motion to dismiss under Rule 12. Whether they involve questions of law or fact, jurisdictional issues are for the court to decide. Under a Rule 12 motion, "no presumptive truthfulness attaches to the Plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." The Plaintiff has the burden of proof to show the court has jurisdiction. *Osborn v. United States*, 918 F.2d 724, 728 n.4 and 729-730 (8th Cir. 1990).

Sovereign immunity is a jurisdictional issue which should be addressed under Rule 12. *Hagen v. Sisseton-Wahpeton Comty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (citations omitted). Upon a defendant's Rule 12(b)(1) motion to dismiss, the plaintiff bears the burden of proving jurisdiction. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Specifically: "On a [tribe's] motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2nd Cir. 2001). Moreover, the party seeking to invoke the Court's jurisdiction must allege all facts necessary to establish it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The primary focus of the Casino's motion to dismiss is an assertion of sovereign immunity, an argument that implicates the Court's subject matter jurisdiction. *St. Stephen's Indian High School*, 264 F.3d at 1302-03. Although sovereign immunity is recognized as an affirmative defense, it is clear that the party seeking to sue a sovereign entity bears the burden of showing that such immunity has been waived. *See e.g. James v. U.S.*, 970 F.3d 750, 752 (10th

Cir. 1992). As will be discussed below, no waiver of sovereign immunity has been authorized that would allow the Plaintiff to bring an action against the Casino – an entity wholly owned by the Oglala Sioux Tribe - or the General Manager.

As to formal requirements, Plaintiff did not even try to make an attempt to satisfy the strictures of Chapter Two of the Oglala Sioux Tribe's Law and Order Code. First, Defendants were not served in either their official or individual capacities. And finally, those who seek to resolve legal disputes are presumptively required, before filing a claim with the Tribal Court, to exhaust any remedies that are available within the administrative and governmental bodies of the Tribe as mandated by Tribal law. Plaintiff contends that he has exhausted his administrative remedies. He clearly overlooked the unambiguous requirement of Section 20.1 of Chapter Two of the Tribe's Law and Order Code that requires the Plaintiff to file a written complaint with the Tribal Executive Committee. Plaintiff has failed to submit any evidence that he complied with same.

SUMMARY OF ARGUMENT

Plaintiff's complaint must be dismissed, because this Court must acknowledge and give credence to the fact that the Oglala Sioux Tribe is a sovereign Tribe and as such enjoys absolute immunity from suit. A characteristic unique to a sovereign Indian tribe is immunity from suit, which is a jurisdictional consideration. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753, 118 S.Ct. 1700, 1702-03 (1998). The Tribe, its entities and the tribal officials charged with operating the entities share in the Tribe's sovereign immunity from suit. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000). This fundamental right is a bar not only to entry of judgment against a Tribe, but

to suit in the first instance. *See, e.g.*, *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 172 (1977). The Defendants have not unequivocally and expressly waived their sovereign immunity from suit, therefore, this Court lacks jurisdiction to hear Plaintiff's claims.

I. THE TRIBE'S SOVEREIGN IMMUNITY BARS THIS COURT FROM EXERCISING JURISDICTION OVER THIS MATTER.

The Oglala Sioux Tribe is a federally recognized Indian Tribe. 79 Fed. Reg. 4748-02 (2014) (listing the Oglala Sioux Tribe as a federally recognized Indian Tribe). Indian tribes have long been recognized as distinct, independent political communities with the power of self-government over their members, such as the Plaintiff, and territory. *Worcester v. Georgia*, 31 U.S. 515 (1832). As self-governing entities, Tribes possess and enjoy all aspects of sovereignty except that which has been expressly withdrawn by treaty or statute, or by implication as a necessary result of their so-called dependent status. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held the following:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without Congressional authorization, the Indian Nations are exempt from suit.

Id. at 58.[2]

As such, it is a well-settled principal of federal law that Indian tribes are immune from suit unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Because preserving tribal resources and autonomy are matters of vital importance, tribal immunity is broad and extends to both

[2]*See also C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001); *Kiowa Tribe*, 523 U.S. 751 (1998); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986).

governmental and commercial activities, whether undertaken on or off the Tribe's reservation.[3] In fact, Tribal immunity is jealously guarded by Congress. *See Three Affiliated Tribes v. Wold Engineering*, P.C., 476 U.S. 877, 890 (1987). Consistent with this "strong presumption against waivers of tribal sovereign immunity," *Demontiney v. United States,* 255 F.3d 801, 811 (9th Cir. 2001), it is "settled that [an abrogation or waiver] of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58; *See also C&L Enterprises v. Citizens Band of Potawatomi*, 532 U.S. 411, 418 (2001)(to relinquish its immunity, an Indian tribe's waiver must be "clear"). Accordingly, Indian Tribes can only be sued if they actually explicitly and unambiguously waive (or Congress abrogates) this broad right to immunity. *Kiowa Tribe of Okla. v. Manufacturing Technologies*, 523 U.S. 751, 757, 760 (1998).

In practice, these rules have resulted in strict construction of the actions necessary to waive an Indian Tribe's immunity. *See Quiletue Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994)(Tribe's voluntary participation in proceedings "is not express and unequivocal waiver of tribal immunity that we require in this circuit"); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986)(sovereign immunity barred state's counterclaim in suit filed by Tribe); Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization, 757 F.2d 1047, 1053 (9th Cir. 1985)(same). In fact, as courts throughout the nation have recognized, "the standard the Supreme Court has established for a waiver of tribal sovereignty is extremely

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[3]Sovereign immunity is not lost because an Indian Tribe engages in a commercial enterprise. In fact, noting "the modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," the Supreme Court has reaffirmed that Tribal sovereign immunity applies to purely commercial activities of an Indian Tribe. *Kiowa*, at 757-58 (1998). In holding an Indian Tribe immune from liability on a contract, the Supreme Court recognized that Indian Tribes enjoy immunity for a variety of commercial enterprises, including "ski resorts, gambling, and sales of cigarettes to non-Indians." *Id.*

difficult to satisfy." *Smith v. Babbitt*, 875 F.Supp. 1353, 1361 n.4 (D.Minn. 1995), *aff'd.* 100 F.3d 556 (8th Cir. 1996); *see also Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 298 (Minn. 1996)(noting "high threshold on the issue of a tribe's waiver of its sovereign immunity.") The federal appellate decisions are uniformly in accord with the above propositions.[4] In this case, Plaintiff has provided no evidence that the Tribe has specifically waived its sovereign immunity.

II. THE CASINO IS AN ARM OF THE TRIBE AND AS SUCH IS AFFORDED SOVEREIGN IMMUNITY FROM SUIT.

To the extent the Plaintiff consciously chose not to name the Tribe itself as a defendant, but rather, its casino, in hopes of avoiding dismissal on immunity grounds, the effort was futile. As with other Tribes across the nation, the Oglala Sioux Tribe desired to benefit from gaming. Pursuant to the IGRA, the Tribe delegated governmental authority to the Prairie Wind Casino - a wholly owned Tribal entity- for the sole purpose of managing and conducting the Tribe's gaming activities. The Prairie Wind Casino is the governmental arm and instrumentality through which the Tribe conducts lawful gaming in an exercise of inherent sovereignty and in accordance with the IGRA. The Oglala Sioux Tribe owns 100% of the Casino, its business affairs are controlled by the Tribal Council, and the sole purpose of the Casino is to provide an economic benefit to the Oglala Sioux Tribe and its members.

Under controlling law, Tribal entities created to perform business or governmental functions, i.e., the Casino, possess the same immunity from suit that the Tribe possesses. *See*

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[4]*See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2nd Cir. 2000)("a tribe does not waive its immunity merely by participating in off-reservation activities"); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998)("[T]he Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case"); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995)("[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation."); *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.D.Cir. 1986)("In holding that a tribe may consent to be sued, it is imperative to caution, however, that such consent 'cannot be implied but must be unequivocally expressed.'")

Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1307 (2007)(when a Tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the Tribe); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006)(Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority); *see also Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393-94 (E.D. Wis. 1995)(finding Tribe's casino and gaming commission immune from suit). In fact, Courts have routinely extended the rights and privileges of the sovereign to its Tribally created enterprises. *See Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 164 n.3 (1980). *See E.E.O.C. v. Fond du Lac Heavy Equipment*, 986 F.2d 246 (8th Cir. 1993) (equipment and construction company, wholly-owned by federally-recognized Tribe, is entitled to assert the Tribe's sovereign rights); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Auth.*, 199 F.3d 1123, 1125 (10th Cir.1999) ("housing authority's creation under state statute did not preclude characterization as a tribal organization"); *Dillon*, at 583 (*quoting Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 670 (8th Cir.1986)(housing authority, established by a Tribal Council pursuant to its powers of self-government, is a tribal agency*); EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir.1993) (age discrimination act did not apply to a construction company wholly-owned and chartered by a tribe).[5] Relief against a Tribal subsidiary organization is, in effect, relief against the Tribe itself. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Thus, sovereign immunity shields the Tribe's entities from suit absent a

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[5] *See also*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n.13 (1973); *Hagen*, 205 F.3d at 1043; *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670-71 (8th Cir. 1986); *Maryland Casualty Co. v. Citizens Tribal Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966); *Ramah Navajo School Board v. Bureau of Rev. of N.M.*, 458 U.S. 832, 839-40 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983); *Namekogan Development Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508, 510 (8th Cir. 1975); *Dubray v. Rosebud Housing Authority*, 565 F.Supp. 462, 465 (D.S.D. 1983).

clear and unequivocal waiver of that immunity. *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982).

In *Allen v. Gold Country Casino, supra*, 464 F.3d 1044, 1046, the Ninth Circuit squarely held that a Tribe's sovereign immunity extends to its casino. In so holding, the Court reasoned that under the federal law regulating Indian gaming (specifically, the Indian Gaming Regulatory Act), gaming activities at the Tribe's casino are "permitted only under the auspices of the Tribe." *Id.* at 1046. As the Court further explained, "[o]ne of the principal purposes is 'to insure that the Indian tribe is the primary beneficiary of the gaming operation'" (*id.*, at 1046), and protection of the "sovereign Tribe's treasury" was "one of the historic purposes of sovereign immunity in general." *Id.* at 1047. Applying these principles, the Ninth Circuit held that "[i]n 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." *Id.*; See *also Redding Rancheria v. Superior Court*, 88 Cal.App.4th 383, 388-89 (2001)(off-reservation casino owned and operated by the Tribe was entitled to sovereign immunity); *Trudgeon v, Fantasy Springs Casino*, 71 Cal.App. 4th 632, 642 (1999)(for-profit corporation formed by the Tribe to operate the Tribe's casino enjoys sovereign immunity).

As in *Allen*, the Oglala Sioux Tribe established the Casino to build a strong Tribal government, become economically self-sufficient, and provide for its members' health and welfare. Likewise, its Casino is an arm and instrumentality of the Tribe's government. As such, sovereign immunity cannot be avoided by suing the individual Tribal entity. Further, "[i]n deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling." *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980).

Although an action may be nominally brought against an official; or, as here, the Tribal entity and a Tribal official, the suit is still considered to be against the sovereign where the judgment sought will expend itself on the public treasury or domain, interfere with the public administration, and restrain the government from acting or compel the government to act. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). Plaintiff cannot subvert the doctrine of sovereign immunity by naming the Tribal entity as defendant, and therefore, this action must be dismissed.

III. THE TRIBE'S OFFICIALS AND AGENTS SHARE THE TRIBE'S SOVEREIGN IMMUNITY FROM SUIT IN THEIR CAPACITY AS TRIBAL OFFICIALS.

The Complaint alleges that certain unnamed employees of the Casino confronted the Plaintiff about an alleged counterfeit bill that he used at the Casino's restaurant. These employees were not named in Plaintiff's lawsuit but the General Manager - who was not involved in the incident with the Plaintiff - is named in his official capacity. As such, Plaintiff rests the General Manager's participation in the alleged wrongful act solely upon his official capacity an agent of the Tribe. Because a governmental entity can only act through its officials, a lawsuit imposed upon a Tribal official is generally considered to be a lawsuit against the sovereign. Hence, Tribal officials acting in their official capacities share the Tribe's immunity from suit when "acting in their representative capacity and within the scope of their authority." *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989).[6] A plaintiff cannot circumvent a

[6] *See also Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Burlington Northern v. Blackfeet Indian Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds*, *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

sovereign's immunity simply by substituting a suit against the sovereign's agents for a direct suit against the sovereign. *Snow v. Quinault Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984)(stating that one cannot avoid "the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant rather than the sovereign entity.") Hence, a Tribe's immunity extends to its agents and officials when acting in their representative capacity and within the scope of their authority. *Baker Elec. Co-op., Inc, v. Chaske,* 28 F.3d 1466, 1471 (8th Cir. 1994)(stating that if Tribal officers act within their authority, they are "clothed with the Tribe's sovereign immunity").[7]

The Courts have long recognized the importance of extending sovereign immunity to Tribal officials working on the Tribe's behalf. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981)(Tribe's "immunity also extends to tribal officials when acting in their official capacity and within the scope of their authority"). The reason for this rule is clear: the sovereign immunity of individual Tribal officials is founded "on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired." *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir. 1968). Accordingly, sovereign immunity attaches to officials who "perform a high level or governing role in the affairs of the tribe" such that they occupy "a discretionary or policymaking position."

The immunity of Tribal officials is not limited to high level officers or officials who are performing governmental functions and exercising discretion. *Basset v. Mashantucket Pequot*

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[7] *See also Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir 1993); *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1982); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969).

Museum & Research Ctr., Inc., 221 F.Supp.2d 271, 277-78 (D.Conn. 2002). Instead, Tribal immunity extends to all Tribal employees acting within their representative capacity and within the scope of their official authority. *Id.* at 278. *See E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001)(holding that claims against employees of a Tribal social service agency in their official capacities were barred by sovereign immunity); *Dry*, 235 F.3d at 1252-53 (holding that various Tribal officials, including the Tribe's general legal counsel, prosecutor, director of law enforcement, and seven other law enforcement personnel, were immune from suit in their official capacities); *Hardin*, 779 F.2d at 479-80 (holding that claims against "various tribal officials" were "barred by the Tribe's sovereign immunity"); *Snow*, 709 F.2d at 1322 (holding that claims against a tribal revenue clerk were barred by sovereign immunity).

Accordingly, federal district courts across the country have overwhelmingly treated sovereign immunity as a bar to claims against a wide variety of Tribal officials and employees, including: the president of a Tribal college; a boxing promoter; a marketing manager; the Executive Director of a museum; the Projects Director of a museum; Tribal attorneys; members of a Tribal business council; employees responsible for the maintenance of a casino parking lot; and a consultant. *See Cohen v. Winkleman*, 428 F.Supp.2d 1184, 1189 (W.D. Okla. 2006) (dismissing claims against a Tribal college and its president on the basis of sovereign immunity); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 309-10 (N.D. N.Y. 2003) (dismissing claims for injunctive relief against chief, boxing promoter, and marketing manager for acts taken in their official capacities as agents of the Oneida Nation and its Casino); *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 277-78 (D. Conn. 2002) (finding that Tribal immunity applied to the Executive Director of a museum and to the

Projects Director of the museum); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 923 (S.D. N.Y. 2002) (holding that a Tribe's sovereign immunity extended to its attorneys); *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914, 921 (D. Wyo. 1997) (holding that members of Tribal business council were entitled to sovereign immunity); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996), *aff'd on other grounds*, 114 F.3d 15 (2nd Cir. 1997) (characterizing a plaintiff's action against Tribal employees responsible for the maintenance of a casino parking lot as "a suit against the tribe" and holding that "the individual defendants' immunity from suit is coextensive with the Tribe's immunity from suit."); *United States ex rel.Shakopee Mdewakanton Sioux Cmty. v. Pan American*, 650 F.Supp. 278, 281 n.5 (D. Minn. 1986) (Community officials and a consultant hired by the Community would be protected by the Community's immunity if they acted in their official capacities and within the authority granted them).

It must also be noted that Plaintiff's complaint is not directed at stopping the General Manager's ongoing or future conduct, but rather, in recovering monetary damages. Where "the 'essential nature and effect' of the relief sought is against the Tribe, the Tribe is the 'real, substantial party in interest,' and its immunity applies to bar suit, irrespective of claims against Tribal officials." *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). As the Ninth Circuit explained:

> A suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of questionably sovereign power.

Id. at 1320. Plaintiff's requested relief – monetary damages – will "require affirmative action by the sovereign [and] the disposition of unquestionably sovereign property." *Id.* Because the

requested relief "would expend itself on the public treasury or domain", Plaintiff's claims are necessarily against the sovereign itself. *Shermoen*, 982 F.2d at 1320.

Finally, Plaintiff's allegations in his Complaint are insufficient to strip the Defendants of their immunity. The case entitled *Chayoon v. Sherlock*, 89 Conn. App. 821 (Conn.App. 2005) is directly on point. The plaintiff in this case was an employee of the Foxwoods Casino, a casino owned and operated by the Mashantucket Pequot Gaming Enterprise, an arm of the Mashantucket Pequot Tribe. Chayoon was granted a leave of absence under the Family Medical Leave Act, but was terminated when he returned to work. Plaintiff sued for wrongful termination. Plaintiff argued sovereign immunity should not apply because defendants were not Indians and were being sued individually, and because in terminating his employment defendants acted in violation of federal law and therefore beyond the scope of their authority. Defendants argued that at the time plaintiff was terminated they were all casino employees, and plaintiff's claims related to conduct undertaken pursuant to their employment responsibilities. The court agreed with the defendants, affirming dismissal on the basis of sovereign immunity. The Court explained:

> In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads-and it is shown-that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe....Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity....[A] tribal official – even if sued in his individual capacity – is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority...
>
> *Id.* The Court further stated:
>
> [T]he complaint against the defendants in the present matter patently demonstrates that in terminating the plaintiff's employment, the defendants were acting as employees of Foxwoods within the scope of their authority. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. *See Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F.Supp.2d at 280-81. Such an

> interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted "without any colorable claim of authority ...." (Internal quotation marks omitted.) *Id.* at 281. The plaintiff has made no proffer of such conduct here. The plaintiff merely has alleged that he sued the defendants in their personal capacities and that they have acted outside of their authority.

Id. at 829-30.

Here, as in *Chayoon*, Plaintiff has failed to plead facts showing that the General Manager acted "without any colorable claim of authority." *Id. See also Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 2007 WL 1673535 (N.D. Okla. 2007)("tribal official, even if sued in an individual capacity, is only stripped of tribal immunity when he acts "without any colorable claim of authority"). In fact, it is patently clear that Plaintiff has named the General Manager and not the Tribe, because he is well aware that he cannot sue the Tribe itself. Nevertheless, not naming the Tribe is meaningless here since the result is the same. The General Manager plays a vital and important role for the Tribe's government, and therefore, possesses sovereign immunity similar to the Tribe itself. The Plaintiff cannot circumvent the sovereign's authority simply by substituting a suit against the sovereign's agents for a direct suit against the sovereign. *Snow*, 709 F.2d at 1322.

IV. EVEN IN HIS INDIVIDUAL CAPACITY, DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY.

The Plaintiff names the General Manager of the Casino only in his official capacity. However, to be successful in hailing this Tribal agent into court, Plaintiff must prove that the conduct in question is not related to his current or former governmental duties. To overcome an official's sovereign immunity, "a claimant must allege and prove that the officer has acted outside of the scope of his authority." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir.

1989). The allegation and proof that an official acted outside his or her authority is necessary to convert the action from one against the sovereign to one against the official in their individual capacity. *Malone v. Bowdoin*, 369 U.S. 643, 646-48 (1962). Plaintiff's complaint must be dismissed based upon his failure to allege any conduct where the Defendant has acted outside the scope of his authority.

However, even if this Court finds that the Plaintiff has implied that the General Manager has acted outside the scope of his authority, the allegations are insufficient to strip him of his immunity. "A tribal official—even if sued in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.' " *Shenandoah v. Halbritter*, 275 F.Supp.2d. 279, 287 n.5 (N.D. N.Y. 2003) (*citing Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2nd Cir. 2000). *See also Hardin*, 779 F.2d at 479-80 (holding that various Tribal officials sued in their individual capacities were still entitled to the protection of sovereign immunity because they had acted within the scope of their authority). Further, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Id.* Finally, a mere claim of error in the exercise of an official's authority is not sufficient. *Larson*, 337 U.S. at 690. *See also Snow*, 709 F.2d at 1322 (holding that Tribal immunity extended to Tribal revenue clerk where there had "been no allegation that [the clerk] exceeded the scope of her authority); *Bassett*, 221 F.Supp.2d at 280 (stating that a claim against a Tribal official "lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a Tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). If an official's actions relate to the performance of their official duties, they are generally treated as being within the scope of their authority. *See Romanella*, 933 F.Supp. at 168 (holding that Tribal employees responsible for the maintenance of a casino parking lot were

entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties). Here, no allegation in the complaint would support a theory of liability against the General Manager in his individual capacity.

Again, there is *no* claim asserting that Defendant exceeded the scope of his authority, and hence, he is protected from this suit. The Plaintiff has not alleged that Defendant exceeded the scope of his authority in any way, much less in such a way that he could arguably be liable in his individual capacity. Nor has the Plaintiff made any factual allegations that would support the conclusion that Defendant exceeded the scope of his authority. To the contrary, the Plaintiff alleges only actions which would reasonably fall within the scope of the authority of a Tribal official. Without an allegation in the Complaint that the Defendant exceeded the scope of his authority, much less any factual allegations that could support such a conclusion, the Defendant must not be stripped of his immunity from suit. "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994). The Plaintiff must not be permitted to make an end run around sovereign immunity in this manner, as there is no asserted basis for a claim against the Defendant in his individual capacity. Thus, the Plaintiff's purported claims against the Casino and the General Manager must be dismissed.

V. PLAINTIFF HAS FAILED TO ALLEGE THE EXISTENCE OF A VALID WAIVER OF SOVEREIGN IMMUNITY.

Plaintiff has failed to prove, or even allege, that a valid waiver of sovereign immunity exists that would allow him to sue a wholly owned Tribal entity. The Defendants are not subject to suit unless the Tribe consents to such suit. "Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void . . . ." *U.S. F.*

& G., at 514. Neither Defendants, nor the Tribe have waived the Defendants' sovereign immunity from suit. "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . the application of which is within the discretion of the court." *California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979). Dismissal is required where the Court lacks the authority to hear and decide the dispute.

VI. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Given the absence of subject matter jurisdiction by virtue of the Tribe's sovereign immunity, this Court need not reach the substance of Plaintiff's allegations. In the event the Court is nonetheless inclined to do so, dismissal is still warranted because the Plaintiff's complaint fails to state a claim upon which relief can be granted. A complaint should be dismissed for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Although the court construes the allegations of the complaint favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), the court should not accept conclusory allegations or unwarranted deductions of fact as true. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). If a required element, a prerequisite to obtaining the requested relief is lacking in the complaint, dismissal is proper. *Clark v. Amoco Prods. Co.*, 794 F.2d 967, 970 (5th Cir. 1986). Here, construing all allegations in the light most favorable to Plaintiff, it is apparent Plaintiff would not be entitled to any relief.

Plaintiff filed the instant replevin action seeking return of his property, to wit: the fifty dollar ($50.00). The incident in question occurred on January 22, 2014, when Plaintiff tendered a fifty dollar bill at the Casino's restaurant. Following protocol, Casino staff checked the bill's legitimacy by marking it with a pen that would turn yellow if the money was good and black if it

was counterfeit. When marked with the pen, Plaintiff's bill initially turned yellow but when retested turned a dark brown color. Casino staff further tested the bill by inserting it into one of the gaming machines. The bill was accepted by the machine, and so, it was determined that the bill was in fact not counterfeit. On January 23, 2014 – eleven days before he filed his complaint for replevin – Plaintiff was notified by Casino staff that he could pick up his money at the cage. **Exhibit 3**. Because Plaintiff has access to his property, the complaint for replevin must be dismissed.

VII. PLAINTIFF HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

The failure of the Plaintiff to exhaust administrative remedies provides a further ground for dismissing the complaint. Generally, a party may not seek judicial review of an adverse administrative action in any type of case unless they have first exhausted all available administrative remedies. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Exhaustion promotes judicial efficiency by reserving the courts resources for matters which cannot be resolved administratively. *McKart v. United States*, 395 U.S. 185, 195 (1969). In recognition of this objective, Chapter Two – Section 20.1 of the Oglala Sioux Tribe's Law and Order Code provides:

> (a) Effect of Exhaustion of Remedies. The Oglala Sioux Tribal Court shall entertain no action or suit against the Oglala Sioux Tribe, a Tribal government agency, or any Tribal official, or employee complaining of official conduct thereof, unless the plaintiff in such action has first exhausted Tribal administrative remedies to correct the conduct complained of by complying with the procedure set out in subsection (b) or (c) below as appropriate. ***Any complaint in the Tribal Court against the Oglala Sioux Tribe, a Tribal government agency, or any Tribal official, or employee complaining of the official conduct thereof which fails to demonstrate on its face that the plaintiff has complied with the requirements of this Section shall be dismissed by the Court without prejudice to the plaintiff's right to file the suit again when and if those requirements have been complied with.*** (b) General Exhaustion Requirement. Except as provided in subsection (c) below for certain police complaints, a complaining party may exhaust Tribal administrative remedies under this ordinance by filing a written complaint with the Tribal Executive Committee, provided that if the Executive Committee has acted adversely on

such complaint or has failed to act on it within thirty (30) days after it was filed, the Oglala Sioux Tribal Court may entertain an action seeking judicial remedy for the conduct complained of. Emphasis added.

Here, the Plaintiff is attempting to seek judicial review in this Court without first pursuing his administrative remedies, and he must exhaust these remedies prior to filing a claim with this Court. Therefore, his claims against the Defendants are not ripe for judicial review and must be dismissed.

VIII. THE COMPLAINT HAS NOT BEEN SERVED ON THE DEFENDANTS IN ACCORDANCE WITH THE LAWS OF THE OGLALA SIOUX TRIBE.

Section 20.3 of the Oglala Sioux Tribe's Law and Order Code sets forth the procedure that must be followed in order to serve a summons and complaint upon an officer of the Tribe. The rule clearly specifies that service is effected by:

> (c) Service of process upon the Tribe or an Officer of the Tribe shall be made by delivering a copy of the complaint to the Tribal Secretary, the Tribal attorney and the officer named in the manner prescribed in subsection (b) above, except that service by publication is not permitted.

There has been no affidavit of service provided to this Court or the Defendants that evidence the Plaintiff's compliance with Tribal law as it pertains to service of process on a Tribal entity. The return of service forms filed with this Court evidence an apparent attempt to serve the Prairie Wind Casino and the General Manager at the office of the Tribal Secretary. The General Manager of the Prairie Wind Casino was never personally given a copy of the complaint. Nor was a copy of the complaint left at the General Manager's residence or place of business. The President of the Oglala Sioux Tribe is authorized to accept service on behalf of the Prairie Wind Casino, and yet, there has been nothing filed with this Court proving that anyone in that office was served a copy of Plaintiff's complaint. Because the Defendants have not been properly

served the Complaint in accordance with the requirements of the Oglala Sioux Tribe's Law and Order Code, Plaintiff's complaint must be dismissed.

CONCLUSION

WHEREFORE, the premises considered, Defendants move the Court to dismiss this action and to tax costs against the Plaintiff.

March 7, 2014

STEVEN D. SANDVEN, Law Office, PC

By:

STEVEN D. SANDVEN,
3600 South Westport Ave, Ste. 200
Sioux Falls SD 57106
Telephone: 605 332-4408
Facsimile: 605 332-4496

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of March, 2014, a true and correct copy of the foregoing NOTICE OF MOTION AND MOTION TO DISMISS and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS was mailed by first-class mail to Russell D. Blacksmith, Little Killer Legal Services, P.O. 1664, Pine Ridge, SD 57770.

March 7, 2014

Steven D. Sandven