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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 JAMES NASELLA, JR.,

11 Plaintiff,

12 vs.

13 BARONA VALLEY RANCH
14 RESORT AND CASINO,

15 Defendant.

CASE NO. 12-CV-2102 BEN (JMA)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS**

[Docket No. 3]

16 Presently before the Court is Defendant's Motion to Dismiss the Complaint.
17 (Docket No. 3.) For the reasons stated below, the Motion is **GRANTED**.

18 **BACKGROUND**

19 Barona Band of Mission Indians ("Tribe") is a federally recognized Indian tribe
20 that occupies the Barona Indian Reservation. The Tribe owns and operates Defendant
21 Barona Valley Ranch Resort and Casino, a resort complex that includes a casino, on
22 the Barona Indian Reservation.

23 Ruth Nasella, a patron of Barona Valley Ranch Resort and Casino who was
24 allegedly injured in the casino on April 28, 2007, filed a claim. On March 3, 2008, the
25 claim was denied by the Tribe's claims adjustor, Tribal First. Ms. Nasella filed an
26 appeal with Barona Tribal Court on March 20, 2008. Ms. Nasella subsequently passed
27 away. Her son, Plaintiff James Nasella, Jr., proceeded with the appeal, representing the
28 estate of Ms. Nasella. On October 27, 2010, a trial commenced in the Tribal Court.

1 The Tribal Court yielded a finding of no liability.

2 Plaintiff filed the present action on August 27, 2012. The Complaint alleges: (1)
3 “breach of Tribal Compact with the State of California”; and (2) “wrongful death.”
4 Presently before the Court is Barona Valley Ranch Resort and Casino’s Motion to
5 Dismiss the Complaint.

6 DISCUSSION

7 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if,
8 taking all factual allegations as true, the complaint fails to state a plausible claim for
9 relief on its face. FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
10 556-57 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring plaintiff
11 to plead factual content that provides “more than a sheer possibility that a defendant
12 has acted unlawfully”). Under this standard, dismissal is appropriate if the complaint
13 fails to state enough facts to raise a reasonable expectation that discovery will reveal
14 evidence of the matter complained of, or if the complaint lacks a cognizable legal
15 theory under which relief may be granted. *Twombly*, 550 U.S. at 556.

16 “Suits against Indian tribes are . . . barred by sovereign immunity absent a clear
17 waiver by the tribe or congressional abrogation.” *Okla. Tax Comm’n v. Citizen Band*
18 *Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Here, the Tribe is a federally-
19 recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive
20 Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810, 60,810
21 (Oct. 1, 2010).¹ Accordingly, the Tribe is immune from suit.

22 The Tribe conducts its tribal governmental gaming enterprise under the name,
23 “Barona Valley Ranch Resort and Casino.” Barona Valley Ranch Resort and Casino
24 has the same legal status as does the Tribe, including its sovereign immunity. *See Allen*
25 *v. Gold Country Casino*, 464 F.3d 1046, 1066 (9th Cir. 2006) (“[Tribal sovereign]
26 immunity extends to business activities of the tribe, not merely to governmental
27

28 ¹ The Tribe’s request for judicial notice of the fact that the Tribe is a federally-
recognized Indian tribe is **GRANTED**. *See* FED. R. EVID. 201; 44 U.S.C. § 1507.

1 activities. When the tribe establishes an entity to conduct certain activities, the entity
2 is immune if it functions as an arm of the tribe.” (internal citation omitted)). Therefore,
3 Barona Valley Ranch Resort and Casino is also immune from suit.

4 First, Plaintiff argues that the Tribe consented to suit under Sections 9.1(d) and
5 9.4 of the Compact entered into by the Tribe and the State of California. The only
6 parties to the Compact are the Tribe and the State of California. (See Bunce Decl.,
7 Exh. 2 [Compact], at 1.) Section 9.1(d) provides that if a dispute between the Tribe and
8 State is not otherwise resolved, it may be resolved in either federal or state court.
9 Section 9.4 of the Compact provides limited waivers of both tribal and state sovereign
10 immunity in the designated courts for resolution of disputes between the Tribe and
11 State by litigation, subject to certain limitations. One such limitation is: “No person
12 or entity other than the Tribe and the State is party to the action, unless failure to join
13 a third party would deprive the court of jurisdiction; provided that nothing herein shall
14 be construed to constitute a waiver of the sovereign immunity of either the Tribe or the
15 State in respect to any such third party.” (*Id.* § 9.4(a)(3).) In addition, the Compact
16 provides: “[N]othing herein shall be construed to constitute a waiver of the sovereign
17 immunity of either the Tribe or the State in respect to any such third party.” (*Id.* §
18 9.4(b).) By their express terms, therefore, the mutual waivers provided by and between
19 the Tribe and the State apply only to litigation between the Tribe and State, subject to
20 the limitations set forth in Section 9.4, and do not extend to any third parties. See
21 *Sossamon v. Texas*, 131 S. Ct. 1651, 1662 (2011) (“A waiver of sovereign immunity
22 must be strictly construed, in terms of its scope, in favor of the sovereign.” (internal
23 quotation marks omitted)).

24 Second, Plaintiff argues that he represents the State in this suit. (Compl. at 13
25 (“[I]n this case the Plaintiff is an ‘Agent’ of the State of California because [he] is a
26 citizen of that State.”).) Section 2.17 of the Compact defines “State” as the “State of
27 California or an authorized official or agency thereof.” Plaintiff has not alleged that
28 he is an authorized state official or that any state agency has authorized him to speak

1 for the State. The waiver of sovereign immunity available to the State is not available
2 to Plaintiff.

3 Third, Plaintiff argues that tribal immunity is “a modern principle which has
4 evolved to protect ‘nascent’ tribal government” and “such immunity is no longer
5 applicable to a Tribe whose apparent wealth has been derived from its large resort and
6 casino which cater to a large non-tribal public.” (Opp. at 2.) On the contrary, the
7 Supreme Court has repeatedly held that Indian tribes possess sovereign immunity. *See,*
8 *e.g., Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm’n*,
9 498 U.S. at 509.

10 Fourth, Plaintiff points to Section 10.2(d) of the Compact as giving this Court
11 jurisdiction in this action. Section 10.2(d) permits the Tribe to choose in which forum
12 it will waive its immunity so that injured patrons of Barona Valley Ranch Resort and
13 Casino may seek a remedy. (*See* Compact § 10.2(d) (“[T]he Tribe shall adopt and
14 make available to patrons a tort liability ordinance setting forth the terms and
15 conditions, if any, under which the Tribe waives immunity to suit for money damages
16 resulting from intentional or negligent injuries to person or property at the Gaming
17 Facility or in connection with the Tribe’s Gaming Operation, including procedures for
18 processing any claims for such money damages . . .”).) The Tribe has chosen to waive
19 its immunity in its own Tribal Court; the Tort Claims Ordinance provides that if a claim
20 is denied by the Tribe’s insurer, the claimant may appeal to the Barona Tribal Court,
21 as provided in the Compact. This waiver of immunity in the Tribal Court does not
22 translate into a waiver of immunity in federal court as well.

23 Accordingly, Defendant is immune from suit and therefore the Court lacks
24 subject matter jurisdiction in this action. *Alvarado v. Table Mountain Rancheria*, 509
25 F.3d 1008, 1015-16 (9th Cir. 2007) (“[T]ribal immunity precludes subject matter
26 jurisdiction in an action against an Indian tribe.”). As this issue is dispositive, the
27 parties’ remaining arguments will not be addressed.

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CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED**.

This action is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: 5/23/13



HON. ROGER T. BENITEZ
United States District Judge