

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (Northern (Jackson))**

HOWARD BROWN and BRANDON SIBLEY,	)	
	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action No. 3:22-cv-00256-DPJ-FKB
	)	
CHOCTAW RESORT DEVELOPMENT ENTERPRISE, ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN
THE ALTERNATIVE, FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF
CAN BE GRANTED UNDER 42 U.S.C. § 1983**

(ORAL ARGUMENT REQUESTED)

COME NOW the Defendants by and through their counsel of record, and hereby seek dismissal of the 42 U.S.C. § 1983 claims filed against them pursuant to Fed. Rule of Civ. Proc. (“F.R.C.P.”) 12(b)(1) for lack of subject matter jurisdiction, and in the alternative, for failure to state claims upon which relief can be granted under 42 U.S.C. § 1983 pursuant to F.R.C.P. 12(b)(6), and in support of said Motion state as follows:

1. The institutional Defendants named in the Complaint¹ are identified as the “Choctaw Resort Development Enterprise” (“CRDE”) (Compl., in the caption and at ¶ 15) and as the “Mississippi Band of Choctaw Indians” (“MBCI”) (Compl., in the caption and at ¶s 16 and 17).

2. The individual Defendants in this suit are identified as:

¹ In violation of the pleading requirement at Rule 10(b), F.R.Civ.P., Plaintiffs did not number any of the allegations in their 27 page Complaint. To facilitate Defendants’ Response to this Complaint, Defendants have hand-numbered each allegation as shown on the hand-marked copy of the Complaint attached to this Motion as **Exhibit 1**.

(1) “William Sonny Johnson ... Chief Executive Officer for Choctaw Resort Development Enterprise” (Compl., in the caption and at ¶ 19);

(2) “Chief Cyrus Ben ... Chief of the Mississippi Band of Choctaw Indians” (Compl., in the caption and at ¶ 18);

(3) Four John Doe parties referenced as “security officers and armed man ... employed by the Choctaw Resort Development Enterprise” (Compl., in the caption and ¶ 20).

3. The Tribe’s status as a federally recognized Indian Tribe has been expressly recognized by the United States in the Official List of “Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs” published at 87 Federal Register 4636, 4638 (January 28, 2022) (**Exhibit 2**), of which this Court may take judicial notice per 44 U.S.C. § 1507; and, by the U.S. Supreme Court’s rulings referenced in Defendants’ Memorandum filed in support of this Motion.

4. Also, as is made clear by Choctaw Tribal Ordinance 56 and Choctaw Tribal Council Resolution CHO-00-010, true and correct copies of which are appended to this Motion as **Exhibits 4 and 5**, the Choctaw Resort Development Enterprise (“CRDE”) which operates the Tribe’s resorts, including the Golden Moon (and Silverstar) Casinos and Hotels is not an entity separate and apart from the MBCI. Instead, CRDE is just a d/b/a name for this unincorporated tribal enterprise. This is confirmed by the plain text of Choctaw Tribal Council Resolution CHO 00-010 and Choctaw Ordinance 56 (**Exhibits 4 and 5**), the relevant excerpts of which are set out in the Memorandum filed in support of this Motion. Thus, CRDE is the Tribe itself.

5. The individual Defendants are all alleged to be officials or employees of the MBCI or the MBCI d/b/a CRDE. (Compl., ¶s 18-20).

6. Plaintiffs have sued all Defendants (hereafter the “Tribal Defendants”) based on the MBCI’s enactment of and the individual Tribal Defendants’ action to implement and enforce

(at the Tribe’s Golden Moon Casino & Hotel (Compl., ¶s 25, 26, 27-71)) a tribal mask mandate issued as a public health emergency measure authorized by Choctaw Tribal Ordinance 50-A, cited in the Chief’s Executive Order No. 2020-06-B “Reinstatement of Face Covering Requirement.” That Executive Order is referenced in the Complaint at ¶s 23, 24, 82 and appended thereto as Exhibit A. A true and correct copy of Choctaw Tribal Ordinance 50-A is attached hereto as **Exhibit 6**.

7. Plaintiffs allege that all the events giving rise to this suit occurred at the Golden Moon Hotel and Casino (Compl., ¶s 25, 26, 27-71). That facility is owned and operated by the Tribe and located on Choctaw Reservation lands. This is confirmed by the Choctaw Gaming Commission license issued for the Golden Moon Hotel and Casino issued to the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise for that facility “located at Choctaw Indian Reservation.” (**Exhibit 7**).

8. While Plaintiffs allege claims arising under 42 U.S.C. § 1983, and allege in a purely conclusory way (at Compl., ¶91) that Defendants’ were “state actors”, the fact is that Plaintiffs’ complaint itself demonstrates that all of the Tribal Defendants’ actions were taken under color of tribal law, not under color of state law.

9. Indeed, Plaintiffs’ only complaint is that the Tribal Defendants wrongfully enacted, implemented and enforced a tribal mask mandate issued by the Tribal Chief per Choctaw Tribal Ordinance 50-A. (Compl., ¶s 23, 24, 25, 26, 82, 83). Moreover, the Tribe’s Constitution and Bylaws referenced in the Complaint at ¶ 17 show that the Tribe derives none of its powers from the State, but instead derives those powers from its tribal membership pursuant to federal law. *See*, Art. III—Adoption, confirming that this Constitution was adopted by the Choctaw people in a Secretarial election per federal law; *and see*, Art. VIII, § 1(a) of the Tribe’s

Constitution which empowers the Tribal Council “[t]o negotiate with and to approve or disapprove contracts or agreements with federal, state or local governments ...” (emphasis added).

10. Thus, it is clear from the factual allegations of the Complaint that the Tribal Defendants were not “state actors.” Accordingly, none of Defendants are suable under 42 U.S.C. § 1983, and this Court has no jurisdiction to adjudicate Plaintiffs’ § 1983 claims.

11. Pursuant to Local Rule 7(b)(4), Defendants have filed a Memorandum in Support of this Motion to Dismiss, both filed simultaneously herewith.

WHEREFORE, Defendants pray for an Order of this Court dismissing Plaintiffs’ claims based on 42 U.S.C. § 1983 for lack of subject-matter jurisdiction per Rule 12(b)(1) F.R.Civ.P. or, in the alternative, for failure to state claims upon which relief can be granted per Rule 12(b)(6), F.R.Civ.P., and for such other and further relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically pursuant to CM/ECF procedures, which cause the parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ C. Bryant Rogers