

**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.

**MEMORANDUM IN SUPPORT OF 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**

A.

The Tribal Defendants’ Motion to Dismiss Plaintiffs’ 42 U.S.C. § 1983 claim is supported by various exhibits, all of which are either (1) referenced in the Complaint or are matters of public record, (2) judicially noticeable as readily ascertainable local law, or (3) otherwise lawfully before the Court in ruling on the Tribal Defendants’ factual attack on this Court’s jurisdiction per F.R.Civ.P. Rule 12(b)(1).

Documents referenced in the Complaint (or which are otherwise matters of public record) are considered a part of the Complaint for purposes of Rules 12(b)(1) and 12(b)(6) motions even if those documents are not attached to the Complaint; and, taking those into account in ruling on the subject Motion does not convert a Rule 12(b)(6) Motion into a Summary Judgment Motion. *Causey v. Sewell Cadillac-Chevrolet*, 394 F.3d 285, 288 (5th Cir. 2004) (Court may consider documents attached to 12(b)(6) motion as “part of the pleadings if they are referred to in the Plaintiff’s complaint and are central to [the] claim”); *Funk v. Stryker Corporation*, 631 F.3d 777,

783 (5th Cir. 2011) (District Court’s consideration of public records in other proceedings not referenced in the Complaint by Judicial Notice did not convert Rule 12(b)(6) motion into summary judgment motion); *Norris v. Heart Trust*, 500 F.3d 454, 461 and n.9 (5th Cir. 2007) (“... it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record”). This empowers this Court to consider the documents attached to this Motion as Exhibits 2, 3, 4, 5, 6 and 7.

Local law—in this case tribal law, some of which is and some of which is not referenced in the Complaint—is also judicially noticeable. This Court may take judicial notice of this “local” law per F.R.Evid. 201(b)(2) where (as here) the promulgation and content of that law is readily ascertainable. The current version of the Choctaw Constitution is publicly available at www.choctaw.org. This empowers the Court to consider the documents attached to the Motion as Exhibits 3, 4, 5 and 6. *See, J.M. Blythe Motion Lines Corporation v. Blalock*, 310 F.2d 77, 78-79 (5th Cir. 1962).

Finally, this Court is entitled to consider information outside the face of a Complaint when a factual attack is made on this Court’s jurisdiction per Rule 12(b)(1). *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981 (“Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.”); *accord, Clark v. Tarrant County, Texas*, 798 F.2d 736, 741 (5th Cir. 1986). This empowers the Court to consider the documents attached to the Motion as Exhibits 2-7.

B.

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” or the “Tribe”) (Compl., in the caption and at ¶s 5, 16, and 17).

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 to the Motion), of which this Court may take judicial notice per 44 U.S.C. § 1507; and, by the U.S. Supreme Court’s rulings in *U.S. v. John*, 437 U.S. 634, 646 (1978) (holding *inter alia* that the MBCI is a federally recognized Indian Tribe organized per 25 U.S.C. § 476) and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (again, recognizing that the MBCI is a federally recognized Indian Tribe).

Further, it is axiomatic that the Tribe as a government is entirely a creature of federal law, 25 U.S.C. § 176, and derives none of its powers from the State. *U.S. v. John*, *supra* at 646. Plaintiffs admit this at Compl., ¶ 84 where they allege that “The Mississippi Band of Choctaw Indians derive their authority ... from the United States Congress ...” Moreover, the Tribe’s Constitution and Bylaws referenced in the Complaint at ¶s 17 and 104 (Exhibit 3 to the Motion) shows 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

¹ 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.

negotiate with and to approve or disapprove contracts or agreements with federal, state or local governments ...” (emphasis added); *see generally*, *U.S. v. Cooley*, 141 S.Ct. 1638 (2021) (reiterating that “Indian Tribes are ‘distinct independent political communities’ exercising sovereign authority.”).

This Court has previously recognized that the Choctaw Resort Development Enterprise (“CRDE”) is just a d/b/a name for this unincorporated tribal enterprise. Hence, is the Tribe itself. *Payne v. Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise, et al.*, 159 F.Supp. 724 (S.D. Miss. 2015) (CRDE is the same legal entity as the MBCI and the MBCI’s status as a federally recognized Indian Tribe destroys complete diversity); *accord*, *Michelle Dawn Copeland v. Mississippi Band of Choctaw Indians d/b/a Silverstar Resort*, 2010 WL 2667359 (S.D. Miss. 2010).

This is also confirmed by the plain text of Choctaw Tribal Council Resolution CHO 00-010 and Choctaw Ordinance 56 (Exhibits 4 and 5 to the Motion). The Resolution provides *inter alia* that “1. A new tribal business enterprise is hereby established which shall be known as the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise;” and “5. All other organizational requirements and procedures for this new business enterprise shall be governed by Tribal Ordinance 56.” Ordinance 56 provides *inter alia* in the third “Whereas” that:

WHEREAS, it is now and has always been the intent of the Tribal Council that these wholly owned Tribal business enterprises should operate as and be legally classified as unincorporated enterprises of the Mississippi Band of Choctaw Indians, d/b/a the particular Tribal enterprise, rather than as separate Tribally-chartered corporations; and,

and, at Section 9(a) that:

All new wholly-owned enterprises which will operate under separate boards shall be authorized and established pursuant to this general Ordinance rather than by separate Ordinance. All new Tribal business enterprises shall operate under the taxpayer identification number/employer identification number of the Mississippi

Band of Choctaw Indians, to wit: 64-0345731 and all new wholly-owned Tribal business enterprises shall operate as and be classified as unincorporated enterprises of the Tribe, and shall operate from the Tribal Business Enterprise Division of the Executive Branch pursuant to this ordinance. (Emphasis added).

So, the only institutional defendant actually joined in this suit is the Mississippi Band of Choctaw Indians.

C.

The individual Defendants in this suit are identified as:

(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).

D.

Given the above and based on the other actual factual allegations in the Complaint, Plaintiffs’ claims allege that the Tribal Defendants violated their rights under various federal statutes (including 42 U.S.C. § 1983) or under common law tort standards, in adopting, implementing and enforcing a tribal mask mandate (adopted as an emergency tribal public health measure) against Plaintiffs as they were attempting to register for an overnight stay at the Golden Moon Casino and Hotel based on a confirmed hotel reservation. (Compl., ¶s 25, 26, 27-80).

The actual factual allegations of the Complaint thus allege that the Tribal Defendants’ actions giving rise to this suit were taken under “color of tribal law. The Complaint contains no allegation that these actions were taken under “color of state law.” It is well-settled that complaints which only allege actions taken under “color of tribal law” do not state valid § 1983 claims and do not invoke this Court’s jurisdiction under 28 U.S.C. § 1331 or 42 U.S.C. §

1343(a). *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (allegations that defendants deprived plaintiffs of constitutional rights by actions taken under color of tribal law fail to state § 1983 claims); *accord*, *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1305-06 (10th Cir. 1991); *Barnes v. White*, 494 F.Supp. 194 (N.D.NY 1980); *Holquin v. Ysleta del Sur Pueblo*, 2021 WL 4126908 (W.D. Texas 2021); *Chavez v. Navajo Nation Tribal Courts*, 2011 WL 13174514 (D. NM 2011) (U.S. District Court had no jurisdiction to adjudicate § 1983 claims based on defendants' actions taken under color of tribal law); *Lafley v. Adams*, 2020 W.L. 4550467 (D. Montana 2020) (allegations showing that defendants took action under color of tribal law are not actionable under 42 U.S.C. § 1983); *accord*, *Taquma v. Benton*, 2019 WL 1877171 (W.D. Wisconsin 2019).

The only allegation which attempts to establish a basis for § 1983 jurisdiction is the bare, unsupported and patently conclusory allegation at ¶ 91 that the Tribal Defendants were “state actors” when the events giving rise to this suit occurred. But, this kind of bare, unsupported and obviously conclusory allegation is not sufficient to establish the factual predicate for invoking this Court’s federal question jurisdiction over claims based on 42 U.S.C. § 1983, or to otherwise state a valid § 1983 claim. Instead, some real and substantial factual allegations supporting the “state actor” assertion are required. *Montoya v. Fed Ex Ground Packaging Case System, Inc.*, 614 F.3d 145, 149 (5th Cir. 2010), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord*, *Spivey v. Wilson*, 2019 WL 5089683 (E.D. Texas 2019); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017) (to withdraw a motion to dismiss for failure to state a claim upon which relief can be granted on a civil rights or constitutional claim, the complaint must set out specific and sufficient factual allegations which if proven would permit recovery on that

claim. Mere conclusory allegations setting out the bare elements of the claim are not sufficient to avoid dismissal); *see also*, *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994).

This Complaint contains no factual allegations supporting the obviously conclusory “state actors” allegation at ¶ 91, and that allegation is plainly refuted by the other factual allegations of the Complaint.

CONCLUSION

Plaintiffs’ 42 U.S.C. § 1983 claims should be dismissed for failure to state claims upon which relief can be granted per Rule 12(b)(6) or for lack of subject matter jurisdiction per Rule 12(b)(1).

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