

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Richard J. Nicolaus,

Plaintiff/Counter-  
Defendant,

v.

Havasupai Indian Tribe,

Defendant/Counter-  
Claimant.

No. CV-13-08025-PCT-JJT

**ORDER**

At issue are the following motions: Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 24); Defendant's First Motion to Supplement Memorandum in Support of Motion to Dismiss (Doc. 34); and Defendant/Counter-Claimant's Motion for Default Judgment on its counterclaims (Doc. 36). Plaintiff/Counter-Defendant has not responded to any of the motions. For the reasons set forth below, the Court will grant each of the motions.

**I. ANALYSIS**

Defendant moved the Court for permission to supplement its Motion to Dismiss Plaintiff's Complaint on October 3, 2014 (Doc. 34). Plaintiff never responded to that motion, and as discussed below, never responded to the underlying motion to dismiss; therefore, Plaintiff is in no way prejudiced by the Court allowing Defendant to supplement its memorandum. The Court will grant Defendant's motion to supplement.

1 On June 10, 2014, Defendant filed a motion to dismiss Plaintiff's Complaint in  
2 this matter for lack of subject matter jurisdiction, tribal sovereign immunity, and failure  
3 to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal  
4 Rules of Civil Procedure. (Doc. 24). Plaintiff filed no response to this motion by the  
5 deadline imposed under Rule 7.2 of the Local Rules of Civil Procedure. On  
6 September 19, 2014, well after the time for filing any responsive memorandum had run,  
7 this Court entered an Order advising the *pro se* Plaintiff of his responsibilities to file a  
8 response to the motion to dismiss and gave Plaintiff an additional twenty-one days to so  
9 respond. (Doc. 30). The Order quoted LRCiv 7.2 and its requirements and warned  
10 Plaintiff that his failure to respond could result in the dismissal of his Complaint. Plaintiff  
11 never responded to the motion or to the Order.

12 The Court will grant Defendant's motion to dismiss on several grounds. First,  
13 Defendant is correct that, as a federally recognized Indian tribe, it enjoys immunity from  
14 civil suit under the doctrine of tribal sovereign immunity, *Santa Clara Pueblo v.*  
15 *Martinez*, 436 US 48, 58 (1978), and the Tribe has not waived its sovereign immunity to  
16 allow suit in this matter.

17 Second, Plaintiff fails to allege any facts or claims which would confer on the  
18 Court subject matter jurisdiction in this matter. He fails to identify any federal cause of  
19 action that would implicate federal question jurisdiction. He also fails to allege the  
20 elements necessary to demonstrate diversity jurisdiction, in that he nowhere alleges an  
21 amount in controversy. Indeed, Plaintiff appears only to seek the return of an Internet  
22 domain name to him, the value of which he has not alleged and the court cannot divine.

23 Third, Plaintiff fails to state in his Complaint any claim upon which relief can be  
24 granted as required by Rule 12(b)(6), Federal Rules of Civil Procedure. The brief  
25 Complaint, consisting of only five paragraphs, entreats this Court to nullify the World  
26 Intellectual Property Organization's (WIPO) arbitration decision awarding a single  
27 domain name to Defendants. Plaintiff states no law, nor refers to any cause of action,  
28 under which he is entitled to such relief.

1 Fourth, as set forth above, Plaintiff has failed utterly to prosecute his claim in this  
2 matter.

3 On October 3, 2014, Defendant/Counter-Claimant filed an Amended Motion for  
4 Entry of Default Judgment on its counterclaims. (Doc. 36). Plaintiff/Counter-Defendant  
5 never responded to the counterclaims in the matter, and upon Counter-Claimant's motion  
6 (Doc. 21), filed December 23, 2013, the Clerk entered default on the counterclaims.  
7 (Doc. 23). The Court held a hearing on Counter-Claimant's amended motion for default  
8 judgment on November 20, 2014, where it inquired in detail as to the justification and  
9 support for the awards of damages and attorneys' fees sought.

10 In its Amended Motion for Default Judgment, Counter-Claimant satisfactorily and  
11 exhaustively discusses all of the *Eitel* factors which this Court must weigh in considering  
12 an entry of default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).  
13 Counter-Claimant demonstrates it would suffer prejudice if default judgment is not  
14 entered, as it is without other recourse for recovery. The counterclaims sufficiently allege  
15 unfair competition, trademark dilution, false designation of origin and cybersquatting  
16 against Counter-Defendant under the Lanham Act, 15 USC § 1125 and ARS § 44 –  
17 1448.01. While the sum of money at stake is large – Counter-Claimant seeks over  
18 \$500,000 in damages – the Court has satisfied itself through inquiry at the hearing and  
19 review of the motion's supporting attachments that the damage figures are well supported  
20 and reasonably calculated. There are no material facts in dispute in this case and, as  
21 demonstrated above, Counter-Defendant's default is not due to excusable neglect. Taken  
22 together, these factors, all weighing in favor of the entry of judgment of default, outweigh  
23 the final factor, the general policy favoring decisions on the merits.

## 24 **II. CONCLUSION**

25 Counter-Defendant having failed to plead or otherwise defend against the  
26 counterclaims, default having been entered on January 9, 2014, counsel for Counter-  
27 Claimant having filed the instant Amended Motion for default judgment in accordance  
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1 with Rule 55(a) and (b), and the Court having satisfied itself through review of the  
2 pleadings and conduct of a hearing,

3 IT IS ORDERED granting Defendant/Counter-Claimant's Motion for Default  
4 Judgment on its counterclaims (Doc. 36).

5 IT IS FURTHER ORDERED that Counter-Defendant, its officers, agents,  
6 servants, employees and all persons acting in concert with any of them, are permanently  
7 enjoined from:

8 i. committing any further acts of trademark infringement against Counter-  
9 Claimant;

10 ii. using any term likely to be confused with Counter-Claimant's Marks on  
11 Counter-Defendant's websites, websites of any third parties, in Internet advertisements,  
12 or in any advertising, promoting, distributing, offering for sale, or selling any services in  
13 any media using the Marks (the term "Mark" or "Marks" as used herein means the marks  
14 and names Havasupai, Supai, Havasu Bajja, Havasu, Havasu Falls, Mooney Falls, Little  
15 Navajo Falls, Fifty-Foot Falls and any other marks, names or designations that Counter-  
16 Claimant uses to further its tourism industry, including those marks which the Counter-  
17 Claimant has trademarked or has submitted an application for trademark status with the  
18 United States Patent and Trademark Office);

19 iii. registering a domain name that is similar to or confusingly similar to the  
20 Counter-Claimant's Marks and using it in a manner that constitutes a violation of the  
21 Lanham Act or Arizona common law;

22 iv. representing directly or indirectly in any form or manner whatsoever that  
23 any service offered by Counter-Defendant is associated with or approved by Counter-  
24 Claimant; and

25 v. any further acts of unfair competition as alleged in the Counterclaim.

26 IT IS FURTHER ORDERED that Counter-Defendant shall immediately transfer  
27 all domain names currently controlled by Counter-Defendant that infringe on any of  
28 Counter-Claimant's Marks, including havasupaifalls.net and havasuwaterfalls.com.

1 IT IS FURTHER ORDERED that Counter-Defendant shall pay a monetary award  
2 in the amount of \$526,040.48 to Counter-Claimant for damages suffered as a result of  
3 Counter-Defendant's use of infringing domain names, unfair competition, trademark  
4 dilution, and cybersquatting. Interest shall accrue at the federal rate on this amount from  
5 the date of entry of judgment.

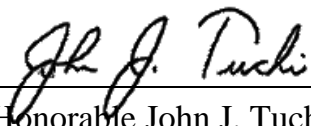
6 IT IS FURTHER ORDERED that Counter-Defendant shall pay Counter-Claimant  
7 \$94,724.00 for attorneys' fees and litigation expenses and costs to defend and prosecute  
8 claims in this matter. Interest shall accrue at the federal rate on this amount from the date  
9 of entry of judgment.

10 IT IS FURTHER ORDERED granting Defendant's motion to supplement its  
11 memorandum (Doc. 34).

12 IT IS FURTHER ORDERED granting Defendant's motion to dismiss the  
13 Complaint in this matter (Doc. 24). The Complaint is dismissed with prejudice.

14 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment  
15 consistent with this Order.

16 Dated this 21st day of November, 2014.

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20 Honorable John J. Tuchi  
21 United States District Judge  
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