IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHNNY L. GRAHAM **PLAINTIFF**

v. **CIVIL ACTION NO. 4:08CV26-TSL-LRA**

APPLIED GEO TECHNOLOGIES, INC., ET AL. **DEFENDANTS**

DEFENDANTS' REBUTTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL REMEDIES

Defendants, by and through undersigned counsel, submit this Rebuttal Memorandum in Support of their Motion to Dismiss for Failure to Exhaust Tribal Remedies. Plaintiff's arguments in opposition do not establish any basis for denial of Defendants' Motion to Dismiss, as shown below.

I. FACTUAL PREDICATE FOR THE MOTION

The following facts have now been established by the pleadings and submissions of the parties:

1. Plaintiff, Johnny L. Graham, is an African American, who is a former employee of Defendant, Applied Geo Technologies (hereinafter "AGT"); (p.1 of Resp. Memo).

2. Defendant AGT is a tribally owned, tribally chartered corporation developed by the Mississippi Band of Choctaw Indians, a federally recognized Indian tribe. (p.1 of Resp. Memo).

3. AGT was established under the Mississippi Choctaw Tribal Ordinance as a tribal entity and issued a Charter. (p.1 of Resp. Memo).

4. Plaintiff "entered into a consensual employment relationship with AGT, a federal contractor owned by the Mississippi Band of Choctaw Indians and located on the Reservation." (p. 11 of Resp. Memo).

5. Plaintiff's employment with AGT was terminated by AGT at AGT's headquarters on the Choctaw Indian Reservation. (p. 2 of Defs. Initial Memo).

6. Plaintiff claims his termination was the product of racial discrimination or unlawful retaliation. (¶¶ 26, 27 of Amended Compl.).

7. Defendants claim Plaintiff's termination was legally justified and was not motivated by any unlawful discrimination or retaliation. (Motion To Dismiss, ¶ 8).

8. Plaintiff's "underlying claims arose as a result of his employment with AGT." (p. 11 of Resp. Memo).

9. This civil action involves causes of action arising on the Choctaw Indian Reservation and a tribal entity has been named a party defendant herein respecting that cause of action in a lawsuit filed by Plaintiff. *Id.*

10. Plaintiff has challenged the jurisdiction of the Choctaw Tribal Court to adjudicate his claims as follows: "Accordingly, although Mr. Graham entered into an on-reservation employment relationship with AGT, the first exception to *Montana's* 'Main Rule' is not satisfied and the exercise of tribal court jurisdiction is not validated." (p. 11 of Resp. Memo).

II. INTRODUCTION TO ARGUMENT

The duty to exhaust tribal remedies applies to any civil action involving any dispute arising on Indian Reservation lands to which a tribe, tribal member or tribal entity is named as a party, where there is at least a colorable claim to tribal jurisdiction over the underlying dispute. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *Bank One v. Shumake*, 281 F.3d 507 (5th Cir. 2002). Under *Montana v. U.S.*, 450 U.S. 544 (1981) and its progeny, an Indian tribe will have a colorable claim to jurisdiction over a cause of action arising on its reservation trust lands and which involves the tribe, a tribal member or tribal entity as a party where one of the exceptions to *Montana's* Main Rule is satisfied.[1] The relevant exception here is *Montana's* first exception—the consensual relationship exception—by which a non-Indian party's transactional conduct on reservation land will be deemed consent that causes of action arising from that conduct will be adjudicated in a tribal forum. Indeed, the Court has held that where the non-Indian party is the

[1] Plaintiff has properly conceded that none of the exceptions to exhaustion of tribal remedies noted in *National Farmers Union, supra,* at 856, n.21 are applicable here. *See,* fn.3, p.6 of Plaintiff's Resp. Memo.

plaintiff the tribal court will often be the only forum that can adjudicate such cases. *Williams v. Lee*, 358 U.S. 217 (1959); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984) (*Wold I*); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986) (*Wold II)*.

Applying these tests to the facts of this case makes clear that the Choctaw Courts have colorable jurisdiction over Plaintiff's claims here;[2] and, that this action must be dismissed (or stayed) pending the outcome of tribal court proceedings on Plaintiff's claims because he has failed to exhaust his tribal remedies as to those claims.

III. ARGUMENT

Plaintiff argues (Resp. pp. 2-5) that the Choctaw Tribal Council has waived AGT's sovereign immunity as to the Title VII and 42 U.S.C. § 1981 claims pled in this action. Defendants disagree. The waiver of immunity in AGT's Amended Charter was expressly limited

[2] The federal question to be decided under the *Montana* test does not encompass the question whether a tribal court has jurisdiction over a particular case under tribal law. *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66-67 (2nd Cir. 1997). *Accord, Park Place Entertainment Corp. v. Arquette,* 113 F.Supp.2d 322, 324, n.1 (N.D.N.Y. 2000). However, the Choctaws Courts clearly have jurisdiction to adjudicate these claims under Choctaw law per § 1-2-5 Choctaw Tribal Code in circumstances where the *Montana* test is satisfied. The Court is requested to take judicial notice of this provision (*see,* fn. 4, p.9 of Defs. Initial Memo):

> §1-2-5 **General Subject Matter Jurisdiction and Limitations**
>
> (1) Subject to any contrary provisions, exceptions or limitations contained in either federal law, the Tribal Constitution, or this Tribal Code, the Courts of the Mississippi Band of Choctaw Indians shall have jurisdiction over all civil actions and over all offenses occurring within the jurisdiction defined by the Tribal Code.
>
> (2) The Courts of the Mississippi Band of Choctaw Indians shall not assume jurisdiction over any civil or criminal matter which does not involve either the Tribe, its officers, agents, or employees in their official capacities; or its property or enterprises, or a member of the Tribe or of some other federally-recognized tribe, or the interests thereof or a person eligible for membership in the tribe or some other federally-recognized Tribe, or the interests thereof, or the ordinances, resolutions, rules or regulations of the Tribe, if some other judicial forum exists for the handling of the matter and the matter is not one in which the rights of the Tribe or its members may be directly affected.

to claims "relating to Small Business Administration ("SBA") programs" engaged in by AGT. (See Exhibit "1" to Motion to Dismiss, *Affidavit of Tim Nelson*, Ex. "C" thereto). Plaintiff's claims do not relate to AGT's SBA programs within the meaning of the waiver. Plaintiff is not the SBA, is not a federal agency and is not a prime or subcontractor on any contracts awarded pursuant to SBA programs. Further, Plaintiff's claims as pled (if otherwise viable) would be viable even if AGT were not an SBA 8(a) contractor, hence do not in any sense depend upon AGT's status as an SBA 8(a) certified entity.

It is likewise well-settled that conditional sovereign immunity waivers must be strictly construed and ambiguities construed against finding a waiver, since waivers of sovereign immunity cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (federal statute conferring rights against tribes did not impliedly waive tribal sovereign immunity). *Lobo v. Miccosukee Tribe of Indians of Florida, et al.,* No. 07-15073 (11th Cir. 2008) (unpublished) (FLSA applies to Indian tribes but the Act did not expressly or impliedly waive tribe's sovereign immunity; hence, the Act is not enforceable against the tribe or its officials acting in their official capacities); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 34 (1992) (reaffirming "the traditional principle that the government's consent to be sued must be construed strictly in favor of the sovereign"); *Missouri River Services, Inc. v. Omaha Tribe of Indians,* 267 F.3d 848 (8th Cir. 2001) (if a tribe consents to a waiver of immunity any conditional limitations on that consent must be strictly construed and applied); *Cayuga Tribe of OK v. State of Oklahoma,* 874 F.2d 709 (10th Cir. 1989) (waivers of tribal sovereign immunity must be strictly construed).

Moreover, whether AGT (and the other Defendants) are protected by the defense of sovereign immunity *viz* Plaintiff's claims, is irrelevant at this stage of this proceeding. Defendants have not yet pled that defense because such defenses are not properly raised or

addressed by the Court until the Court has first ruled on Defendants' Motion to Dismiss for Failure to Exhaust Tribal Remedies. *McArthur v. San Juan County,* 309 F.3d 1216, 1227 (10th Cir. 2002) (reversing District Court's dismissal of claims arising within Indian Reservation boundaries on jurisdictional (sovereign immunity) grounds because District Court should first have required exhaustion of tribal remedies to give the Tribal Court the first chance to rule on the sovereign immunity defense: *"Hicks* thus stands for the proposition that *Montana* analysis should proceed before considering immunity defenses. In sum, we conclude that the district court should have performed a *Montana* analysis before reaching the sovereign immunity question.").

Further, no matter what the answer to the sovereign immunity/waiver question—a question that this Court will not have to reach if Defendants' exhaustion motion is granted—that answer will have no bearing on the Plaintiff's duty to exhaust tribal remedies. The question whether a tribal entity (and its officers/employees) are protected by sovereign immunity respecting a given claim for money damages is wholly distinct from the question whether a U.S. District Court should dismiss for failure to exhaust tribal remedies in an action where the immunity defense might also (or later) be raised. *McArthur, supra; Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002) (Exhaustion of tribal remedies required in a suit brought by Choctaw tribal members against a non-Indian bank based on contract and tort claims arising from on-reservation sales contracts notwithstanding that the tribal parties (as individuals) did not possess sovereign immunity).

Plaintiff next spends three pages (pp. 3-5) to establish the uncontested proposition that AGT rather than its owner, the Mississippi Band of Choctaw Indians, was really his "employer." Defendants do not contend (and never have contended) otherwise. This fact supports rather than undermines Defendants' argument that Plaintiff has a duty to exhaust his tribal remedies. *See,*

authorities cited at pp. 7-19 of Defs. Initial Memo. Plaintiff's reliance on *Hines v. Grand Casinos of Louisiana, LLC,* 140 F.Supp.2d 701 (W.D. La. 2001) on this point is also unavailing. *Hines* is clearly distinguishable from the instant case. *Hines* involved a suit pleading a Title VII claim filed by a non-Indian (former) employee against a non-Indian employer (not owned or established by a tribe) who had contracted to operate a tribal casino on the Tunica-Biloxi Indian Reservation. No tribal party had been sued or otherwise ever been a party to the suit.

Plaintiff next argues—without citing any case law for the proposition—that AGT's status as a "federal contractor" excuses his duty to exhaust tribal remedies (p.6). AGT's eligibility (or ineligibility) to compete for federal contracts through the SBA 8(a) program or otherwise has no bearing whatever on Plaintiff's duty to exhaust tribal remedies. All that status does is to give Plaintiff a separate federal administrative remedy via the Office of Federal Contract Compliance where actionable violations of applicable non-discrimination rules are alleged. Plaintiff has in fact invoked that separate procedure alleging there the same racial discrimination claims (plus new veterans' status discrimination claims) as alleged here. *See, OFCCP charge and notice thereof attached hereto as Exhibit 1.* In his OFCCP charge, Graham alleged discrimination on account of race and veterans' status. This separate administrative proceeding is now in progress.

Moreover, virtually all tribes and tribal organizations are federal contractors of one form or another. *Cherokee Nation of Oklahoma v. Leavitt,* 543 U.S. 631 (2005); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F.Supp.2d 1303 (D.N.M. 2003). If merely having the status of a federal contractor *ipso facto* obviates the duty to exhaust tribal remedies in suits involving those tribes and tribal organizations, that exception would swallow the rule of exhaustion. Whether those entities have contracted with the United States to

operate public service or governmental programs or have engaged in federal procurement contracting to generate revenues which can then be used to provide governmental services to their communities, any lawsuit which seeks relief against such tribal entities clearly implicates important interests of those tribal communities. Any suit which would lead to the entry of monetary relief or, in some instances, injunctive relief, against such entities could damage their ability to operate, to deliver services or to generate revenues to pay for the delivery of such public services on their reservations. Thus, contrary to Plaintiff's suggestion at p. 9, Resp. Memo, suits of this type clearly constitute disputes which should be adjudicated in the tribal courts of the tribal communities in which the impact of such suits will be most directly felt. The mere fact that a tribal organization is also a federal contractor in no way undermines the obligation of a plaintiff seeking such relief on a cause of action seeking relief against them arising on the reservation to first seek recourse on its plaintiff's claims in the tribe's courts before seeking judicial relief in state or federal court.

Plaintiff further argues that since "there is no pending tribal litigation and tribal jurisdiction has not been challenged" there is no requirement to exhaust tribal remedies. (p.6). These arguments do not relieve Plaintiff of the duty to exhaust tribal remedies for two reasons. First, where (as here) the case involves a *Williams v. Lee* scenario—non-Indian plaintiff suing tribal defendant on cause of action arising on reservation lands—the exhaustion question will almost always arise in circumstances in which the non-Indian plaintiff has not first sought relief in the tribal court. Indeed, in *Williams,* the non-Indian Plaintiff had gone straight to state court. The U.S. Supreme Court ultimately ruled that the Navajo Tribal Court was the only forum which could properly adjudicate his claims. Moreover, the great weight of authority clearly recognizes that the duty to exhaust tribal remedies applies even when no tribal court action has yet been

filed. *See,* authorities cited in Defs. Initial Memo, pp. 10-11. Otherwise, non-Indian plaintiffs in those circumstances would always be able to evade tribal court jurisdiction, and the duty to exhaust tribal remedies, by rushing to the Federal Courthouse.

Second, Plaintiff's admission that "tribal jurisdiction has not been challenged" (p.6) is clearly erroneous. Notwithstanding Plaintiff's initial assertion that he has not challenged the tribal court's jurisdiction (p. 6), he has expressly challenged the Choctaw Court's jurisdiction at p. 11:

> … although Mr. Graham entered into an on-reservation employment relationship with AGT, the first exception to *Montana's* "Main Rule" is not satisfied and the exercise of tribal court jurisdiction is not validated.

Thus, Plaintiff has in fact challenged the Choctaw Court's ability to exercise jurisdiction over him and his claims under *Montana.* That fact clearly supports requiring Plaintiff to exhaust his tribal court remedies, giving the Choctaw Courts the first opportunity to rule on the underlying tribal court jurisdiction challenge Plaintiff has made, and avoiding unnecessary conflict between the federal court and the tribal court on that issue. *National Farmers Union, supra; Iowa Mutual, supra; Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002), *r'hrg and r'hrg en banc den'd,* 34 Fed. Appx. 965 (5th Cir. 2002), *cert. den'd.,* 537 U.S. 818 (2002); *Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773 (S.D.Miss. 2001).

Plaintiff then argues (pp. 7-8) that the ruling in *Vance v. Boyd Mississippi, Inc.,* 923 F.Supp. 905 (S.D. Miss. 1996) excuses exhaustion of tribal remedies in this case. *Vance* does not help Plaintiff for the same reason that *Hines v. Grand Casinos of Louisiana, LLC, supra,* was of no help. In *Vance,* there were no tribal (or tribal member) parties involved. As Plaintiff properly concedes (p.7) that case involved a Title VII action filed by a non-Indian (employee) against a non-Indian company (*Boyd*, the employer) based on an alleged wrongful employment

termination which occurred on the Choctaw Reservation. It is undisputed that here, the Defendant employer, AGT is a "tribal entity" of the Mississippi Band of Choctaw Indians. Thus, *Vance* is fundamentally distinguishable on its facts.

Moreover, Plaintiff's reliance on *Vance* for the proposition that the question whether to require exhaustion of tribal remedies must be analyzed under the *Colorado River* factors is wholly misplaced (pp. 7-8). Both this Court and the Fifth Circuit in the *Bank One, NA* cases have expressly ruled that where a tribal party is involved in litigation involving a cause of action arising on the Choctaw Reservation, the *Colorado River* factors are not to be applied in deciding the tribal exhaustion question; and, that where exhaustion of tribal remedies is at issue, the *Colorado River* presumptions favoring the exercise of federal court jurisdiction applicable in other exhaustion contexts are reversed. *Bank One, N.A. v. Lewis,* 144 F.Supp.2d 640, 649-650 (S.D.Miss. 2001); *affirmed, Bank One, N.A. v. Shumake,* 281 F.3d 507, 514-515 (5th Cir. 2002):

> Bank One also argues that courts must apply the abstention principles included in *Colorado River* [FN28] when considering tribal exhaustion. We disagree. The tribal exhaustion doctrine is in no way based on *Colorado River*. *Iowa Mutual's* reference to the *Colorado River* doctrine as another comity-based abstention doctrine does not suggest that the *Colorado River* principles apply to a tribal exhaustion ***515** case. [FN29] The district court correctly distinguished the two abstention doctrines on the ground that the *Colorado River* doctrine "proceeds from the premise that 'the federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them"'" and that therefore, the pendency of litigation in state court is not a bar to proceedings in federal court involving the same subject matter in the absence of "exceptional circumstances." The policy which animates the tribal exhaustion doctrine, however, "subordinates the federal court's obligation to exercise its jurisdiction to the greater policy of promoting tribal self-government." *Colorado River* abstention is thus the exception to the rule, whereas tribal exhaustion is the rule rather than the exception. The latter is the appropriate doctrine to apply here.

Further, neither *Myrick v. Devils' Lake Sioux Manufacturing Corp.,* 718 F.Supp. 753 (D.N.D. 1989) nor *Tidwell v. Harrah's Kansas Casino Corp.,* 322 F.Supp.2d 1200 (D.Kan. 2004) (cited at pp. 8-9 of Plaintiff's Resp.) support Plaintiff. Both are clearly distinguishable. In

Myrick the corporate defendant was a North Dakota state-chartered corporation, only 51% owned by the Devils' Lake Sioux Tribe.[3] In stark contrast, it is now uncontested that AGT is a tribally-chartered, 100% tribally-owned corporation—truly "a tribal entity" for exhaustion purposes, no matter what the correct answer today might be as regards a 51% tribally-owned (or individual tribal member owned) state-chartered corporation as was involved in *Myrick.* Likewise in *Tidwell, supra,* as in *Vance* and *Hines,* a non-Indian employee sued a non-Indian employer located on the reservation under Title VII. The Court denied defendants' motion to dismiss for failure to exhaust tribal remedies because of the absence of any tribal party to the litigation.

Plaintiff also argues that the only tribal parties whose involvement in a lawsuit can trigger the duty to exhaust as to a cause of action arising on their reservation is a "tribe" or a "tribal member" (p. 11). However, as shown in Defendants' initial Memorandum, it is now well-settled that the same duty to exhaust extends to suits involving other tribally-owned tribal entities such as a 100% tribally-owned, tribally-chartered corporation. *See* authorities cited on this point at pp. 4-6 of Defs. Initial Memo. Notably, Plaintiff has not attacked or distinguished any of those cases. *Also see,* footnote 3, *supra,* showing that the recent ruling in *Plains Commerce* also supports that position.

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[3] In *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* ___ U.S. ___, 128 S.Ct. 2709 (2008) the Court's analysis of the jurisdictional questions there addressed proceeded on the premise that a 51% Indian owned, state chartered corporation (recognized to constitute an Indian entity for BIA guaranteed loan purposes) was an "Indian" entity for purposes of the *Montana* analysis. If the Court had concluded the Long Family's corporation should have been considered a "non-Indian," the court could simply have disposed of the case as in *Strate v. A-1 Contractors, Inc.,* 520 U.S. 438 (1997), viewing it as a non-Indian *vs.* non-Indian suit over which the tribal court would in no event have had jurisdiction. That the court did not do so suggests that such a corporation may properly be deemed to constitute an Indian entity for jurisdictional purpose (hence, for exhaustion purposes). The Eight Circuit had explicitly treated that state chartered corporation as an Indian entity for purposes of the several rulings there involved. *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* 491 F.3d 878 (8th Cir. 2007).

Plaintiff argues (p. 9) that the policies underlying *National Farmers Union* do not support requiring exhaustion in this case, arguing that none of the comity interests which underlie that requirement are advanced here; and, on that basis seeks to distinguish this case from cases where exhaustion was required because of a colorable ground for tribal jurisdiction under the consensual relationship exception to *Montana's* Main Rule. Plaintiff argues that his case is different because his claims arise under federal law and because they arise from his (undisputed) on-reservation employment relationship with AGT on the Choctaw Indian Reservation.

But Defendants have already shown that the mere fact a cause of action arises under federal law does not excuse Plaintiff's duty to exhaust tribal remedies before seeking judicial relief elsewhere. (*See* authorities cited at Defs. Initial Memo, pp. 7-8). Defendants have also shown that disputes grounded in employment relationships involving on-reservation tribal entity employers or tribal member employees do constitute the kind of "consensual" relationship that satisfy *Montana's* Main Rule. (Authorities cited at Defs. Initial Memo, pp. 17-19).

Plaintiff also seeks to evade exhaustion on the theory (put forth at p. 11, Resp. Memo) that this case is about AGT's conduct rather than the conduct of Plaintiff during his employment at AGT which led to his discharge, arguing that "Mr. Graham's activities as an employee are not at issue in this matter. The unlawful employment activities engaged in by AGT against Mr. Graham are at issue. The present case at bar has no factual similarities to the Supreme Court cases cited, *supra,* as being illustrative of the first exception to the "Main Rule'.".

Plaintiff has the cart before the horse. The central issue to be litigated here is why Mr. Graham was fired. Defendants intend to prove he was fired for legitimate non-discriminatory reasons related to his job performance during his employment with AGT on the reservation. Thus, his activities on the reservation at AGT's headquarters will be the central focus of the

litigation. Whether Plaintiff's actions and inactions while an employee—which led to his discharge—warranted his termination, and whether Defendants otherwise have valid defenses to Plaintiff's claims (if they otherwise prove viable) will ultimately be decided in part based on tribal law and the personnel policies and practices of AGT. The Choctaw Courts as the courts of the sovereign which promulgated those laws and established AGT (which issued those policies) are the proper Courts to adjudicate disputes respecting his discharge and to determine whether AGT has valid tribal law grounds for his discharge or valid tribal law defenses (including, but not limited to, sovereign immunity) to those claims. This will require interpretation of various tribal code provisions and prior Choctaw Court decisions construing those provisions.[4] Thus, while Plaintiff's claims turn primarily on questions of federal law, Defendants' defenses will turn in large measure on questions of tribal law. Plaintiff's activities on the Choctaw Reservation (trust) lands—not on non-Indian fee land—during his employment relationship with the tribal entity AGT and the consensual relationship that entailed clearly invoke the consensual relationships exception to *Montana's* Main Rule; and, since invoking that exception clearly create a colorable basis for the exercise of Choctaw Court jurisdiction over Plaintiff, his duty to exhaust tribal remedies on his claims remains intact.

If there were any doubt on these issues, that doubt has now been put to rest by the ruling in *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.,* ____ U.S. _____, 128 S.Ct. 2709 (2008). There the Court (to a large extent *in dicta*[5]—but instructive *dicta*) held that

[4] *Sharp v. Mississippi Band of Choctaw Indians,* S.C. 2002-02 (Sept. 30, 2004) (construing various tribal code provisions touching upon the scope of the sovereign immunity defense in tribal court proceedings); *see,* § 25-1-1 *et seq.,* Choctaw Tort Claims Act (defining "Tribe" to include "any . . . business or instrumentality of the" Tribe and imposing explicit limits on sovereign immunity waivers). This factor also supports requiring exhaustion of tribal remedies. *Basil Cook Enterprises, Inc., supra.*

[5] Given the way the Court moved the focus in *Plains Commerce* from the question whether the tribe could via adjudication in its courts regulate a non-Indian bank's resale of non-Indian owned fee land—instead of whether the tribal courts had jurisdiction to adjudicate the Indian plaintiff's discrimination claims

the Cheyenne River Sioux Tribal Courts could not (under *Montana*) adjudicate claims seeking to stop a bank from reselling certain non-Indian fee lands located within the reservation which had come into the bank's possession as the result of various prior loan deals gone bad. Thus, the Court left the pre-*Plains Commerce* law of *Montana* and its progeny (as to tribal court jurisdiction) and *National Farmers Union* and *Iowa Mutual* (as to exhaustion) unchanged as to cases involving non-Indian tribal court defendants.

The Court, however, did reaffirm that tribal courts are proper forums for adjudication of disputes involving non-Indian claims based on causes of actions filed by them against Indians or tribal entities arising on their reservations. This is evident by the Court's repeated favorable references to *Williams v. Lee* type cases—such as the instant case—as properly invoking the consensual relationship exception to *Montana's* Main Rule to permit the exercise of tribal court jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959). The key passages from *Plains Commerce* addressing these issues are:

> We have recognized two exceptions to this principle, circumstances in which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.". . . These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of "the *activities* of nonmembers" or "the *conduct* of non-Indians on fee land." . . .efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid," *Atkinson, supra,* at 659. The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Id* at 11.
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> . . . *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana*

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against the bank (and given the bank's failure to challenge the tribal court's jurisdiction to decide the breach of contract claims tried to verdict against the bank), the Court in *Plains Commerce* (as in *Hicks*) declined to issue any holding on whether the tribal court did or did not have jurisdiction to adjudicate any of the claims as tried in the tribal court. *Plains Commerce, supra,* at p. 21, n.2 ("First, we have not said the Tribal Court has jurisdiction over the other claims: That question is not before us and we decline to speculate as to its answer.").

> expressly limits its first exception to the "activities of nonmembers," 450 U.S., at 565, allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations," *id.,* at 564. . . . Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers". . . We cited four cases in explanation of *Montana's* first exception. Each involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members. The first concerned a tribal court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. *See Williams v. Lee,* 358 U.S. 217 (1959). *Id* at 13-14.
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> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. *See Hicks, supra,* at 361 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them"). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. *Id.* at 16.
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> Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his action. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *See Montana,* 450 U.S., at 564. (Emphasis added). *Id.* at 19.

Regulating on-reservation employment relations between tribal entities or tribal members on the one hand and non-Indians on the other (and disputes derivative thereof)—whether through tribal legislative actions or tribal court adjudication of disputes—are examples of where the Tribe's regulatory interest as a sovereign is properly invoked to support the exercise of tribal court jurisdiction when one of the exceptions to *Montana's* Main Rule is established. This is how tribes can address the adverse consequences of improper behavior (including unfounded claims by non-Indians against tribal defendants derivative of on-reservation consensual relationships) of Indians or non-Indians on their reservations and the impact on the internal relations of these communities which such improper conduct can have. *See, Plains Commerce, supra,* at Slip.

Opinion 18 ("The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving self-government by regulating non-members *activity* on the land, within the limits set forth in our cases.").

CONCLUSION

Exhaustion of tribal remedies is required in this case because the tribal Defendants have established that a colorable basis for tribal court jurisdiction exists under *Montana* and *Williams v. Lee.* Thus, exhaustion is required and this action should be dismissed.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
100 Concourse, Suite 204
1052 Highland Colony Parkway
Ridgeland, MS 39157
(601) 360-8444

By: /s/ *Timothy W. Lindsay*
HERBERT C. EHRHARDT
MS Bar: 5490
TIMOTHY W. LINDSAY
MS Bar: 1262

VanAMBERG, ROGERS, YEPA, ABEITA & GOMEZ, LLP
Post Office Box 1447
Santa Fe, NM 87504-1447
(505) 988-8979

By: /s/ *C. Bryant Rogers*
C. BRYANT ROGERS
MS Bar: 5638

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that I did, on the 17th day of July, 2008, hereby certify that I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Amanda Green Alexander, Esquire
Alexander & Watson, P.A.
Post Office Box 1664
Jackson, MS 39215-1664

ATTORNEY FOR PLAINTIFF

/s/ *Timothy W.Lindsay*

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