IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

| | | |
|---|---|---|
| FINE CONSULTING, INC., *et al.*, Plaintiffs, | ) | |
| V. | ) | Civil Action No. 1:12-cv-00004-LH-RHS |
| GEORGE RIVERA, *et al.*, Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

## I. INTRODUCTION TO ARGUMENT

Plaintiffs Fine Consulting, Inc., a Kentucky corporation, d/b/a The Fine Point Group ("Fine Point") and Randall A. Fine ("Fine") have sued Defendants for tortious interference with certain contracts executed with Buffalo Thunder, Inc. ("BTI") and Pojoaque Gaming, Inc. ("PGI"), governmental instrumentalities of the Pueblo of Pojoaque. Compl., p. 1; *see*, Aff. of Frank Demolli, ¶s 2-5, attached hereto as Ex. 1. Plaintiffs seek money damages.

All of these claims have their origin in (a) commercial dealings and consensual commercial relationships (the referenced contracts and Randall Fine's Pueblo of Pojoaque gaming license) between Plaintiffs and the several Pueblo of Pojoaque governmental entities or instrumentalities for whom the Defendants serve as officials, officers or employees. (*See*, Motion to Dismiss, ¶ 1-12; (b) the termination of those contracts; (c) the revocation of Plaintiff Fine's Gaming license; and, (d) in various disputes grounded in those relationships, all involving actions and decisions of the Defendants occurring on Pueblo of Pojoaque grant lands. *See*, Complaint, ¶s 4-10; *See*, Aff.s of Frank Demolli (Ex. 1) and Allen Mosley (Ex. 2) attached to the Motion to Dismiss.

The two contracts in question are the Employment Contract (Ex. 1, Compl.) and the Consulting Contract (Ex. 2, Compl.). The Employment Contract involves Plaintiff Randall Fine. As an employee of BTI and PGI involved in management of the Pojoaque casinos, Mr. Fine's services and his rights under the Employment Contract were contingent upon him maintaining his Pojoaque gaming license. *See*, ¶ 2(b)(i) of the Employment Contract. The Consulting Contract involves Plaintiff Fine Point, but was contingent upon Plaintiff Fine's availability and licensure to provide core services under Fine Point's contract (¶s 1.6, 2. and 11.b) of the Consulting Contract.

Per § 2(b)(ii) of the Employment Contract Plaintiff Fine was hired as an employee answering directly to Defendant (Pueblo of Pojoaque Governor) George Rivera as Governor and in his capacity as President of BTI and PGI—the governmental corporations which actually operate the Pueblo's casinos. Fine was not hired as an independent contractor to operate those casinos, a management contractor status that would have required approvals of the contract by the Pojoaque Pueblo Gaming Commission ("PPGC") and National Indian Gaming Commission ("NIGC") which were not obtained. *See*, § 10-8-8 Pojoaque Gaming Ordinance and 25 U.S.C. § 2711. Failure to obtain NIGC approval of such management contracts renders them void *ab initio. First American Kickapoo Operations, LLC v. Multi Media Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005).

Significantly, Plaintiffs agreed in both Contracts that all disputes arising from the Contracts would fall within the exclusive jurisdiction of the Pojoaque Pueblo Tribal Courts and would be "governed exclusively by the laws of the Pueblo" § 7(g), Empl. Contract; § 20(f), Consulting Contract. Neither Contract contains any waiver of the Pueblo's or any of the referenced tribal entities' sovereign immunity from unconsented civil lawsuits in any court; and,

Plaintiffs in both contracts expressly waived their right to a jury trial as to "any litigation based [on the contract], or arising out of, under, or in connection with this Agreement or any course of conduct, course of dealing, statements (whether oral or written) or actions of either or both of the parties hereto" § 7(h), Empl. Contract; § 20(g) Consulting Contract).

A related dispute referenced in the Complaint (¶s 43, 46-63)—and which Fine claims satisfies the "improper means" element of his tort claims (Compl. ¶ 69)—involves prior and ongoing PGC license revocation proceedings regarding Fine's gaming license. Ex. 3 to the Complaint is the Pojoaque Tribal Court's procedural decision of December 15, 2011 in *Fine, et al. v. Pueblo of Pojoaque Gaming Comm'n,* Case No. 11-4083-CV ruling that a hearing before the Gaming Commission was required before Fine's license could be revoked. All of Plaintiffs' references to Defendants' "illegal" conduct respecting the Gaming Commission's prior efforts to revoke his gaming license without a hearing are just exaggerated references to the Tribal Court's ruling that there were procedural defects in the process initially used to seek revocation of that license.[1] Attached to the Demolli Aff. as Ex. B is the Complaint in the new license revocation

[1] PPGC's action to revoke Fine's gaming license without a hearing—found to have been a procedural flawed process—cannot establish the "improper means" element of the tort of interference with contractual relations if the New Mexico law defining that tort is ultimately borrowed and applied by the Pojoaque Courts. *Kelly v. St. Vincent Hospital,* 102 N.M. 201, 692, 207 P.2d 1350 (N.M. App.1984):

> In arguing that the hospital violated its bylaws and reached its decisions in a procedurally suspect manner, Kelly asks this court to include in the definition of "improper means" such actions as would ordinarily make out claims of ultra vires or violations of procedural due process. Restatement, supra, Section 766A, comment e, describes "improper means" as actions which are innately wrongful or predatory in character. As a matter of law, bare allegations of violation by bylaws or procedural due process, without more, do not make out a claim of improper means under a claim of tortuous interference with contractual relations.

Whether the Complaint's allegations otherwise satisfy the "improper motive" element of that tort will (if that court borrows New Mexico law respecting this tort) ultimately turn on the Pojoaque

proceeding initiated before the PPGC on January 3, 2012 (without exhibits). If that license revocation becomes final, Plaintiff Fine will have no gaming license. This will independently negate any rights Plaintiffs had or might have had to enforce either contract from and after such license revocation.

All of the Defendants named in this action are officers, officials or employees of the Pueblo of Pojoaque, the PPGC and/or BTI and PGI. For the reasons set out in the Motion to Dismiss, and addressed *infra* at Part II.D., all the Defendants were acting in their official capacities in connection with one or more of these Pueblo entities when the actions giving rise to this lawsuit occurred. *See,* Motion to Dismiss ¶s 1-12 and the Affs. of Demolli and Mosley.

## II. THIS COURT IS REQUIRED TO DISMISS OR STAY PLAINTIFFS' SUIT DUE TO THEIR FAILURE TO EXHAUST TRIBAL REMEDIES

### A.

*National Farmers Union v. Crow Tribe of Indians,* 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante,* 480 U.S. 9 (1987) hold (except for certain exceptions not here relevant)[2]. that where a party seeks to secure a federal court ruling on a civil cause of action

---

Courts' rulings on whether any of Defendants' actions were or were not primarily motivated by concerns about protecting the legitimate interests of the Pueblo and its casinos, as maintained by Defendants and by BTI and PPG. *See,* termination letters of March 14, 2011 and February 9, 2012, Exs. L & M (and ¶s 7 and 8 of), Demolli Aff. *Martin v. Franklin Capital Corp.,* 145 N.M. 179, 182, 195 P.3d 24 (N.M. App. 2008):

> If the defendant interfered in some way with the plaintiff's contract "[t]he inquiry, in the end, should be to determine the [defendant's] primary motivation for the interference. If it was primarily improper, then the [defendant] has no privilege. If it was primarily proper, then liability should not attach." Id. ¶ 23.

[2] *National Farmers Union* at 856. n.21 ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' *cf. Juidice v. Vail*, 430 US 327, 338, 51 L Ed 2d 376, 98 S Ct 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."); *El*

arising on lands constituting a federally recognized Tribe's Indian Country based on voluntary transactions or other consensual relationships between one of the parties to the dispute and a tribal member, tribe or tribal entity of that tribe (or Pueblo), the federal court must dismiss (or stay) the federal suit until plaintiff has exhausted its tribal remedies—so long as there exist colorable tribal court jurisdiction over the claims pled under *Montana v. United States*, 450 U.S. 544 (1981) and/or *Williams v. Lee*, 358 U.S. 217 (1959).

The same rule applies where (as here) a plaintiff seeks relief against a tribal entity or officials, officers, employees of the tribe or tribal entity (including in-house attorneys) based on actions they took in the Pueblo of Pojoaque's Indian Country in connection with the subject transactions or consensual relationships; and, this rule applies without regard for the defendants' status as members or non-members, although two of the Defendants (Rivera and Lopez) are Pojoaque tribal members.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), the Court reaffirmed the exhaustion of tribal remedies requirements of *National Farmers Union* and *Iowa Mutual* where there exists at least a colorable claim that the federal requirements for exercise of tribal jurisdiction over a non-Indian party are met. This exhaustion requirement has been reaffirmed many times. *See, Granberry v. Greer*, 481 U.S. 129, 131 and n.4 (1987) (construing the duty to exhaust tribal remedies as imposing "an inflexible bar to consideration of the merits of the [habeas] petition by a federal court, and

---

*Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999) (exhaustion of tribal remedies not required where the Congress has clearly expressed an intent that a particular federal claim be heard only in a federal forum); *Nevada v. Hicks*, 533 U.S. 353, 369 (exhaustion of tribal remedies is not required where there is not even a colorable basis for exercise of tribal jurisdiction; held: since tribal court had no jurisdiction to adjudicate tort and § 1983 claims against state officers, exhaustion of tribal remedies was not required as to suit pleading such claims). None of those exceptions apply here.

therefore requiring that [habeas] petition be dismissed when it appears there has been a failure to exhaust" (inserts added)); *Hartman v. Kickapoo Tribe Gaming Commission*, 319 F.3d 1230, 1233 (10th Cir. 2003) (affirming dismissal for failure to exhaust tribal remedies of a federal civil suit against Indian tribe, its gaming commission and individual gaming commissioners alleging wrongful suspension of plaintiff's tribal gaming license without a hearing)—reaffirming that exhaustion of tribal remedies in such circumstances is mandatory; *Smith v. Moffett*, 947 F.3d 442, 446 (10th Cir.1991) (order dismissing civil suit against various tribal officials to the extent the claims pled arose on the Navajo Indian Reservation and reiterating that the duty to exhaust tribal remedies in such cases is mandatory—following the "inflexible bar" analysis of *Granberry v. Greet, supra*); *Stock West Corporation v. Michael Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (*en banc*) (affirming dismissal for failure to exhaust tribal remedies of suit pleading civil tort claims filed by non-Indian contractor against in-house non-Indian attorney for tribe who provided legal opinion for Indian tribal corporations where the opinion was prepared on the reservation in connection with an on-reservation transaction between the tribal corporations and the non-Indian contractor since there was colorable tribal court jurisdiction over the claims under *Montana*); *Graham v. Applied Geo Technologies, Inc.*, 593 F.Supp.2d 915 (S.D. Miss. 2008) (requiring exhaustion of tribal remedies on former employee's civil suit against tribally-owned, tribally chartered corporation and various non-Indian officers and employees thereof); *Bank One, N.A. v. Lewis*, 144 F.Supp. 2d 640 (S.D. Miss. 2001) (exhaustion of tribal remedies required on non-Indian creditor's effort to compel arbitration on tort claims of fraud filed in Choctaw Court in connection with installment sales contracts executed on Choctaw Indian Reservation), *aff'd sub nom 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); *TTEA Corp. v.*

*Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (exhaustion of tribal remedies required on tribe's claim that contract with non-Indian was void under 25 U.S.C. § 81); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) ("The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims.").

Satisfying the duty to exhaust tribal remedies requires adjudicating the tort claims pled in this action in the Pojoaque Trial Courts and taking an appeal to the Pojoaque Appeals Court. *Iowa Mutual Insurance Company v. LaPlante, supra* at 17 ("Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claims and federal courts should not intervene"). *See*, Pueblo of Pojoaque Tribal Council Resolution 98-52 ("Pojoaque Pueblo Appellate Procedure"), appended to the Demolli Aff. as Ex. J. Since Plaintiffs have not exhausted their tribal remedies as to such claims, they must be dismissed.

**B.**

Plaintiffs' duty to exhaust tribal remedies did not go away just because Plaintiffs won the race to the courthouse. That duty exists even when no tribal lawsuit is pending at the time a federal action is commenced. *Brown v. Washoe Hous. Auth.,* 835 F.2d 1327 (10th Cir. 1988) (dismissing non-Indian plaintiff's suit for failure to exhaust tribal remedies even though no tribal court action involving that dispute was pending and expressly rejecting argument that exhaustion was not required in that circumstance); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (same); *Sharber v. Spirit Mt. Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003) (same); *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245-1247 (9th Cir. 1991) (same); *Weeks Const.*,

*Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673-674 (8th Cir. 1986) (same); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) (same).

Indeed, the whole federal policy of requiring exhaustion of tribal remedies would be rendered meaningless if that policy could be evaded by simply winning a race to the federal courthouse. This is especially true where, as here, the party seeking to evade tribal jurisdiction is a non-Indian Plaintiff seeking judicial relief against officials, officers and employees of tribal entities for causes of action arising within their Indian Country, as to which it has long been settled that tribal courts are the appropriate forums for resolving such disputes. *Williams v. Lee, supra.*

Here, moreover, there are ongoing license revocation proceedings involving the same gaming license and license revocation issues complained of by Plaintiffs at ¶s 34, 46-63 of the Complaint. That proceeding is now pending before the PPGC and the initial appeal from that proceeding will be to the Tribal Court. *See,* Ex. 3, Pl. Compl. Plaintiffs have now sought additional relief in the Pojoaque Court in No. 11-4083-CV arising from the same consensual relationships here involved—the license and the FPG contract. However, BTI and PGI are not parties to that action, and cannot be bound by any ruling the Tribal Court may issue regarding the FPG contract. *Jicarilla Apache Tribe v. Hodel,* 821 F.2d 537, 540 (10th Cir. 1987) ("[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."). *See,* Exs. J and M, and ¶ 8, Demolli Aff. Plaintiffs are not permitted to pursue simultaneous tribal and federal court relief on disputes arising from the same consensual relationships. *Iowa Mutual, supra* at 14-18.

**C.**

The Pueblo of Pojoaque is a different law-making jurisdiction than the State of New Mexico. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Williams v. Lee*, 358 U.S. at 220-223 (1959) (holding that absent governing acts of Congress, Indian tribes have "the right to make their own laws and be ruled by them" and to have that law applied to private commercial disputes between tribal members and non-members arising in their "Indian Country"); *see, Garcia v. Gutierrez*, 147 N.M. 105, 217 P.3d 591, 594-598 and n.2 (N.M. 2009) (reaffirming that Pueblo of Pojoaque grant lands are Indian Country for civil jurisdiction purposes, but rejecting contention that non-Indian fee land within the Pueblo's grant boundaries constitutes land satisfying the "home state" test of UCCJEA for child custody jurisdiction determinations).

Accordingly, the underlying tort and choice-of-law rules implicated by this dispute are supplied by the local laws, customs and traditions of the Pueblo, not by the laws of New Mexico. *See, Greentree Servicing, LLC v. Cisneros*, 37 ILR 6021, No. 10-3889-CV (Jan. 12, 2010) (recognizing the evolution of Pojoaque common law) (Ex. C, Demolli Aff.); *Palencia v. Pojoaque Gaming, Inc.*, Nos. 01-2622-CV and 01-2633-CV (April 7, 2001) (explaining how Pojoaque customs and traditions influence the Pojoaque court's interpretation of the ICRA) (Ex. D, Demolli Aff.). Moreover, Plaintiffs expressly agreed that tribal law would supply the rule of decision for disputes involving these contracts. § 7(g) of the Employment Contract and § 20(f) of the Consulting Contract. Thus, whether any conduct engaged in by any of the parties to this action within the Pueblo of Pojoaque Indian Country is actionable in tort[3]—or did or did not

[3] *See,* fn. 1 *supra.* Also (if the Pojoaque Courts ultimately adopt New Mexico law to decide this case), that Court will have to determine whether any Defendant was acting *ultra vires* his authority—a question that also bears on whether (based on Pojoaque law and analysis of the relevant documents and actions involved, *see, e.g.* Ex. I (and ¶s 7-9), Demolli Aff.) any of their conduct was or was not tortious. *Deflon v. Sawyers*, 139 N.M. 637, 137 P.3d 577, 581 (N.M.

constitute a breach of contract—are questions which requires examination and determination under the laws of the Pueblo, not under the laws of the State of New Mexico or of any other jurisdiction. Per *Williams v. Lee, supra,* tribal governments and tribal courts have the sovereign power to make their own laws and to determine the proper interpretation and application of those laws to all persons under their jurisdiction, including their law of torts and damages. Where such tribal law questions must be addressed, this provides an even stronger ground for requiring exhaustion of tribal remedies. *U.S. v. Tsosie,* 92 F.2d 1037 (10th Cir. 1996) (federal court's duty to require exhaustion of tribal remedies is especially clear where questions of tribal law are involved); *Hartley v. Baca,* 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981) (tribal court jurisdiction preempts state court jurisdiction over tort claims filed against an Indian defendant based on an accident in defendant's Pueblo "Indian Country"); *see also, In re Estate of Tsinahnajinnie,* No. SC-CV-80-98 (Nav. S.Ct. 2001) (rejecting English common law rule set forth in Prosser and Keeton on the Law of Torts, §§125A-127 (5th Ed. 1984) barring wrongful death actions brought by survivors on behalf of decedent in absence of a wrongful death statute and holding that "Navajo common law permits a wrongful death action despite the lack of a wrongful death statute"); *Bolanos v. Gulf Oil Corp.,* 502 F.Supp. 689 (W.D. Pa. 1980) (whether defendant's role in causing criminal proceedings to be initiated against plaintiff in Guatemala gave rise to actionable tort claims for "malicious prosecution" or "abuse of process" had to be determined under the law of Guatemala (where the criminal proceedings were filed) rather than under the law of Pennsylvania where plaintiff's civil suit for tort damages was filed; hence, plaintiff's

---

2006) ("A corporate officer acting outside the scope of his authority…may be liable for interfering with a corporate contract"). However, for the reasons set out above, that question cannot be answered solely by examining the language of the contract. Tribal customs and traditions also have to be taken into account.

Pennsylvania suit was properly dismissed under doctrine of *forum non conveniens.*), *aff'd*, 681 F.2d 804 (3rd Cir. 1982).

Here, it is clear that the Pueblo of Pojoaque is the jurisdiction having the most significant relationship to the conduct which Plaintiffs claim was tortious. Hence, it is the Pueblo's law which supplies the rule of decision on whether anything actionable in tort or contract has occurred here. Moreover, Plaintiffs agreed that the Pueblo's customs, traditions and laws would govern in all disputes regarding interpretation of these contracts. ¶ 7(g), Ex. 1 to Compl.; ¶ 20(f), Ex. 2 to Compl.; *see*, Demolli Aff., Ex. I. Nor does it help Plaintiffs that diversity jurisdiction has been invoked. The duty to exhaust tribal remedies applies with equal force in diversity cases. *Iowa Mutual Insurance Company v. LaPlante, supra; Bank One, N.A. v. Shumake*, 281 F.3d 507, 515 (5th Cir. 2002).

**D.**

Plaintiffs' contention (Compl. ¶ 48 and p.4 of Intro. to Compl.) that these Pueblo officers, officials and employees were acting *ultra vires* or somehow on their own and not on behalf of the entities by which they were employed or appointed is plainly ludicrous in context;[4] and is, in any event, legally irrelevant for purposes of this Motion. Exhaustion of tribal remedies is in any event required even if Defendants acted *ultra vires* and are not protected by the Pueblo's sovereign immunity. *Burell v.Armjio*, 456 F.3d 1159, 1164 (10th Cir. 2006) (noting that district court properly required non-Indian plaintiffs to exhaust their tribal remedies before seeking money damages in federal court on civil claims for money damages against Pueblo official notwithstanding allegations that the defendant officials acted *ultra vires* their authority);

[4] If the Defendants truly acted *ultra vires*, then the termination of the Fine contract, the revocation of the Fine license and the termination of the Fine Consulting Contract never occurred and Defendants could not be liable for interference with the subject contracts by (as claimed by Plaintiff) inducing their termination—because they would now remain in force.

*MacArthur v. Jan 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 tribal court first chance to rule on the sovereign immunity defense); *Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988) (staying federal proceedings for district court to "consider whether on the facts of this case, the federal action should be stayed pending further tribal court proceedings or dismissed under . . . *National Farmers Union*" even though the district court had already ruled that the tribal defendant had waived its immunity as to the claims pled); *Whitebird v. Kickapoo Housing Authority*, 751 F.Supp. 928 (D.Kansas 1990) (plaintiff had to exhaust tribal court remedies on claims against employees of tribal housing authority even if those employees were not protected by sovereign immunity).

Indeed, one of the issues on which exhaustion is required is the question whether the Defendants here were or were not acting *ultra vires* their authority and are or are not protected by the Pueblo's sovereign immunity, *McArthur v. San Juan County*, *supra; Burrell v. Armijo*, 603 F.3d 825 (10th Cir. 2010) (applying *ultra vires* doctrine in ruling that the defendant Pueblo officials were all protected from civil damage liability by the Pueblo's sovereign immunity); *Ninigret Development Corp. v. Narrangansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000) (ruling that plaintiff was required to exhaust its tribal remedies as to plaintiff's contract claims even though tribal defendant had waived its sovereign immunity as to those claims); *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990 (8th Cir. 1999):

> Davis first argues that exhaustion of tribal remedies is not required in this instance because the Band has explicitly waived its sovereign immunity for the type of claims alleged in her complaint. We disagree. We do not read a purported waiver of sovereign immunity by the Band as doing away with the exhaustion requirement. In fact, the Supreme Court has stated that the issue of a tribe's sovereign immunity is the very kind of question that is to be decided in the first

> instance by the tribal court itself. *See National Farmers*, 471 U.S. 855-56, 105 S.Ct. 2447 ("T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty.... We believe that examination should be conducted in the first instance in the Tribal Court itself."); *Duncan*, 27 F.3d at 1299.

*Marceau v. Blackfeet Housing Authority*, 519 F.3d 838 (9th Cir. 2008) (even though tribal defendant had waived its sovereign immunity, exhaustion of tribal remedies would have been required but for the fact that defendant "forfeited the argument that the tribal court should decide the immunity issue by failing to raise it until . . the . . . petition for rehearing" and where tribal court had already ruled on same legal issue in a prior case); *Auto-Owners Insurance Company v. The Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017 (8th Cir. 2007) (holding that federal plaintiff was required to exhaust its tribal remedies on claim against tribal defendant without regard to whether defendant possessed or had waived its sovereign immunity); *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003):

> Nor did the district court err in concluding that the tribal exhaustion requirement also applies to issues of tribal sovereign immunity. Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires "a careful study of the application of tribal laws, and tribal court decisions." *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992); *see also Nat'l Farmers*, 471 U.S. at 855-56, 105 S.Ct. 2447. Accordingly, the district court properly "stayed its hand until after the ... Tribal Courts have the opportunity to resolve the question." *Stock West Corp.*, 964 F.2d at 920.

Moreover, Plaintiff Fine otherwise admitted in the very proceedings which led to the Pojoaque Court's ruling of December 15 (attached as Ex. 3, Compl.) that it was the PPGC—not Defendant Rivera (its Chairman), not Defendant Demolli (its attorney), not Defendant Zucker (its Executive Director), and not Defendant Eddie Lopez (one of the Gaming Commissioners)—which revoked his license in March 2011. *See*, Exs. E & F, Demolli Aff. where Plaintiff Fine informed the Court that "…The facts in this case are simple and uncontested. Mr. Fine held a gaming license issued by the PPGC; the PPGC summarily revoked that license without granting

Mr. Fine a hearing;" (Page 1) (emphasis added)); and "On March 14, when the PPGC improperly revoked Fine's key employee license," (Page 8) (emphasis added). Plaintiff Fine has likewise claimed that it was BTI and PGI which terminated his contract—not these Defendants. *See,* Ex. G, Demolli Aff..

## III. THE POJOAQUE TRIBAL COURTS CLEARLY HAVE COLORABLE JURISDICTION TO ADJUDICATE PLAINTIFFS' TORT CLAIMS

The headquarters of the Pueblo of Pojoaque, of the subject tribal gaming corporations and of the Gaming Commission are all located on Pueblo of Pojoaque grant lands and all Defendants' actions complained of by the Plaintiffs on the part of the Defendants occurred, if at all, on Pueblo of Pojoaque grant lands within the Pueblo of Pojoaque Indian Country. (Mot. To Dis., ¶s 9 and 10).

Both Mr. Fine's gaming license and the contracts he executed with the two gaming corporations clearly constitute consensual relationships of the sort which give rise to colorable Tribal Court jurisdiction under the *Montana* test. *Montana v. U.S. supra* at 565; *Strate v. A-1 Contractors, supra* at 445-447; *Atkinson Trading Co. v. Shirley, supra* at 655-666. *MacArthur v. San Juan County,* 497 F.3d 1057, 1071 (10th Cir. 2007):

> There is no doubt that an employment relationship between two parties is contractual in nature. In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at will. Consequentially, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe. (Citations omitted).

There is an obvious logical nexus between those consensual relationships as evidenced by those contracts and the license and the sole cause of action pled here; that is, the tort of interference with contractual relations regarding those same contracts. *Atkinson Trading Company, Inc. v. Shirley, supra* at 123 S.Ct. at 1833 (requiring that the cause of action pled must

have some logical connection ("nexus") to the underlying consensual relationships to anchor *Montana* jurisdiction); *MacArthur v. San Juan County*, 309 F.3d 1216, 1223 (10th Cir. 2002) (the *Montana* nexus requirement is not met where there is no logical connection between the plaintiff's cause of action and the underlying consensual relationships).

In these circumstances, the Pojoaque Tribal Court clearly has colorable jurisdiction to adjudicate Plaintiffs' claims under *Williams v. Lee* and *Montana*, just as that Court had jurisdiction to adjudicate Plaintiffs' claims against the PPGC in the prior suit they filed in that Court: No. 11-4083-CV, to appeal the PPGC's initial revocation of his gaming license, the decision in which is appended to his Complaint as Ex. 3; and, over Plaintiffs' new claims filed in that proceeding in February 2012 (Ex. N and ¶ 8, Demolli Aff.)

**A.**

In *Williams v. Lee*, 358 U.S. 217 (1959) the Court barred the exercise of state court jurisdiction over causes of action arising on Indian reservations in which non-Indians sought to sue Indians for such causes of action, ruling that tribal courts were the proper forum for hearing those cases. In this regard, the Court stated at pp. 220, 223:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there.. . .The cases in this court have consistently guarded the authority of Indian governments over their reservations. (Citations omitted).

Likewise, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-72 (1978), the Court ruled that "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."

Under *Williams v. Lee*, where a cause of action arises on-lands constituting a tribe's Indian country and involves a non-member plaintiff suing a tribal defendant, based on alleged civil wrongs committed by the Indian defendant on the reservation in derogation of the rights of the non-Indian plaintiff, the propriety of tribal court jurisdiction to adjudicate such claim under federal law is well-settled. Those kind of claims do not usually require analysis of the more rigorous sort required under *Montana* when the tribal court plaintiff is Indian and the tribal court defendant is non-Indian as in *Bank One, supra; see, Montana v. United States*, 450 U.S. 544, 565-566 (1981) (listing *Williams v. Lee* as example of case where tribal jurisdiction was clearly appropriate under consensual relations exception to Main Rule); *see, Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (construing *Montana's* reference to *Williams v. Lee* as "declaring tribal jurisdiction exclusive over a lawsuit arising out of an on-reservation sales transaction between non-member plaintiff and member defendants"). *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267 (1984) makes clear that the same rule applies to tribal entity defendants as to tribal members.

In *Nevada v. Hicks*, 533 U.S. 353, 357, n.2 (2001), the court noted that the typical case in which the court has addressed and upheld the exercise of tribal court jurisdiction "have involved claims brought against tribal defendants. *See, e.g., Williams v. Lee* . . . ," but also noting that:

> In *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants. *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

Thus, while *Hicks* did rule that tribal courts could not adjudicate claims against state officers sounding in tort or arising under 42 U.S.C. § 1983 in cases filed by tribal members against those officers based on their on-reservation conduct carried out while on duty, the Court was careful to disclaim any holding on any broader issue respecting the scope of tribal court jurisdiction over non-Indian defendants in general; *Hicks, supra* at 358, fn.2 and 373; and, nothing in *Hicks* otherwise undermined the existence of tribal court jurisdiction to adjudicate civil claims filed by non-members against tribal defendants under *Williams v. Lee,* 358 U.S. 217 (1959) (which established the basic rule that state courts may not adjudicate civil claims filed by non-Indians against Indians on causes of action arising on defendants' Indian reservation; proper forums for resolving such disputes are the tribal courts of those reservations).

*Plains Commerce Bank v. Long Family Land & Cattle Company, Inc.* 554 U.S. 316, 128 S.Ct. 2709 (2008)[5] did not alter the rules requiring exhaustion of tribal remedies. There the Court held that 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

[5] While it was widely anticipated that the *Plains Commerce* case might issue binding rulings clarifying some of the basic principles governing when the exercise of tribal jurisdiction over non-Indians is permitted under *Montana*, the Court's ruling does not contain any holdings which squarely address any of those issues. The Court reconfigured the facts of the case and restructured the Court's analysis so that it did not have to reach any of those fundamental issues. 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 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. 2725 ("The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide.") and p. 2725, 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.").

which had come into the bank's possession as the result of various prior loan deals gone bad. The Court left the pre-*Plains Commerce* law of *Montana* and *Williams v. Lee* and their progeny (as to tribal court jurisdiction) and *National Farmers Union* and *Iowa Mutual* (as to exhaustion of tribal court remedies) unchanged as to cases involving non-Indian tribal court defendants; *Philip Morris USA, Inc. v. King Mountain Tobacco Company, Inc.*, 469 F.3d 932, 940 (9th Cir. 2009) (reiterating that *Plains Commerce* left intact the rule of *Williams v. Lee* under which "tribal courts have exclusive jurisdiction over suits against tribal members on claims arising on the reservation").

A number of post-*Plains Commerce* cases have affirmed tribal court jurisdiction under *Montana* to adjudicate tort claims filed against non-Indian defendants where those tort claims arose from and had a logical nexus to on-reservation consensual relationships between the non-Indian defendants and various tribal parties. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (tribal court had *Montana* jurisdiction to adjudicate tort claims against non-Indian corporate lessor and its owner/manager seeking money damages grounded in land lease and trespass disputes); *Attorneys Process & Investigation Services, Inc. v. Sac & Fox tribe of Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010) (tribal court had *Montana* jurisdiction to adjudicate tort claims for trespass seeking money damages against non-Indian security guard for on-reservation actions); *Dolgencorp., Inc., et al. v. The Mississippi Band of Choctaw Indians, et al.*, 2011 WL 7110624 (S.D.Miss.) (tribal court had *Montana* jurisdiction to adjudicate tort claims seeking damages for assault and battery grounded in on-reservation consensual relations between non-Indian corporation and tribe and tribal member).

The basis for tribal court jurisdiction under *Montana* (and under *Williams v. Lee*) here is even stronger. Here it is the non-Indian Plaintiffs who are seeking relief against tribal officials,

officers and employees on tort claims grounded in their on-reservation consensual relationships with tribal entities. Tribal court jurisdiction to adjudicate such claims is not just colorable, it is well-settled under *Williams v. Lee* and *Montana. Nevada v. Hicks*, 533 U.S. at 382 (Souter, J. concurring) ("It is the membership status of the unconsenting party. . . that counts as the primary jurisdictional fact."); *Philip Morris USA, Inc. v. King Mountain Tobacco Company*, 569 F.3d 932, 941, 945 and n.2 (9th Cir. 2009) after *Plains Commerce* ". . . the *Montana* analysis is controlling in tribal jurisdiction cases, with party alignment in the tribal court action as the most important factor to be weighed in determining the application of *Montana's* rule and exceptions to the case at hand.

> Phillip Morris's complaint does not allege claims based on King Mountain's sales of its cigarettes on the Yakama Reservation, . . .. *Cf. Smith*, 434 F.3d at 1132 ("where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction");

**CONCLUSION**

Thus, under *National Farmers Union, supra, Iowa Mutual, supra,* Plaintiffs are required to pursue their claims in the Pojoaque Pueblo Trial and Appellate Courts, thereby exhausting their tribal remedies and this Court is required to dismiss or stay Plaintiffs' action in this Court. Dismissal is warranted and is here requested.

Respectfully submitted,

VanAMBERG, ROGERS, YEPA, ABEITA
& GOMEZ, LLP

By: /s/ C. Bryant Rogers
C. BRYANT ROGERS
RONALD J. VanAMBERG
Post Office Box 1447
Santa Fe, NM 87504-1447
Phone: (505) 988-8979
Fax: (505) 983-7508
E-mail: cbrogers@nmlawgroup.com