IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN

v.

NARRAGANSETT INDIAN TRIBE

Civ. No. 13-185-S

MEMORANDUM IN SUPPORT OF PLAINTIFF DOUGLAS J. LUCKERMAN'S OBJECTION TO DEFENDANT NARRAGANSETT INDIAN TRIBE'S MOTION TO DISMISS AND IN SUPPORT OF HIS MOTION TO REMAND TO THE SUPERIOR COURT OF RHODE ISLAND

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Douglas J. Luckerman ("Plaintiff") submits the following memorandum of law ("Plaintiff's Memorandum") in support of his objection to Defendant Narragansett Indian Tribe's ("Tribe") motion to dismiss pursuant to three provisions of Rule 12(b), FED. R. CIV. P. ("Defendant's Motion" or "the Motion"),[1] and in support of his own motion to remand this case to the Rhode Island Superior Court.

This Objection and Memorandum are supported by the Affidavit of Douglas J. Luckerman Pursuant to Rules 12(b)(1) and 12(b)(7) in Support of His Objection to Defendant's Motion to Dismiss ("Luckerman Affidavit"), dated June 12, 2013, and filed herewith.

I – Summary of Argument

The Tribe, like other federally recognized American Indian tribes, enjoys some measure of sovereignty.[2] Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 26 (1st Cir. 2006) (en banc). This includes the power to legislate as to activities occurring on tribal lands, determine tribal membership, regulate domestic relations among tribal members, and exclude outsiders from tribal lands. Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, 327-328 (2008). As a general rule, however, Indian tribes do not enjoy sovereignty over non-members. Montana v. United States, 450 U.S. 544, 565 (1981).

Tribal sovereignty may be exercised through legislative or regulatory action, just as it may through exercises of adjudicative power. But the adjudicative jurisdiction of the tribes—the permissible, subject-matter jurisdiction of tribal courts—does not exceed a tribe's legislative or

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[1] Defendant's memorandum in support of the Motion is referred to here as "Defendant's Memorandum."
[2] The extent of tribal sovereignty is not uniform among the tribes. See, e.g., Aroostook Band of Micmacs v. Ryan, 484 F.3d 41, 54-55 (1st Cir. 2007).

regulatory jurisdiction. Plains Commerce Bank, 554 U.S. at 330. Accordingly, an assertion of adjudicative jurisdiction in an area outside of a tribe's legislative or regulatory purview cannot be sustained. Id. at 324 ("If the tribal court is found to lack [adjudicative] jurisdiction, any judgment as to the nonmember is necessarily null and void.").

The principal contentions of the Motion are that (a) the Tribe enjoys sovereign immunity as to Plaintiff's claim, (b) the subject matter of this dispute is within the Tribe's adjudicative jurisdiction, and, as a consequence, (c) Plaintiff's case is subject to the rule on tribal-court exhaustion. See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31-32 (1st Cir. 2000). Each of these contentions is mistaken. In the engagement agreements at issue here, the Tribe clearly and explicitly waived its sovereign immunity as to Plaintiff's claims (see infra at III,B,1 and III,B,2), and, even if it did not, the Tribe enjoys no sovereign immunity as to a nonmember's claim related to services provided outside of tribal lands. See infra at III,B,3. Further, there is no adjudicative jurisdiction in the Tribe in the circumstances of this case because the engagement agreements are between the Tribe and a non-member; they do not relate to activities conducted on tribal land or non-Indian fee land;[3] and, at their core, they implicate the general commercial law of the states. See infra at III,C,2. Finally, even if it could exercise adjudicative jurisdiction here, the Tribe explicitly waived that jurisdiction through the forum-selection provisions of the engagement letters.[4] See infra at III,C,1; see, e.g., Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir. 1993) ("To

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[3] "Non-Indian fee land" refers to land on a reservation owned by non-tribal members. See Plains Commerce Bank, 554 U.S. at 328.

[4] The engagement letters are part of Plaintiff's Complaint, marked as Tabs A and B.

refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination."). In the end, the Tribe does not advance a colorable claim of tribal adjudicative jurisdiction, a prerequisite to tribal-court exhaustion. See Rincon Mushroom Corp. v. Mazzetti, 490 F. App'x 11, 13 (9th Cir. 2012); Ninigret Dev. Corp., 207 F.3d at 31.

While the Tribe's assertion of tribal adjudicative jurisdiction in the Motion is enough to endow this Court with the subject-matter jurisdiction necessary to decide the tribal-exhaustion question, Plains Commerce Bank, 554 U.S. at 324 ("[W]hether a tribal court has adjudicative authority over nonmembers is a federal question."), it is not enough to sustain this Court's jurisdiction after a ruling on the defense. See infra at III,D. Accordingly, a ruling unfavorable to the Tribe will warrant remand of this state-law-based case to the state court from which it came, while a ruling favorable to the Tribe will warrant a stay of these proceedings pending the Tribal Court's initial review of the tribal-jurisdiction question. See infra at III,E; see Rincon Mushroom Corp., 490 F. App'x at 13-14.

II – Facts

A – Facts Relating to the Tribe's Rule 12(b)(1) Motion[5]

The Plaintiff is a Massachusetts lawyer knowledgeable in American Indian law. Luckerman Aff., ¶ 2. He is not, and never has been, a member of the Tribe. Luckerman Aff., ¶ 3.

[5] The Motion purports to be grounded in sections (b)(1) and (b)(7) of Rule 12, as well as in section (b)(6). The former sections permit reference to material outside of the pleadings, while the latter does not. Rodgers v. Callaway Golf Operations, Inc., 796 F. Supp. 2d 232, 237 (D. Mass. 2011) (as to Rule 12(b)(1)); Dine Citizens Against Ruining Our Env't v. Klein, 676 F. Supp. 2d 1198, 1215 (D. Colo. 2009) (as to Rule 12(b)(7)). For this reason, the facts pertinent to each segment of the Motion are set forth separately in Plaintiff's Memorandum.

Beginning in 2002, Plaintiff began to provide legal services to the Tribe. Luckerman Aff., ¶ 4. In principal part, his services related to litigation undertaken by the Tribe. Luckerman Aff., ¶ 5. As a consequence, most of Plaintiff's work was performed at his law office in Lexington, Massachusetts, and in federal courthouses in Providence and Boston. Luckerman Aff., ¶ 6.

During the eight-year period of his engagement, Plaintiff's communication with the Tribe occurred primarily by telephone, electronic mail, and regular mail. Luckerman Aff., ¶ 7. On one occasion, Plaintiff met with the Tribe's general counsel, John F. Killoy, Jr., at his offices in Narragansett, Rhode Island. Luckerman Aff., ¶ 8. Only rarely did Plaintiff meet personally with tribal officials on tribal lands. Luckerman Aff., ¶ 9.

The present dispute is not "center[ed] on the land held by the [T]ribe and on tribal members within the reservation." See Plains Commerce Bank, 554 U.S. at 327. It does not relate to the Tribe's "power to legislate and to tax activities on the reservation, including certain activities by nonmembers." Id. Moreover, this dispute does not implicate the Tribe's power to "determine tribal membership," Id., and it certainly has no relationship to the regulation of "domestic relations among members." Id.

The Tribe offers no facts to support application of one of the Montana exceptions. Montana v. United States, 450 U.S. 544, 565-566 (1981); see infra at III,C,2. This dispute does not concern the regulation, "through taxation, licensing, or other means[,]" of a nonmember's consensual commercial activity on the reservation. Id. at 565. While Plaintiff and the Tribe undoubtedly entered into a lawyer-client relationship, that relationship was not centered on the Tribe's settlement lands and this dispute does not concern an effort by the Tribe to regulate Plaintiff's activities on the Tribe's settlement lands.

Neither does the Tribe offer factual support—nor can it do so—for the second Montana exception. Id. at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."). As the Supreme Court emphasized in Plains Commerce Bank, a tribe may invoke the second Montana exception only in the case of the most extreme conduct which "menaces" the political integrity, the economic security, or the health or welfare of the tribe. Plains Commerce Bank, 554 U.S. at 341. The "conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." Id. (quoting Montana, 450 U.S. at 566). Plaintiff's effort to secure payment for his legal services fails to satisfy the second Montana exception for two principal reasons: (a) the legal services in question were not performed in any substantial way on tribal lands, and, even if they were, (b) while the prospect of having to pay its bills may be unpleasant for the Tribe, there is no indication that doing so is menacing to the Tribe's political integrity, economic security, or the health or welfare of the Tribe.

B – Facts Relating to the Tribe's Rule 12(b)(6) Motion

In 2002, the Tribe contacted Plaintiff, a Massachusetts-based lawyer, to discuss the possibility of retaining him to provide legal services to the Tribe. Complaint, ¶¶ 1 and 6. Those discussions were successful and, shortly thereafter, Plaintiff began to give legal advice to the Tribe in a variety of matters. Complaint, ¶ 6.

In early 2003, the Tribe asked Plaintiff to undertake additional legal duties relating primarily to issues involving tribal sovereignty. Complaint, ¶ 7. On March 6, 2003, in connection with the expanded scope of his work, Plaintiff prepared and forwarded to the Tribe a

formal engagement letter ("2003 Agreement") setting forth, among other things, a general description of the scope of work, the applicable hourly rates, and the procedures for billing and payment, including a provision for interest on past-due amounts. Complaint, Tab A. The 2003 Agreement contained this language regarding sovereign immunity and forum selection:

> The Tribe agrees to waive any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts.

2003 Agreement at 1. By its conduct, the Tribe acknowledged its acceptance of the terms of the 2003 Agreement, and Plaintiff undertook to act as counsel to the Tribe in a variety of cases and transactions. Complaint, ¶¶ 9, 11 and 12.

In February 2007, the Tribe engaged Plaintiff to provide legal advice and representation to one of its offices, the Narragansett Indian Tribal Historic Preservation Office ("NITHPO"). Complaint, ¶ 13. On February 3, 2007, Plaintiff prepared and forwarded to the Tribe a formal engagement letter ("2007 Agreement") setting forth, among other things, a general description of the scope of work, the applicable hourly rates, and the procedures for billing and payment, including a provision for interest on past-due amounts. Complaint, Tab B. The 2007 Agreement also contained this language regarding sovereign immunity and forum selection:

> The NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal, and state courts, solely for claims arising under this Agreement.

2007 Agreement at 1. On February 20, 2007, the Tribe's Historic Preservation Officer, John Brown, signed a copy of the 2007 Agreement stating that he read, understood, and accepted all of its terms. 2007 Agreement at 2. At approximately the same time, Plaintiff undertook to act as counsel to the Tribe in a number of historic-preservation and economic-development matters.

Throughout the period of his representation of the Tribe, Plaintiff submitted regular billings for his services, expenses, and, when applicable, interest on unpaid balances. Complaint, ¶ 16. From time to time, the Tribe made payments to Plaintiff in response to these billings, Complaint, ¶ 17, although the payments were never sufficient to meet the Tribe's obligations under the terms of the 2003 and 2007 Agreements. Complaint, ¶ 18. With interest, the Tribe is now indebted to Plaintiff in an amount exceeding $1.1 million. Complaint, ¶ 19.

The Tribe never expressed dissatisfaction with the legal services provided by Plaintiff. Complaint, ¶ 21. Prior to the filing of this Motion, the Tribe never contested the validity, fairness or enforceability of the 2003 and 2007 Agreements. Complaint, ¶ 22.

C – Facts Relating to the Tribe's Rule 12(b)(7) Motion

NITHPO is an office of the Tribe authorized by the Tribe to act on its behalf in historic-preservation and other matters. See National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 et seq. (2011); 36 C.F.R. 800 (2012). NITHPO is not separately incorporated under Rhode Island law.

NITHPO is the Tribe's designated historic-preservation office within the meaning of NHPA. 16 U.S.C. § 470 et seq. (2011); 36 C.F.R. 800 (2012). Indian participation in the NHPA is open only to federally recognized tribes. 16 U.S.C. § 470w (2011). Over the years, the Tribe has applied for and/or received NHPA grants as a consequence of having established NITHPO as its historic-preservation office.

On its website, the Tribe describes NITHPO as follows:

> The Narragansett Indian Tribal Historic Preservation Office (NITHPO) is a designated office of the Narragansett Indian Tribe. NITHPO is authorized to determine all matters on behalf of the Tribe with respect to

> historic preservation, Indian graves' protection, and religious freedom and other relevant cultural matters.

Narragansett Indian Tribe: Historic Preservation, NARRAGANSETT INDIAN TRIBE, http://www.narragansett-tribe.org/historic-preservation-dept.html (last visited June 6, 2013).

In December 2002, when the Tribe filed a complaint in this Court seeking declaratory and injunctive relief with respect to an alleged historic burial site in Warwick, Rhode Island, the Tribe identified itself as a single plaintiff acting "by and through the" NITHPO. Luckerman Aff., ¶ 25 and Tab C. In the body of the same complaint, the Tribe referred to NITHPO as a duly authorized entity of the Narragansett Indian Tribe responsible for tribal historic preservation. Id.

The Bureau of Indian Affairs of the United States views NITHPO as part of the Tribe. Luckerman Aff., ¶ 14 and Tab A. NITHPO is not organized as a legal entity under the civil laws of the State of Rhode Island or any other state.

In short, the Tribe's assertion that NITHPO is separate from the Tribe is completely unsupported.

III – Argument

A – The Tribe Fails to Satisfy Its Burdens Under Rule 12.

1 – Rule 12(b)(1)

The parties appear to agree that this Court has subject-matter jurisdiction under 28 U.S.C. § 1331 to decide (a) whether the Tribe is immune from Plaintiff's claims and (b) whether Plaintiff has an obligation to exhaust tribal remedies.[6] Defendant's Memorandum at 3-4;

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[6] In Ninigret, the First Circuit held that both tribal sovereign immunity and tribal-court exhaustion are federal questions, and that the former should be decided before the latter. Ninigret Dev. Corp., 207 F.2d at

Plaintiff's Memorandum at 2-3. The parties disagree, however, as to whether the Tribe has presented a colorable case for tribal adjudicative jurisdiction over Plaintiff's claims.

As the proponent of the defense and proposition that tribal exhaustion is required here, the Tribe has at least the initial burden to demonstrate the existence of a colorable claim of such jurisdiction. Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany, 615 F.3d 97, 105 (2d Cir. 2010) (defendant had initial burden with respect to lack of subject matter jurisdiction in FSIA case); Matar v. Dichter, 563 F.3d 9, 12 (2d Cir. 2009) (same); Springdale Venture, LLC v. US WorldMeds, LLC, 620 F. Supp. 2d 810, 815 (W.D. Ky. 2009) (denying motion to dismiss for lack of subject-matter jurisdiction because defendants failed to satisfy initial burden showing a requirement to exhaust administrative remedies). Here, the Tribe has failed to satisfy its similar burden because it points to no authority for the proposition that a contract claim brought against the Tribe by a nonmember relating to services performed largely in offices and courthouses outside tribal lands is within the adjudicative jurisdiction of the Tribe. Accordingly, the Tribe fails to satisfy its burden under Rule 12(b)(1).

2 – Rule 12(b)(6)

Under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff, see Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994), must take all well-pleaded allegations as true, and must afford the plaintiff the benefit of all reasonable inferences. See Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v.

28-29. In Plaintiff's Memorandum, Plaintiff addresses these questions in the same order. See infra Sections III,B and C.

Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995). If under any theory the allegations are sufficient to state a cause of action, the motion to dismiss must be denied. Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994).

While a plaintiff need not plead factual allegations in great detail, the allegations must be sufficiently precise to suggest a right to relief that is greater than mere speculation. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). As the First Circuit has noted, "The complaint must allege 'a plausible entitlement to relief' in order to survive a motion to dismiss." Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (quoting Twombly, 550 U.S. at 559). The plausibility requirement is not akin to a "standard of likely success on the merits," but instead is one of "plausibility assuming the pleaded facts to be true and read in a plaintiff's favor." Sepulveda–Villarini v. Dep't of Educ. of Puerto Rico, 628 F.3d 25, 30 (1st Cir. 2010).

"'Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint.'" Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (quoting Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc., 524 F.3d 315, 321 (1st Cir. 2008)). If matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. Thus, the Court has discretion to consider matters outside the pleadings in ruling on a motion to dismiss under Rule 12(b)(6), but, if it does so, it must convert the motion to one for summary judgment and give the parties a reasonable opportunity to present material pertinent to the motion. See Trans-Spec Truck Serv., 524 F.3d at 321.

The Tribe asserts that it is entitled to dismissal under Rule 12(b)(6), but it does not explain why or how this is so. Defendant's Memorandum at 8. The Tribe makes no reference to

the applicable standard for decision, and it does nothing to develop its assertion. If Plaintiff's Complaint is treated in the manner required by Rule 12(b)(6), then it must be viewed in the light most favorable to Plaintiff; its allegations must be taken as true; all reasonable inferences must be drawn in Plaintiff's favor; and the Complaint must be tested by no more onerous a standard than plausibility. Applying this standard here, the Tribe must be deemed to have contracted with Plaintiff in accordance with the terms of the engagement letters; the Tribe must be viewed as having waived its sovereign immunity; and it must be regarded as having agreed that claims arising out of the engagement letters may be litigated in state or federal courts otherwise having jurisdiction. As for the Tribe's claims as to tribal jurisdiction and exhaustion, those are affirmative defenses not established on the face of the Complaint and not properly subject to disposition within the confines of an unconverted Rule 12(b)(6) motion. See, e.g., Jones v. Bock, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense under the [Prison Litigation Reform Act of 1995], and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

3 – Rule 12(b)(7)

Rule 12(b)(7) motions are intended to enforce and implement the provisions of Rule 19, FED. R. CIV. P. ("Required Joinder of Parties"). 5C Charles Alan Wright et al., Federal Practice and Procedure § 1359 (3d ed. 2013). A motion under Rule 12(b)(7) will succeed "when there is an absent person without whom complete relief cannot be granted or whose interest in the dispute is such that to proceed in that person's absence might prejudice that individual or entity or the parties already before the court." Id.

Even a meritorious Rule 12(b)(7) motion, however, does not necessarily warrant dismissal:

> When faced with a motion under Rule 12(b)(7), the district court will decide whether the absent person should be joined as a party. If it decides that question in the affirmative, the district judge will order the individual or entity who is not before the court brought into the action, if such joinder is feasible. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. Rather than being formalistic, the court's consideration of Rule 19(b) factors follows a pragmatic analysis of the particular circumstances of each case.

Id. (emphasis added).

Again, the Tribe relies on an undeveloped and unsupported argument to sustain its motion under Rule 12(b)(7).[7] Defendant's Memorandum at 8. As an initial matter, the Tribe does not explain how an unincorporated office established by the Tribe solely for the purpose of performing tribal functions can be regarded as a separate legal entity for purposes of Rule 19. Luckerman Aff., ¶¶ 10 and 11. Neither does the Tribe explain how NITHPO can be viewed correctly as a legal entity separate from the Tribe after the Bureau of Indian Affairs acknowledged NITHPO "as a part of the Narragansett Tribal Government." Luckerman Aff., ¶ 14 and Tab A. Does the Tribe contend that its several other tribal offices (e.g., "Child & Family Services," "Education," "Finance," "Tribal Police," "Health & Human Services") are separate legal entities as well? See *Narragansett Indian Tribe: Directory*, NARRAGANSETT INDIAN TRIBE,

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[7] "The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." Citizen Band Potawatomi Indian Tribe of Okla. v. Collier, 17 F.3d 1292, 1293 (10th Cir. 1994).

http://www.narragansett-tribe.org/directory.html (last visited June 5, 2013). And if this is the position of the Tribe, then what are the residual functions of Narragansett tribal government?

As a legal matter, the Tribe never addresses the core questions raised by this portion of the Motion. For example, although Rule 19(a)(1)(A) requires a showing that without NITHPO complete relief cannot be granted to Plaintiff, the Tribe never explains how that requirement is satisfied. In fact, the Tribe can make no such showing because, even if the Tribe were to prove that it has no legal responsibility for the fees and expenses incurred by its historic preservation office, this would not render incomplete the relief awarded by the Court as to the Tribe. In other words, the Plaintiff's claims against the Tribe still will have been resolved fully.

A second core requirement of Rule 19 is the prospect of harm to the absent party's interests. FED. R. CIV. P. 19(a)(1)(B). Again, the Tribe offers nothing to support this requirement. Assuming for argument's sake that NITHPO is not part of the Tribe, NITHPO would certainly not be harmed by a judicial determination that the Tribe—not NITHPO—is responsible for the legal fees and expenses at issue here. Neither would NITHPO be harmed by a determination that the Tribe is responsible for a portion of the fees or none of them at all. In both cases, NITHPO will not have lost its right to contest its own liability.

Finally, even if the Tribe were correct that the core requirements of Rule 19(a)(1) have been satisfied, the appropriate remedy is not dismissal as the Tribe suggests. Instead, as Rule 19(a)(2) makes plain, a party capable of being joined (a fact seemingly conceded by the Tribe) should simply be joined.

B – In the Circumstances of This Case, the Tribe Enjoys No Sovereign Immunity.

The 2003 and 2007 Agreements ("Agreements") contain clear and explicit contractual waivers of the Tribe's sovereign immunity for claims arising under the Agreements. In the case of the 2003 Agreement, the operative language states that "[t]he Tribe agrees to waive any defense of sovereign immunity . . . ." 2003 Agreement at 1. In the case of the 2007 Agreement, the operative language is equally clear: "The NITHPO agrees to a limited waiver of Tribal sovereign immunity . . . ." 2007 Agreement at 1. In both cases, it is hard to imagine clearer (or more succinct) words to accomplish the intended purpose.

There can be no doubt that American Indian tribes have the ability to effect such waivers (see Cohen's Handbook of Federal Indian Law §7.05[1][b], at 644 (Nell Jessup Newton ed., 2012) (collecting cases)), that no special turn of phrase is necessary to achieve them (Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 25 (1st Cir. 2006) (en banc) ("T]here is no requirement that talismanic phrases be employed.")), and that clarity of intention is the essential requirement. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991) (tribe did not waive its immunity merely by seeking an injunction against a proposed tax assessment). Indeed, the requisite clarity may be achieved impliedly through, for example, adoption of an arbitration clause calling for enforcement of the resulting award "in any court having jurisdiction thereof." C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 415 (2001).

1 – The 2003 Agreement Waives the Tribe's Sovereign Immunity.

The Tribe offers several undeveloped and largely unsupported arguments in an effort to suggest that the waiver contained in the 2003 Agreement is ineffective. Defendant's

Memorandum at 5. For example, the Tribe suggests that there is equivocation in the waiver, but it does not explain how this is so. Id. Instead, the Tribe cites, without discussion, to Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Id. at 4-5. Martinez involved a federal court action under the Indian Civil Rights Act ("Act"). The plaintiff argued that the Act's habeas corpus remedy should be interpreted to provide, by implication, a private right of action and related waiver of sovereign immunity to permit vindication of rights established by the Act. Martinez, 436 U.S. at 58. The Supreme Court rejected the argument as an unwarranted extension of the Act's limited remedial provisions. Id. at 72. While Plaintiff has no quarrel with the holding in Martinez, he finds no support there for the Tribe's position in this case. There is no equivocation in the waiver set forth in the 2003 Agreement; it is straightforward and clear, and it relies in no way on inference or implication.

The Tribe argues further that the waiver set forth in the 2003 Agreement is ineffective because it is not signed by the Tribe. Defendant's Memorandum at 5. But the Tribe supplies no legal support for its argument and it is undeterred by cases like C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla. and other authorities holding that effective waivers of tribal sovereign immunity come in many forms. If the result is a clear expression of a tribe's intention to waive, then the form of the waiver is inconsequential. C & L Enters., Inc., 532 U.S. at 418-419 (waiver based on agreement to arbitrate and . . . to enforce in any court of competent jurisdiciton); Narragansett Indian Tribe v. Rhode Island, 449 F.3d at 25 (Rhode Island Land Claims Settlement Act and joint memorandum of understanding between Tribe and state waive tribal sovereign immunity); Confederated Tribes of the Colville Reservation Tribal Credit (In re White), 139 F.3d 1268, 1271 (9th Cir. 1998) (tribal agency waived the sovereign immunity of its

member tribes by consenting to bankruptcy court's adjudication of the merits of its claim against the bankrupt).

Along the same line, the Tribe contends that "the Complaint fails to set forth any other evidence or allegation that the Tribe agreed to a waiver of its immunity or for that matter the remaining terms of the agreement." Defendant's Memorandum at 5. This is not an accurate evaluation of the Complaint's allegations. The Complaint explicitly alleges that, despite the lack of a Tribal signature on the 2003 Agreement, "[t]he Tribe accepted the terms of the [2003] Agreement," (Complaint, ¶ 9), received and paid billings rendered by Plaintiff in accordance with the terms of the 2003 Agreement (Complaint, ¶¶ 16 and 17), and never offered any suggestion that the 2003 Agreement was in any way unenforceable against the Tribe. Complaint, ¶ 22. If the Tribe is suggesting that the terms of a writing can only be accepted by signature, it is mistaken. See, e.g., ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (a seller of goods may invite acceptance of a contract's terms by conduct on the buyer's part); Fontes v. Dell, Inc., 984 A.2d 1061, 1068 (R.I. 2009) (same). Moreover, in the absence of express rejection of a portion of the writing, the Tribe cannot now pick and choose among the terms of the writing that it will treat as binding. Neither can it fairly expect enforcement of an internal rule (if one exists) purportedly requiring a Tribal Council vote and signature of the Chief Sachem (Defendant's Memorandum at 5), after failing to raise the issue upon its receipt of an engagement agreement containing an explicit waiver of sovereign immunity.

2 – The 2007 Agreement Waives the Tribe's Sovereign Immunity.

The Tribe's challenge to the 2007 Agreement takes a different tack. Here, the Tribe suggests that the waiver of sovereign immunity is ineffective because "the engagement letter is addressed not to the Tribe but to the NITHPO, an entity of the Tribe"; the language of the letter suggests an agreement between Plaintiff and NITHPO, as opposed to Plaintiff and the Tribe; and "[T]here is no mention of the Tribe as a client or that work is to be performed for any entity other than NITHPO." Defendant's Memorandum at 6.

The Tribe's argument fails for two principal reasons. First, it is based on a strained reading of the 2007 Agreement. As an initial matter, the engagement letter is directed to the Tribe through its preservation officer. The letter's heading is as follows:

> Mr. John Brown
> Narragansett Indian Tribal Historic Preservation Office
> Narragansett Indian Tribe
> 215 Fenner Hill Road
> Hopkington, Rhode Island 02832

2007 Agreement at 1. As for the contention that the body of the letter contains no reference to the Tribe as the client or beneficiary of the work, that too does not bear up under scrutiny. The fifth paragraph of the letter—a discussion of costs—refers to both the Tribe and NITHPO in a way that suggests the two are used interchangeably, drawing no distinction between them for purposes of the engagement. Further, in the first paragraph at page 2 of the letter, Plaintiff promises "to attend Tribal Council meetings to answer questions or discuss the work [he is] doing for the NITHPO" and "to be available by phone and email to answer questions from the Tribal Chief, Tribal Council and other members of the NITHPO regarding the work [he is] doing

for the NITHPO." Plaintiff's assumption of a reporting responsibility to the Tribe's chief executive and governing body is consistent with a lawyer-client relationship with the Tribe.

Moreover, there is no factual basis for the contention that the Tribe and NITHPO are separate entities. The Tribe is a federally recognized Indian tribe; NITHPO is part of the Tribe and, in various places, is referred to as a "part," "office," and "subdivision" of the Tribe. But whatever the label, there is no reason to think that NITHPO is a separate entity, and certainly not a separate legal entity in any accepted sense of that phrase.

The Tribe's own records and behavior support this view. See supra at II,C and III,A,3. As has been noted, on January 10, 2001, when the federal Bureau of Indian Affairs confirmed NITHPO's status to the Tribe, it used this language in a letter directed to the Tribe's Chief Sachem:

> This is to confirm that, pursuant to Narragansett Tribal Council Resolution TC 100500-01, the Narragansett Tribal Historical Preservation Office is acknowledged as a part of the Narragansett Tribal Government.

Luckerman Aff. ¶ 14 and Tab A. Further, on September 9, 2004, when the Tribal Council found it necessary to expand the duties of NITHPO to include "the task of investigating, pursuing, establishing and accomplishing Indian Gaming, as defined under the Indian Gaming Regulatory Act . . . ," the Tribal Council at the same time provided for NITHPO to "report to the Chief Sachem with any updates of Its [sic] action or findings[.]" Luckerman Aff. ¶ 15 and Tab B. Finally, in November 2002, when the Tribe brought an action in this Court based on rights granted under the National Historic Preservation Act, 16 U.S.C. § 470 et seq., the Tribe identified itself as the plaintiff, using this case caption:

NARRAGANSETT INDIAN TRIBE
OF RHODE ISLAND,
by and through the
NARRAGANSETT INDIAN TRIBE
HISTORIC PRESERVATON OFFICE
Plaintiff,

v. C.A. No. 02-480

WARWICK SEWER AUTHORITY, alias
Defendant

Luckerman Aff. ¶ 25 and Tab C. If it had been true, as the Tribe now suggests, that NITHPO is a separate entity from the Tribe, that fact was completely ignored when the Tribe initiated the Warwick Sewer Authority case.

3 – Quite Apart from the Contractual Waivers of Sovereign Immunity Set Forth in the 2003 and 2007 Agreements, the Tribe Has Been Determined to Have Waived Its Sovereign Immunity, and to Have Had Its Sovereign Immunity Abrogated, in a General and Far-Reaching Way.

In Defendant's Memorandum, the Tribe glosses over the First Circuit's en banc decision in Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) ("Smoke Shop Case"). Indeed, the Tribe relegates the case to a brief footnote to its discussion of tribal sovereign immunity. Defendant's Memorandum at 5 n. 2. This is a striking effort to minimize the adverse impact of a landmark decision in the legal history of the Tribe's sovereign immunity.

In its two-sentence, footnoted statement, the Tribe suggests that the Smoke Shop Case relates solely to the Tribe's sovereign immunity with respect to the State of Rhode Island, but has no wider application. Id. There is no support for this view in the First Circuit's opinion, and the Tribe provides no assistance as to how such a view can be substantiated.

The Smoke Shop Case holds, in essence, that the Tribe waived a substantial portion of its sovereignty and sovereign immunity with respect to settlement lands in exchange for the benefits provided by the terms of a joint memorandum of understanding concluded on February 28, 1978, among the Tribe, the State, the Town of Charlestown, and certain landowners ("the J-Mem"). Narragansett Indian Tribe v. Rhode Island, 449 F.3d at 25. The J-Mem's key provision providing that "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands" had this impact in the First Circuit's view:

> Read in light of this unique historical context, the provision quoted above clearly and unambiguously establishes that the parties to the J-Mem intended to subjugate the Tribe's autonomy on and over the settlement lands (and, thus, its sovereign immunity) to the due enforcement of the State's civil and criminal laws.

Id. (emphasis added). Plainly, the referenced language of the J-Mem and the First Circuit's interpretation of it are not limited to actions in which the State is a party seeking to enforce its civil and criminal laws. On the contrary, the holding recognizes a general contraction of the Tribe's sovereignty with respect to the settlement lands, and a concomitant circumscription of the Tribe's sovereign immunity. This view is reinforced by the related language of the Settlement Act, 25 U.S.C. § 1708(a), which is as follows:

> In general[,] [e]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

Again, the language is not qualified by a limitation restricting its application to enforcement actions by the State of Rhode Island.

Importantly, the First Circuit's opinion in the Smoke Shop Case equates tribal sovereignty and tribal sovereign immunity. Narragansett Indian Tribe v. Rhode Island, 449 F.3d at 24-25. The court explained its view in this way:

> At the threshold, we pause to confront a point made by our dissenting brethren. They suggest that our approach to this question disregards the "subtle but important" distinction between tribal sovereignty and tribal sovereign immunity announced in a decision of a panel of this court. This criticism rests on shaky ground. The *Aroostook* panel-with scant citation to authority-saw a distinction that is not apparent to us; it framed the distinction as being that the doctrine of tribal sovereignty contemplates that, in certain circumstances, a tribe "is not subject to state laws ... *at all,*" whereas tribal sovereign immunity "means that [a tribe] is not amenable to *state judicial or quasi-judicial proceedings* to enforce those laws." In our view, both the *Aroostook* panel's sculpting of the distinction and its ensuing discussion of the scope of tribal sovereign immunity misread the applicable Supreme Court precedents and, thus, are incorrect. As we already have explained, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption," treating sovereignty instead as the source of "tribal power ... to protect tribal self-government or to control internal relations" through tribal regulation of activities on tribal lands. Consistent with this trend, tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty. Consequently, we expressly overrule *Aroostook* with respect to the distinction in question and proceed with our bifurcated inquiry.

Id. (citations omitted). Thus, the court determined that any limitation on tribal sovereignty—such as the one effected by the J-Mem and Settlement Act—carries with it a coextensive limitation on tribal sovereign immunity. Id. at 25. In the case of the Tribe, therefore, sovereignty and sovereign immunity are confined to "matters of local governance including matters such as membership rules, inheritance rules, and the regulation of domestic relations." Id. at 26 (quoting Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701 (1st Cir. 1994)) (internal quotation marks omitted).

In the end, the Tribe's sovereign immunity is operative only with respect to matters of local governance over tribal lands. Here, those requirements are not met; the Tribe's contracts with the Plaintiff relate to legal services, not governance, and they called for services to be performed for the most part in offices and courthouses off tribal lands. As a consequence, the Tribe has no sovereign immunity with respect to Plaintiff's claims.

C – The Tribe Has Not Identified a Colorable Claim of Tribal Jurisdiction. Accordingly, It Has Not Justified Application of the Rule Relating to Tribal-Court Exhaustion.

1 – The Tribe Clearly and Explicitly Consented to the Jurisdiction of State and Federal Courts.

Each of the engagement agreements contains language by which the Tribe explicitly consents to the jurisdiction of state and federal courts. The 2003 Agreement waives sovereign immunity as to "claims or actions arising from this Agreement that are brought in state or federal courts," 2003 Agreement at 1, while the 2007 Agreement waives sovereign immunity in "Tribal, federal and state courts, solely for claims arising under [the 2007] Agreement." 2007 Agreement at 1.

Nevertheless, the Tribe now seeks to withdraw its consent to non-tribal adjudication of Plaintiff's claims by reference to the general rule on tribal-court exhaustion. See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-857 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987). The cases upon which the Tribe relies, however, do not lend support to its position because none of them includes a forum-selection clause like those at issue in this case. Even Ninigret, upon which Plaintiff places some weight, is inapposite. Defendant's Memorandum at 7; Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000).

The pertinent portion of the forum-selection clause in Ninigret was as follows:

> 14.1 All claims, disputes and other matters in question between the Parties to this Agreement arising out of or relating to this Agreement or the breach thereof, shall be first presented to the Tribal Council for resolution and in the event of non-resolution, then to the Tribal Court which will appoint an Arbitration Board . . . .
> This Agreement to arbitrate and any agreement to arbitrate with an additional person or persons duly consented to by the Parties to this Agreement shall be specifically enforceable under prevailing arbitration law.
>
> 14.2 Notice of the demand for arbitration shall be filed in writing with the other Party or Parties to the Agreement and with the Tribal Council . . .
>
> 14.3 The award rendered by the Council or Arbitration Board appointed by the Tribal Court shall be final. Upon exhaustion of final remedy in Tribal Court leading to non-resolution and as a civil option, the Parties may, with written agreement from both, institute a Civil Action in Federal District Court.

Id. at 30. As these provisions make clear, the parties in Ninigret explicitly gave primacy to the Tribal Council and Tribal Court in the resolution of disputes arising under their agreement. All claims and disputes were referred initially to the Tribal Council, and, failing resolution there, to the Tribal Court for appointment of an arbitration board. Any decision of the Tribal Council, Tribal Court or arbitration board was final, and resort could be had to a federal court only with the written agreement of the parties.

No such primacy was accorded the Tribal Council or Tribal Court in the 2003 and 2007 Agreements. Indeed, the most that can be said is that, in the 2007 Agreement, the Tribal Court was placed on an equal footing with state and federal courts as an acceptable adjudicative option. With that, however, there is no reason to think that Plaintiff's selection of a state-court forum should be trumped by the Tribe's preference to have the case proceed in the Tribal Court.

At least two other federal circuits have addressed the enforcement of forum-selection clauses in the face of challenges based on the rule relating to tribal exhaustion. In both cases, the forum-selection clauses were determined to supersede the rule. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir. 1993); FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995).

Altheimer involved an effort by the Devils Lake Sioux Tribe and its wholly owned corporation, Sioux Manufacturing Corporation ("SMC"), to enter the business of manufacturing and marketing latex medical products from an existing plant on the tribe's reservation. Altheimer, 983 F.2d at 806. In furtherance of this effort, the tribe, SMC, and a firm called Medical Supplies & Technologies, Inc. ("MST") signed a letter of intent in anticipation of definitive agreements. Id. One provision of the letter was as follows:

> This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois [and all parties] agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois.

Id. at 807 (emphasis added). A further provision of the letter required the tribe to pay MST's legal and accounting fees if the transaction did not close within 60 days. Id. When the transaction in fact failed to close within the required time frame, MST's law firm (Altheimer & Gray) sued SMC in a federal district court in Illinois seeking to collect its fees and expenses as third-party beneficiary of the letter of intent. SMC asserted, among other things, that Altheimer & Gray failed to exhaust its tribal remedies. Id. at 808. Both the district court and the court of appeals rejected the argument, the latter relying in large part on the language of the forum-selection clause of the letter of intent:

> In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

Id. at 815.

FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), is to the same effect. FGS arose from a dam renovation project on the Pine Ridge Indian Reservation in South Dakota. Id. at 1231-1232. With funds provided by the Bureau of Indian Affairs ("BIA"), the Oglala Sioux Tribe engaged an engineer and a general contractor to perform repairs to the tribe's White Clay Dam. Id. at 1232. In turn, the general contractor retained FGS Constructors to perform mechanical and structural work on the dam. Id. Claiming that the BIA and the project's engineer failed to perform work preliminary to FGS's own responsibilities, FGS filed an action against the general contractor for breach of contract, against its sureties under the Miller Act, and against the government for negligence and imputed negligence under the Federal Tort Claims Act. Id. The district court dismissed FGS's contract action against the general contractor and its sureties on the grounds of comity and failure to exhaust tribal remedies. Id. The court of appeals, however, reversed the dismissal relying in principal part on the following language in the subcontract agreement between FGS and the general contractor:

> In the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal court or other court of competent jurisdiction.

Id. at 1233 (emphasis added). In the circumstances, the circuit court determined that FGS had no obligation to exhaust tribal remedies:

> We do not agree with the district court's determination that FGS must first exhaust its remedies in the tribal court. The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. The district court, therefore, had no significant comity reason to defer this Miller Act litigation first to the tribal court. By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court.

Id.

In the face of forum-selection clauses like those present in the 2003 and 2007 Agreements, and in the absence of a forum-selection clause like the one at issue in Ninigret, the Tribe cannot be regarded as presenting a colorable claim for tribal jurisdiction. Having clearly and explicitly agreed that disputes with the Plaintiff may be resolved in non-tribal courts, there is no comity reason to require Plaintiff to exhaust his remedies in the Tribal Court. In this case, unlike in Ninigret, tribal jurisdiction can only be exercised by first ignoring the clear agreement of the parties on forum selection.

The First Circuit was clearly mindful of the Seventh Circuit's opinion in Altheimer, but declined to follow it. Ninigret, 207 F.3d at 33. The court reasoned in this way:

> Although the question is close, we believe that, under *National Farmers,* the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract. *See National Farmers,* 471 U.S. at 855–56, 105 S.Ct. 2447. At that stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso). *See Iowa Mut.,* 480 U.S. at 16, 107 S.Ct. 971; *National Farmers,* 471 U.S. at 855–57, 105 S.Ct. 2447. This logic indicates that where, as here, the

> tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook,* 117 F.3d at 63–64, 69; *Snowbird,* 666 F. Supp. at 1444.

Id. at 33 (emphasis added). In other words, where a colorable claim of tribal adjudicative jurisdiction is presented by a controversy, tribal exhaustion is required. Where, however, the underlying controversy is clearly outside the scope of a tribe's adjudicative jurisdiction, tribal exhaustion is neither required nor appropriate.

2 – The Tribe's Sovereign Authority Does Not Extend to This Controversy.

The Smoke Shop Case does not stop with a discussion of the relationship between tribal sovereignty and tribal sovereign immunity (see supra at III,B,3); it continues with an appraisal of the Tribe's residual sovereignty:

> We recognize that the Tribe may continue to possess some degree of autonomy in matters of local governance, including matters such as membership rules, inheritance rules, and the regulation of domestic relations. But that core group of sovereign functions, whatever its dimensions, is not implicated in this case. Here, the State is seeking to enforce laws binding on the Tribe's commercial transactions with outsiders, not to dictate, say, tribal membership or inheritance rules. Whatever the exact contours of the Tribe's retained sovereignty, those contours are narrow—and it is perfectly clear that trafficking in contraband cigarettes is not within them.

Narragansett Indian Tribe v. Rhode Island, 449 F.3d at 26 (internal quotation marks and citations omitted). In essence, whatever sovereignty the Tribe may have enjoyed before the J-Mem and Settlement Act was substantially narrowed and circumscribed by that agreement and act of Congress. As the Court noted, "the Tribe may continue to possess some degree of autonomy 'in matters of local governance,' including 'matters such as membership rules, inheritance rules, and the regulation of domestic relations.'" Id. But the Tribe's "commercial transactions with

outsiders" like the State of Rhode Island and cigarette purchasers are not among the Tribe's residual areas of sovereignty. Id.

This view of tribal sovereignty is not limited to the particular circumstances of the Tribe. In Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008), a dispute concerning the Cheyenne River Sioux Indian Tribe's ability to exercise adjudicative jurisdiction over a discrimination claim arising from the sale of fee land by a non-Indian bank, the Supreme Court ruled that the tribal court lacked adjudicative jurisdiction. Id. at 320-324. In doing so, the Court noted that the "sovereignty that the Indian tribes retain is of a unique and limited character" and that "[i]t centers on the land held by the tribe and on tribal members within the reservation." Id. at 327 (citation omitted). The Court then provided this enumeration of the tribes' areas of sovereignty:

> As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, to determine tribal membership, and to regulate domestic relations among members. They may also exclude outsiders from entering tribal land. But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Montana,* 450 U.S., at 565, 101 S.Ct. 1245. As we explained in *Oliphant v. Suquamish Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing ... person[s] within their limits except themselves."

Id. at 316 (some internal citations omitted).

In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court addressed the circumstances under which the tribes may exercise sovereign authority over the activities of nonmembers on tribal reservations, including on non-Indian fee lands. Id. at 565. The Court determined that there are two circumstances in which such exercises of sovereignty are

permissible. Id. at 565-566. The first is that the tribes may regulate "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Id. (emphasis added). The second is that the tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

The Supreme Court returned to this subject (the so-called "Montana exceptions") in Plains Commerce Bank. 554 U.S. at 329-330. In doing so, the Court emphasized that the Montana exceptions modify the default rule (that the tribes may not exercise sovereign authority over nonmembers) only with respect to nonmember activity on tribal reservations, including non-Indian fee land. Id. at 329-330. The Court indicated further that, "[g]iven Montana's general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." Id. at 330 (internal quotation marks and citations omitted). The Court then added:

> 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. These exceptions are limited ones and cannot be construed in a manner that would swallow the rule, or severely shrink it.

Id. (internal quotation marks and citations omitted). Finally, the Court used the occasion to elaborate on the second Montana exception by emphasizing that it is only triggered when the nonmember conduct presents a severe "menace" to specified tribal interests:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that the elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.

Id. at 341 (internal citations and quotation marks omitted).

Against this background, the Tribe's contention that the tribal court has adjudicative jurisdiction over Plaintiff's claims is untenable, and certainly not colorable.[8] This case has no relationship to any matter of local tribal governance; it in no way implicates tribal membership rules, inheritance rules, or the regulation of domestic relations. On the contrary, this is largely an external, commercial dispute between the Tribe and its former lawyer over the Tribe's contract obligations. The services at issue were performed, in principal part, in courts and law offices, on the telephone, over the internet, and only rarely in meetings at tribal offices. In short, this is a dispute between the Tribe and a nonmember over activities that occurred off tribal lands.

Even if the Court were to view this case as involving activities on tribal lands, Montana's default rule would still control because neither of its exceptions is applicable. This case cannot be characterized fairly as a tribal effort to regulate—through taxation, licensing, or other means—nonmember activity occurring on the reservation. Plains Commerce Bank, 554 U.S. at 329-330; Montana, 450 U.S. at 565-566. The Tribe's effort here is not to regulate an activity on its settlement lands; it is to interpose its tribal court, and presumably its tribal law, to adjudicate a

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[8] There is no requirement of tribal-court exhaustion where it is clear that the tribal court lacks jurisdiction and adherence to the rule would serve no purpose other than delay. Nevada v. Hicks, 533 U.S. 353, 369 (2001); Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009).

controversy with a nonmember over services provided off the Tribe's settlement lands—a controversy to which the commercial law of the states is applicable.

Neither does this case satisfy the second Montana exception. This is not a case where the nonmember conduct, i.e., Plaintiff's effort to be paid for his services, "menaces" the "political integrity, the economic security, or the health or welfare of the [Tribe]." Plains Commerce Bank, 554 U.S. at 341; Montana, 450 U.S. at 566. Moreover, it most clearly does not "imperil the subsistence" of the tribal community, Montana, 450 U.S. at 566, or present "catastrophic" consequences for the Tribe. Plains Commerce Bank, 554 U.S. at 341. To characterize this case as one satisfying the second Montana exception is to invite the Tribe to subject the commercial claims of all nonmembers to adjudication in the tribal courts based on the bare assertion that the claim portends some unexplained adversity for the Tribe. Clearly, this is not the intention of the second Montana exception.

D – A Ruling Unfavorable to the Tribe on the Tribal Exhaustion Question Will Warrant Remand of This Case to the Rhode Island Superior Court and a Determination by the Court as to Plaintiff's Entitlement to the Costs and Expenses Incurred as a Result of the Removal.

If this Court determines, as we believe it should, that the Tribe has not presented a colorable case for adjudicative jurisdiction over Plaintiff's claims, then the case should be remanded to the Rhode Island Superior Court. The controlling provisions of 28 U.S.C. § 1447(c) are as follows:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

(Emphasis added.) This is so because the Tribe's assertion of tribal jurisdiction was the only justification for removal and federal-question jurisdiction under 28 U.S.C § 1331.

The Tribe's assertion of sovereign immunity by way of defense does not change this outcome. Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989) (". . . [I]t has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."); Ninigret Dev. Corp., 207 F.3d at 28 (presence of a sovereign immunity defense did not, by itself, establish federal-question jurisdiction).

E – Even if the Court Were to Determine that Tribal Exhaustion Is Required, Dismissal of Plaintiff's Complaint Is Not an Appropriate Exercise of the Court's Discretion. Instead, the Court Should Stay This Case Pending the Determination of the Tribal Court as to Its Own Jurisdiction.

At the conclusion of its discussion of the tribal-exhaustion issue, the Tribe asserts that "the Complaint should be dismissed for failure to exhaust Tribal court jurisdiction." Defendant's Memorandum at 8. That assertion is mistaken; the appropriate procedure is to enter a stay pending the Tribal Court's determination as to its own jurisdiction. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19-20 (1987). In Iowa Mutual, after ruling that the case before it required tribal exhaustion, the Court reversed the court of appeals to the extent that it had affirmed the district court's dismissal of the case. Id. Referring to its remand direction in National Farmers Union, the Court stated:

> As the Court's directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in National Farmers Union did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.

Iowa Mut. Ins. Co., 480 U.S. at 19-20 n. 13 (referring to n. 8). More recent cases are to the same effect. See, e.g., Rincon Mushroom Corp. v. Mazzetti, 490 Fed. App'x 11, 13 (9th Cir. 2012) ("[T]he district court abused its discretion in dismissing the case rather than staying it."); Sharber v. Spirit Mountain Gaming Inc., 343 F.3d 974, 976 (9th Cir. 2003) ("[T]he district court erred when, instead of simply staying the federal action, it granted Spirit Mountain's motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).").

In Ninigret, after determining that tribal exhaustion was required, the First Circuit vacated the district court's dismissal of the plaintiff's case with these observations:

> Methodologically, this [the district court's dismissal under Rule 12(b)(6)] was error, and we therefore vacate the existing judgment. On remand, the district court may, in its discretion, stay the case pending exhaustion of tribal remedies or dismiss it, pursuant to Rule 12(b)(1), without prejudice to refiling after exhaustion. *See Iowa Mut.*, 480 U.S. at 20 n. 14, 107 S.Ct. 971; *National Farmers*, 471 U.S. at 857, 105 S.Ct. 2447. We caution that the exhaustion process demands the good-faith cooperation of all parties. It should of course be given a reasonable time to proceed. See Bruce H. Lien Co., 93 F.3d at 1422. If, however, undue delays develop or changed circumstances evolve, the district court may consider permitting the federal court action to proceed or taking such other steps as it may deem advisable. *See id.*

Ninigret Dev. Corp., 207 F.3d at 35. While the First Circuit clearly saw the issue as one within the district court's discretion, the ruling suggests that discretion should be exercised in a way that prevents harm to a plaintiff and ensures that tribal-court proceedings are conducted in good faith.

These considerations are applicable here. A non-prejudicial dismissal will not protect Plaintiff from the defense that the ten-year statute of limitations has run as to some or all of his claim. The Tribe has already made it clear that it will hold Plaintiff's feet to the fire in this area. Defendant's Memorandum at 8 (". . . Plaintiff's allegations that he is owed for services dating back to 2002 are barred by the Rhode Island statute of limitations of 10 years for contract

actions."). Other courts have determined that a stay is the appropriate response where a non-prejudicial dismissal will not protect the plaintiff from risk under an applicable statute of limitations. Sharper v. Spring Mountain Gaming Inc., 343 F.3d at 976:

> The error [dismissal under Rule 12(b)(1)] is exacerbated here because dismissal might mean that [plaintiff] would later be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations.

(internal quotations marks and citations omitted). See also Rincon Mushroom Corp. v. Mazzetti, 490 Fed. App'x at 14 ("Here, at least some of Rincon Mushroom's claims would be time-barred if it had to re-file after exhausting its tribal remedies.").

Of equal concern is the prospect that dismissal for tribal-court exhaustion will prompt unnecessary delay. The Tribal Council, acting as a tribal court, will have little incentive to address Plaintiff's concerns in an expeditious way. The pendency of this case, however, and the prospect that unnecessary delay can be brought to this Court's attention without Plaintiff having to first re-file his case can have nothing but a salutary effect.

IV – Conclusion

For each of the reasons set forth herein, Plaintiff respectfully urges this Court to deny the Motion, remand this case to the Rhode Island Superior Court, award Plaintiff the costs and expenses, including attorneys' fees, incurred in connection with the Tribe's removal of the case,

and award such other and further relief as may be appropriate in the circumstances.

Respectfully submitted,

DOUGLAS J. LUCKERMAN
By his attorneys,

/s/ Anthony F. Muri
Anthony F. Muri (539)
MURI ASSOCIATES LLC
10 Weybosset Street
Providence, RI 02903
(401) 421-7300 Voice
(401) 421-7352 Fax
amuri@murilaw.com

/s/ Albert L Farrah
Albert L. Farrah, Jr. *(Pro Hac Vice)*
Farrah and Farrah
Two Elm Square
Andover, MA 01810
(617) 694 1549
alf@farrah-law.com

CERTIFICATE OF SERVICE

In accordance with the provisions of LR Cv 5.1, I hereby certify that this Memorandum in Support of Plaintiff's Objection to Defendant Narragansett Indian Tribe's Motion to Dismiss and in Support of His Motion to Remand was filed electronically, that it is available for viewing and downloading from the ECF system, and that each of the parties was served by means of the ECF system.

/s/Anthony F. Muri
Anthony F. Muri