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

MISSISSIPPI ADMINISTRATIVE SERVICE, INC., **PLAINTIFF**

v. **NO. 3:14-cv-00036-CWR-FKB**

MISSISSIPPI BAND OF CHOCTAW INDIANS, ET AL., **DEFENDANTS**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This case is before the Court after removal from the Hinds County Circuit Court based on the following federal question: whether the Circuit Court of Hinds County, Mississippi, may lawfully exercise jurisdiction over the claims of Plaintiff Mississippi Administrative Service, Inc. ("MAS") against the Mississippi Band of Choctaw Indians ("Tribe"), its Chief in her official capacity, and various other tribal entities, for alleged breaches of contracts which, if they occurred at all, occurred because of actions of the Defendants taking place on the Choctaw Indian Reservation. The reciprocal of the federal question presented is whether the Choctaw Tribal Court is the proper forum for resolving this contract dispute. Now that the case is here and on this Court's docket, that second question triggers Plaintiff's duty to exhaust its tribal remedies before seeking to obtain any ruling on that issue or any relief in this Court on the merits. Because Plaintiff's duty to comply (and this Court's duty to require Plaintiff's compliance) with the tribal exhaustion rule are clear, Defendants[1] have moved to dismiss under the tribal exhaustion doctrine. Accordingly, this Court should dismiss Plaintiff's complaint.

STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

[1] Moving Defendants are all defendants other than Choctaw Electronics Enterprise which has not been properly served.

MAS has sued for alleged breaches of certain purported contract(s)[2] which MAS claims were executed by or on behalf of the Tribe. The Tribe is and at all times material has been a federally recognized Indian tribe. Complaint, Exhibit 1, at ¶ 2. *See* 77 Fed. Reg. 47868, 47870: Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs (August 10, 2012); *United States v. John*, 437 U.S. 634, 647 (1978).

The named Defendants include the Tribe, Phyliss J. Anderson, Chief of the Tribe, sued in her official capacity; various other entities which are unincorporated operating divisions or enterprises of the Tribe which have no independent legal existence; and two joint ventures in which the Tribe was the majority owner.[3] Exhibit 1 at ¶¶ 2-20; Exhibit 2 (Carleton Affidavit) at ¶¶ 4-6.

The purported contracts upon which MAS has sued (Exhibits A-C to Complaint, Exhibit 1)[4] identify in their opening paragraph the defendants listed at Paragraphs 4 through 20 of the Complaint as among the "tribal government services, programs, departments, enterprises" whose employees will be served by MAS based on those contracts. The only party to those contracts

[2] Defendants deny the contracts are valid contracts. The validity of the purported contracts is just one of many issues that turn on Tribal law (*see* Section III, *infra*) that should be decided by the Tribal Court for the reasons explained herein.

[3] As set forth in the Joint Notice of Removal, Docket 1 at ¶ 3, and in the supporting affidavit of Melissa Carleton, Exhibit 2 at ¶ 5, Choctaw Electronics Enterprise is a former joint venture of the Tribe that has been dissolved and terminated for some time, and it did not join in the Joint Notice of Removal as it was not a properly joined and served defendant. First American Plastics Molding Enterprise is another joint venture which is majority owned by the Tribe, and it did join in the removal of this action to this Court. All other named defendants, other than the Tribe and Chief Anderson, are unincorporated operating divisions or enterprises of the Tribe and not separate legal entities from the Tribe itself.

[4] These contract documents are all referenced in the Complaint, Exhibit 1 at ¶¶ 24-25, and are attached thereto. Hence, the factual allegations in those contracts are a part of the factual allegations of the complaint. *See Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir. 2004) (court may consider attachments to complaint as part of pleadings).

(besides MAS) is the Tribe identified therein as the "Employer." The Tribe is thus the only named defendant, if any, which can be liable on the purported MAS contracts.

Moreover, these purported contracts expressly provide (under "General") that the "Employer has adopted an employee benefit plan to provide health benefits to qualified participants. Benefits to participants are provided by the benefit plan;" and (under "Participant Eligibility") provide that "Employer shall have the authority to make final decisions on whether a participant is eligible to receive benefits." Under the terms of these contracts, the employees of the referenced "tribal government services, programs, departments, enterprises" (*i.e.*, the named defendants other than the Tribe and Chief Anderson) only became eligible to benefit from MAS' services to the extent the Tribe had control over and authority to approve those employees' participation in the tribal employee health benefit plan (and related tribal employee benefits) that MAS allegedly contracted to administer or support.

All of MAS' contract claims have their origin in commercial dealings and consensual commercial relationships (the referenced purported contracts) between MAS and the Tribe for services to be provided for the benefit of the Tribe and its tribal employees and alleged breaches of those contracts.

More specifically, the purported contract(s) sued upon by MAS (Exhibit 1, at ¶¶ 23-29 and Exhibits A-C thereto) evolved over many years and involved many on-reservation meetings and discussions (Exhibit 2, ¶ 10) and called for MAS to provide administration of the Tribe's employee health benefit plan for tribal employees working on the reservation as well as other services.

The Tribe contracts to operate various health service programs per 25 U.S.C. § 458aaa *et seq*. Section 10221 of the Patient Protection and Affordable Care Act, P.L. 111-148, enacted S.

1790, a provision of which (now codified at 25 U.S.C. § 1674b) entitled Indian tribes which operate Indian Self-Determination Act contracts or compacts per 25 U.S.C. §§ 450 *et seq.*, 458aa *et seq.*, or 458aaa *et seq.*, such as the Tribe, to purchase and enroll their employees in federal employee health benefit ("FEHB") plans.

In accordance with this federal law, the Choctaw Tribal Council, on September 26, 2012, enacted Resolution CHO 12-122. Exhibit 2, ¶ 7 and Ex. A thereto. That Resolution authorized and directed Chief Anderson to terminate the Tribe's own employee health benefit plan and transfer all tribal employees to various FEHB plans. Chief Anderson did so. This eliminated the need for MAS services as regards administration of a tribal employee health benefit plan which no longer existed. The Tribe also decided to cease procuring certain other related tribal employee benefit services through MAS. All of these actions and decisions occurred on the Choctaw Indian Reservation. Exhibit 2, ¶¶ 7-8.

MAS alleges in the Complaint at ¶ 2 that the "principal place of business and governmental location" of the Tribe is in "Choctaw, Mississippi." "Choctaw, Mississippi" is the designated mailing address for the U.S. Postal Service postal unit administered by the Mississippi Band of Choctaw Indians on the Choctaw Indian Reservation. Exhibit 2, ¶ 9. Resolution CHO 12-122 was duly enacted at a Choctaw Tribal Council meeting that occurred at the Choctaw Tribal Hall on Choctaw Indian Reservation lands at the tribal headquarters in the Pearl River Community, Choctaw, Mississippi. Exhibit 2, ¶ 7.

MAS references in the Complaint (Exhibit 1) at ¶ 30, and attaches as Exhibit D to the Complaint, a letter from the Tribe's Attorney General of November 8, 2012, outlining the effect of the enactment of Resolution CHO 12-122. That letter also notes that the only court with jurisdiction over any disputes MAS may have is the Choctaw Tribal Court, because "controlling

federal case law makes clear that state courts may not exercise subject matter jurisdiction to adjudicate disputes between private parties and Indian tribes involving causes of action based on alleged breaches of contract or torts grounded in actions or inactions of the Tribe occurring on its reservation lands." Exhibit 1 at Ex. D (emphasis added) (citing *Williams v. Lee*, 358 U.S. 217 (1959); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984) (*Wold I*); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986) (*Wold II*); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971)).

Nevertheless, MAS sued in the Circuit Court of Hinds County, Mississippi. The removing Defendants[5] timely removed the case to this Court based on federal question jurisdiction,[6] and now move this Court to dismiss this suit due to Plaintiff's failure to exhaust its tribal remedies.

ARGUMENT

As discussed in the Joint Notice of Removal (Docket 1), MAS claims that its allegations should be resolved in the Circuit Court of Hinds County, Mississippi, based on language in some of the purported contracts that are at issue. Moving Defendants dispute the validity of the contracts and also submit that the Tribe cannot unilaterally confer jurisdiction upon state courts under federal law. As discussed further below, the proper place for MAS' claims to be decided is

[5] The removing defendants are the same as the movants. *See* note 1, *supra*

[6] If MAS files a motion for remand challenging the federal question upon which removal was based (the *Williams v. Lee* question), this Court will be called upon to decide that federal question before the merits of the underlying claim are reached. In that instance, the parties would address (and the Court would rule on that issue) in the context of the motion for remand. If MAS does not challenge removal, there will be no occasion for this Court to separately rule upon the *Williams v. Lee* question upon which removal was based. Instead, the suit will simply become another case on this Court's docket which will trigger MAS' duty to exhaust tribal remedies as requested in this motion to dismiss. *See, infra* at pp. 15-16.

in the Choctaw Tribal Court,[7] and this Court should, in accordance with the tribal exhaustion rule, dismiss[8] this suit and require MAS to bring its claims in that Court.

I. Under the tribal exhaustion rule, whenever a colorable claim of tribal court jurisdiction is asserted, the federal court must require the parties to resolve their claims, including jurisdictional disputes, in tribal court.

Controlling federal law clearly holds that this Court may not adjudicate a dispute like the one here until the plaintiff has exhausted tribal court remedies by filing its case in tribal court so that the tribal court can first adjudicate the issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987) ("considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court"; "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'") (quoting *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)). This requirement of exhaustion of tribal court remedies is based on the longstanding policy of encouraging tribal self-government and the sovereignty of Indian tribes. *National Farmers Union*, 471 U.S. at 856 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."); *Iowa Mutual*, 480 U.S. at 16 ("the federal policy

[7] The Tribe has a developed court system, consisting of both a trial court and appellate court, See §§ 1-3-1 through 1-3-9, Choctaw Tribal Code (http://www.choctaw.org/government/court/index.html (*see*, Tribal Code under "Documents of Governance")), with developed rules of civil procedure and evidence, and appellate procedure (§§ 7-1-1 through 7-1-13, Choctaw Tribal Code).

[8] Although federal district courts have discretion to either dismiss or stay the federal action, dismissal is the appropriate action in this case for the same reasons discussed by Judge Lee in dismissing the action in *Bank One, N.A. v. Lewis*, 144 F.Supp.2d 640, 651-52 (S.D. Miss. 2001), *aff'd sub nom Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002), *reh'g and reh'g en banc denied*, 34 Fed. Appx. 965 (5th Cir. 2002), *cert. denied*, 537 U.S. 818 (2002). As in *Bank One*, this case is in the early stages of litigation, the tribal exhaustion rule applies to all of MAS' claims, and there is no benefit to staying this action as opposed to dismissing it. *Id.* (citing *Potaluck Corp. of Kansas v. Prairie Band of Potawatomi Indians*, 2000 WL 1721797, at *3 (D. Kan. Aug. 23, 2000)).

supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction'"; "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law").

In *Bank One*, 144 F.Supp.2d at 642-43, Judge Lee discussed the Supreme Court's decisions regarding "the tribal exhaustion rule" as follows:

> Under the tribal exhaustion rule, as formulated by the Supreme Court in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), "***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." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ....

Bank One, 144 F.Supp.2d at 642 (emphasis added). *See also Graham v. Applied GEO Technologies, Inc.*, 593 F.Supp.2d 915, 918 (S.D. Miss. 2008) ("while the tribal exhaustion rule is 'prudential rather than jurisdictional, "[e]xhaustion is mandatory...when a case fits within the policy"'") (quoting *Malaterre v. Amerind Risk Mgt.*, 373 F.Supp.2d 980, 983 (D.N.D. 2005) (citing *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa*, 317 F.3d 840, 849 (8th Cir. 2003))); *Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773 (S.D.Miss.2001) (granting Choctaw defendant's motion to remand after improper removal from Choctaw Tribal Court and recognizing finance corporation's duty to exhaust tribal remedies re corporation's contract claims).

In *Bank One*, Judge Lee went on to explain the basis for the rule:

> This rule is based on "the Federal Government's longstanding policy of encouraging tribal self-government," *Iowa Mutual*, 480 U.S. at 14, 107 S.Ct. at 975, and "reflects the fact that Indian tribes retain 'attributes of sovereignty over

> both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty," *id.* at 14, 107 S.Ct. at 975 quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *see also National Farmers*, 471 U.S. at 856, 105 S.Ct. at 2454 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination."). Thus, while the federal courts ultimately have jurisdiction to determine the limits of a tribal court's jurisdiction, the tribal exhaustion rule holds that tribal courts, which "play a vital role in self-government," must be permitted the first opportunity to resolve challenges to their jurisdiction without federal court interference. *Iowa Mutual*, 480 U.S. at 14, 107 S.Ct. at 976 .... This is so whether the federal court's jurisdiction is sought to be invoked on the basis of a federal question under 28 U.S.C. § 1331, or diversity of citizenship under § 1332.

Bank One, 144 F.Supp.2d at 642-43 (footnote omitted).

As held by the *Bank One* Court, "the requisite colorable claim of tribal jurisdiction" is met when the actions at issue "not only occurred on the reservation, but also involve the formation of an ostensible consensual relationship" between the non-tribal party and the tribe member.[9] *Id.* at 644. The Court's basis for this conclusion was drawn from Supreme Court precedent establishing tribal court jurisdiction (i) over claims against a Tribe or its members regarding activities on Indian lands and (ii) over non-Indians who enter into commercial dealings with a tribe or its members. *Id.* (citing *Iowa Mutual*, 480 U.S. at 18; *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Montana v. United States*, 450 U.S. 544, 565-66 (1981)).

[9] The *Bank One* Court did note that there are some exceptions to the tribal exhaustion doctrine, none of which were applicable in *Bank One*, *see* 144 F.Supp.2d at 644, and none of which are applicable here. More specifically, the Supreme Court has noted certain exceptions to the tribal exhaustion rule. *See National Farmers Union*, 471 U.S. 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 U.S. 327, 338, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (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 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 (2001) (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).

In *Williams v. Lee*, the Supreme Court barred the exercise of state court jurisdiction over causes of action arising on Indian reservations in which non-Indians sought to sue Indians. The Court ruled that tribal courts were the proper forum for hearing those cases. In this regard, the Court stated as follows:

> 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 right 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.

Id. at 223 (citations omitted). Likewise, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (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."

Thus, 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 (or tribal member) defendant,[10] based on alleged civil wrongs committed by the tribal defendant on its reservation lands in alleged 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. As discussed further below, that is the situation that exists here: MAS, a non-Indian entity, is suing the Tribe, its Chief, and other tribal entities, for alleged breaches of purported contracts; any such breach, if it occurred at all, occurred on Tribal lands; and the purported contracts were also negotiated on Tribal lands with Tribal members. Accordingly, jurisdiction for MAS' claims is in Choctaw Tribal Court.

[10] *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 147-148 (1984), makes clear that the same *Williams v. Lee* rule applies to suits against tribal entity defendants as to suits against individual tribal members.

The second category of cases referenced by the District Court in *Bank One* are those to which jurisdiction under the test established in *Montana* applies. As noted by the Court in *Bank One, supra*, 144 F.Supp.2d at 644:

> And although there is generally no tribal jurisdiction over non-Indians for activities off the reservation or on non-Indian fee lands in the absence of a federal statute or treaty granting such authority, *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), there are specific circumstances in which such jurisdiction does exist:
>
> > A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. 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.
>
> 450 U.S. at 565-66, 101 S.Ct. 1245 [(citations omitted)].

Because the standards set forth in *Montana* address a Tribe's authority to exercise jurisdiction over non-Indians, such as requiring non-Indians to answer claims made by Tribal members against them in Tribal Court which was the situation in *Bank One*, these standards should not be applied in a case such as this where a non-Indian is suing an Indian tribe and tribal entities and not the other way around. Those cases, as already discussed, if involving actions taken by tribal defendants on tribal lands, are subject to tribal court jurisdiction under *Williams v. Lee*. Nevertheless, even if the *Montana* standards are applied to MAS' claims, it is clear that tribal court jurisdiction exists in this case in accordance with those standards as discussed further herein. Indeed, where the *Williams v. Lee* test is satisfied—that is, where the defendant is a tribal party sued for breach of contract and the alleged breach by the tribal party occurred (if at all) on its reservation lands, the Montana "consensual relationship" and "nexus" tests, *see* Section II.C, *infra*, are automatically satisfied. *See, Montana v. United States*, 450 U.S. 544, 565-566 (1981)

(listing *Williams v. Lee* as an 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 lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants"). By definition, when the non-Indian party in such circumstances is the plaintiff, all requirements necessary to confirm the tribal court's authority to hear the claim are established.

As discussed further below, both bases for tribal court jurisdiction exist with regard to MAS' claims in this case, and this Court, like the Court in *Bank One*, should dismiss this suit and require MAS to bring its claims before the Choctaw Tribal Court.

Although Defendants herein have other dispositive legal defenses rooted in tribal law to MAS' breach of contract claims which they plan to assert, including the defense of sovereign immunity, *see Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998), under the tribal exhaustion doctrine the proper forum for addressing those legal defenses in the first instance is the Choctaw Tribal Court, as discussed in *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (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.

See also MacArthur v. San Juan County, 309 F.3d 1216, 1227 (10th Cir. 2002) (reversing District Court's dismissal of claims against tribal defendants arising within Indian Reservation

boundaries on jurisdictional (sovereign immunity) grounds because District Court should instead have first required exhaustion of tribal remedies *viz.* the sovereign immunity defense); *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).

II. Jurisdiction over MAS' claims is in the Choctaw tribal courts.

A. MAS' cause of action arises from actions taken by the Tribe on its own reservation lands.

As explained above, MAS' claims are based mainly on the Tribe's discontinuance of its services after the Tribal Council Resolution was passed requiring Chief Anderson to transfer all tribal employees to various FEHB plans as authorized by the Affordable Care Act, and the Tribe's decision to stop securing other related tribal employee health benefit services from MAS. All of the Tribal Defendants' alleged breaches were based on activities that occurred on Choctaw reservation lands. Accordingly, tribal court jurisdiction is established under the authority of *Williams v. Lee*, *supra*.

B. The contract clause relied upon by MAS does not, and cannot, confer jurisdiction in Mississippi state courts.

To the extent that MAS may argue that the clause quoted in its Complaint, Exhibit 1 at ¶ 24, stating that "any dispute shall be adjudicated by a court of competent jurisdiction in Jackson, Hinds County, Mississippi, unless such laws are pre-empted by applicable federal laws of jurisdiction," somehow operates to bypass *Williams v. Lee*, that would be error.

Kennerly v. District Court of Montana, 400 U.S. 423 (1971), holds that no Indian tribe can by its own action unilaterally alter the *Williams v. Lee* jurisdictional bar as to suits involving

on-reservation actions of the tribe or its members, by any means. Only a state legislature can alter that bar—but may do so only by strict adherence to one of the federal statutes ("governing acts of Congress" in *Williams v. Lee* parlance) which authorize the exercise of state court jurisdiction.

Only two such federal statutes potentially applicable to Mississippi exist—Pub. L. 83-280 and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(C) ("IGRA"). IGRA is not applicable because it only allows this kind of jurisdictional reallocation when necessary for the regulation of Indian gaming. *See Pueblo of Santa Ana v. Nash*, 2013 WL 5366403, at *9-*10 (D.N.M. Sept. 25, 2013) (reaffirming *Williams v. Lee* doctrine that "absent a governing Act of Congress" expressly authorizing abrogation of that rule, state courts may not exercise subject matter jurisdiction over tribal defendants for on-reservation causes of action, and holding that IGRA did not authorize a change in the state court jurisdictional bar over claim for tort injuries suffered at on-reservation casino because adjudication of those claims was not directly related to and necessary for the regulation of gaming). MAS contract services had nothing to do with regulation of the Tribe's casino operations.

Pub. L. 83-280 did at one time (prior to the amendment in 1968 at Pub. L. 90-284) give Mississippi the unilateral right to acquire (without the Tribe's consent) jurisdiction over the Mississippi Choctaw Reservation. The State did not act to acquire such jurisdiction during that time. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 and fn. 16 (1989) ("The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280"); *Tubby v. State*, 327 So. 2d 272, 285-88 (Miss. 1976) (finding that Mississippi had not acquired jurisdiction over the Mississippi Choctaw reservation per Pub. L. 83-280); *see, TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684-685 (5th Cir. 1999) (summarizing

process by which a state can obtain jurisdiction over Indian activities on Indian reservations pursuant to Pub. L. 83-280). Now the law requires not only the State's consent, but also that of the Tribe. 25 U.S.C. § 1322. And any such consent by the Tribe must be done in accordance with the requirements of Public Law 280 (as amended at Pub. L. 90-284) which requires a special election in which the majority of tribal member voters accept such jurisdiction. 25 U.S.C. § 1326; *Kennerly*, *supra*. Simply entering into a contract with an entity like MAS does not suffice.

None of these actions have been taken. Mississippi has thus never acquired jurisdiction over the reservation per Pub. L. 83-280. *Id.*

The State of Mississippi has not acted to obtain jurisdiction over the Tribe in accordance with federal law, and the Tribe may not unilaterally give such jurisdiction to the States. Thus, the provision relied on by MAS, even if contained within an otherwise valid contract, which Moving Defendants dispute, does not operate to confer jurisdiction upon state courts in Hinds County, Mississippi. Indeed, because of the controlling federal common law, there exists no "court of competent jurisdiction" in Hinds County, Mississippi, which could exercise jurisdiction over MAS' action, except for this Court after removal.[11] Thus, by its own terms the provision does not apply.

[11] This Court would not have had jurisdiction to adjudicate MAS' contract claims against the Tribal Defendants if the suit had initially been filed in the U.S. District Court by MAS. The mere fact that a tribe is a party to a contract does not give rise to federal question jurisdiction. Thus, such a direct action would not have presented any federal question. *TTEA Corp*, *supra* at 681 ("The federal courts do not have jurisdiction to entertain routine contract actions involving Indian tribes."). However, MAS filed its suit in a state court and claimed in its complaint that there existed state court jurisdiction over MAS' contract claims against the Tribal Defendants. This squarely presented the federal (*Williams v. Lee*) question upon which removal was based and by which this Court has now obtained jurisdiction over the entire case. *See*, *Pueblo of Santa Ana v. Nash*, 2013 WL 5366403 (D.N.M.) (original jurisdiction); *Luckerman v. Narragansett Indian Tribe*, 2013 WL 4616084 (D.R.I) (removal jurisdiction); *Muhammad v. Comanche Nation Casino*, 742 F.Supp.2d 1268 (W.D. Ok. 2010) (removal jurisdiction); *Tohono O'Odham Nation v. Schwarz*, 837 F.Supp. 1024 (D. Az. 1993) (original jurisdiction). All of these cases found federal question jurisdiction based on challenge to state court jurisdiction under the *Williams v. Lee* rule.

Simply stated, where a non-Indian such as MAS seeks to sue the Tribe and/or its members or entities, for actions taken by the Tribe and/or its members or entities that occurred on Tribal lands, jurisdiction does not exist in state courts; instead, jurisdiction is in the tribal court, and where federal courts have jurisdiction, as here based on removal, federal courts may not adjudicate the matter until after the tribal court has adjudicated the matter, through all levels, including tribal court appeals. *See Iowa Mutual*, 480 U.S. at 17 ("[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts"). This Court should thus dismiss this suit and require MAS to exhaust its remedies in the tribal courts. In that instance, all the contract law, federal law and tribal law issues there raised will be addressed in the Choctaw Tribal Courts. It is clear that tribal courts which otherwise have jurisdiction under *Montana* or *Williams v. Lee* over a given case can decide issues of federal law raised in that case, except for 42 U.S.C. § 1983 claims against state officials, claims not at issue here, *Nevada v. Hicks*, 533 U.S. 353, 358-359, n. 2, 373 (2001) ("We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis"); *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473, 486, n. 7 (1999) ("This is not to say that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (tribal courts available to vindicate federal rights)"); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 683-684 (1999) (tribal court had colorable jurisdiction to rule on question whether federal statute (25

U.S.C. § 81) had been violated respecting contract at issue in tribal court suit, affirming plaintiff's duty to exhaust tribal remedies for such a case and ruling. "We thus find that the tribal court did not violate federal law in exercising subject matter jurisdiction.").

C. Alternatively, the purported contracts sued upon by MAS are the sort of consensual commercial relationships over which the Tribe and its courts have jurisdiction in accordance with *Montana v. United States.*

As discussed, a colorable claim of tribal court jurisdiction exists under the authority of *Williams v. Lee*, *supra*. This Court need look no further to determine that the tribal exhaustion rule requires MAS to pursue its claims in the tribal courts. However, and in the alternative, even if the *Montana* test applied in a context where the non-Indian party is the plaintiff,[12] the contract(s) sued upon by MAS evolved over many years involving many on-reservation meetings and discussions (Exhibit 2, ¶ 10) and called for MAS to provide administrative services for certain tribal employee health benefit plans for tribal employees working on the reservation.

The MAS contract(s) thus constitute consensual commercial relationship(s) with the Tribe of the sort which gives rise to colorable tribal court jurisdiction under the *Montana* test and the complaint pleads claims involving a direct logical nexus to those underlying contracts to-wit: their alleged breach. *Montana*, 450 U.S. at 565 ("tribe may regulate...the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements"); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts'") (quoting *Iowa Mutual*, 480 U.S. at 18); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S.

[12] *See,* analysis, *supra* at pp. 8-13 regarding *Williams v. Lee* bar to exercise of state court jurisdiction in such cases.

645, 655-66 (2001) (requiring that the cause of action pled must have some logical connection ("nexus") to the underlying consensual relationships to anchor *Montana* jurisdiction).

In *Dolgencorp v. Mississippi Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013), the Fifth Circuit affirmed that the Choctaw Tribal Court has jurisdiction under *Montana* over certain tribal member tort claims which arose directly from a verbal agreement between Dolgencorp and the Tribe and tribal members, in which Dolgencorp agreed to participate in a tribal Youth Opportunity Training Program. There is no doubt that a suit for breach of that same agreement (rather than tort claims) would likewise have satisfied the *Montana* "consensual relationship" and "nexus" tests.

In these circumstances, the Choctaw Tribal Court Civil Division clearly has colorable jurisdiction to adjudicate MAS' claims under *Montana* if MAS were to bring its suit there.[13] MAS has the legal right (and under the tribal exhaustion doctrine the legal duty) to pursue its money damage claims against the Tribal Defendants in the Choctaw Courts, subject to all applicable requirements and defenses, if it desires to seek judicial relief on those claims.

III. MAS' duty to exhaust its remedies in the tribal courts is even more pronounced where, as here, the claims are all governed by tribal law.

The Choctaw Reservation is a different law-making jurisdiction than the State of Mississippi. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Williams v. Lee*, *supra* (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").

[13] Indeed, that Court has recently had before it a different breach of contract suit involving a different contract filed against the same defendants by MAS. *See Mississippi Administrative Services, Inc. v. Mississippi Band of Choctaw Indians, et al.*, Cause No. 2013-1236 (filed October 12, 2013), dismissed by stipulation (Exhibit 3).

Accordingly, the underlying contract, choice-of-law, and immunity rules implicated by this dispute are supplied by the laws, customs and traditions of the Tribe, not by the laws of Mississippi. 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[14] (including the Tribe's law regarding choice of law, contract and sovereign immunity) to all persons under their jurisdiction. Where (like here) such tribal law questions must be addressed, this provides an even stronger ground for requiring exhaustion of tribal remedies. *United States v. Tsosie,* 92 F.3d 1037 (10th Cir. 1996) (federal court's duty to require exhaustion of tribal remedies is especially clear where questions of tribal law are involved).[15]

Here, it is clear that the Choctaw Indian Reservation is the jurisdiction having the most significant relationship to the conduct which MAS claims was in breach of contract and whose law controls on numerous issues. The Tribe's termination of the purported contract was required by and occurred in compliance with Tribal Council Resolution CHO 12-122 which eliminated the tribal employee health benefit program for which MAS had been providing certain services. The Tribe allegedly entered the purported contracts on the reservation. The Tribe, like most government entities, has specific procedures that must be followed before a contract is valid as to the Tribe. *See* Articles VIII and IX, MBCI Const.; MBCI Bylaws, Article 1, Section 3.[16] Defendants will assert, in their answer, these procedures were not followed. Hence, it is the

[14] *See Williams v. Lee*, 358 U.S. at 220 (discussing "the right of reservation Indians to make their own laws and be ruled by them").

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

[16] The Constitution and Bylaws of the Mississippi Band of Choctaw Indians is available online at http://www.choctaw.org/government/court/index.html (*see*, Tribal Constitution and Bylaws under "Documents of Governance").

Tribe's law which supplies the rule of decision as to whether the purported contracts are valid as to the Tribe and accordingly, the validity of the contract and whether anything actionable as a breach of contract has occurred here.

The Tribe's law respecting choice of law also controls regarding what affect the purported contract provisions referenced in the Complaint at Paragraph 24 have as to what body of law is controlling in adjudicating MAS' contract claims to the extent federal law does not independently answer that question. *See Bank One, N.A.*, 281 F.3d at 309 (requiring exhaustion of tribal remedies on tribal member contract and fraud claims even though the credit application which gave rise to those claims specified that all "extensions of credit would be deemed to occur in Ohio"). And tribal law will also control on issues such as exhaustion of administrative remedies and sovereign immunity.[17]

This case will *inter alia* require rulings on several questions of tribal law, including but not limited to the following: (1) whether the contracts relied upon by MAS are valid and enforceable for time periods before or after enactment of Resolution CHO 12-122 or January 1, 2012 (its implementation date) under tribal law; (2) the legal effect under tribal law of Resolution CHO 12-122 on the parties' rights; (3) exhaustion of administrative remedies under tribal law; (4) whether MAS' whole claim is barred by the Tribe's unwaived sovereign immunity from unconsented civil lawsuits seeking money damages; and (5) the legal effect of the contract clause quoted at the Complaint, Paragraph 29, under the Tribe's choice of law principles.

[17] *See, e.g.*, Choctaw Tribal Code § 1-5-10 (establishing certain additional tribal law exhaustion requirements which must be satisfied before the Choctaw tribal courts may exercise jurisdiction over any suits seeking relief against the Tribe or its officials); Choctaw Tribal Code § 1-5-4 ("[e]xcept as expressly abrogated by act of Congress, or as specifically waived by resolution or ordinance of the Tribal Council specifically referring to such, the Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties"). The entire Choctaw Tribal Code is available online at http://www.choctaw.org/government/court/index.html (*see*, Tribal Code under "Documents of Governance").

Because tribal law will provide the controlling answers to the issues presented by MAS' claims and the defendants' defenses, the requirement for compelling exhaustion of tribal remedies is strengthened. *Tsosie*, *supra.*

CONCLUSION

Under *National Farmers Union*, *supra*, and *Iowa Mutual*, *supra*, Plaintiff is required to pursue its claims in the Mississippi Choctaw Trial and Appellate Courts, thereby exhausting its tribal remedies, and this Court is required to dismiss or stay Plaintiff's action in this Court. Dismissal is warranted and is here requested.

Respectfully submitted,

MISSISSIPPI BAND OF CHOCTAW INDIANS, PHYLISS J. ANDERSON, in her official capacity, CHOCTAW HEALTH CENTER, CHOCTAW RESIDENTIAL CENTER, CHOCTAW SHOPPING CENTER ENTERPRISE, CHOCTAW MANUFACTURING ENTERPRISE, FIRST AMERICAN PLASTICS MOLDING ENTERPRISE, FIRST AMERICAN PRINTING ENTERPRISE, CHAHTA ENTERPRISE, CHAHTA ENTERPRISE COMMERCIAL LAUNDRY, CHOCTAW RESORT DEVELOPMENT ENTERPRISE, PEARL RIVER RESORT, SILVER STAR CASINO RESORT, GOLDEN MOON CASINO RESORT, CHOCTAW HOSPITALITY INSTITUTE, CHOCTAW GOLF ENTERPRISE, DANCING RABBIT GOLF CLUB, and CHOCTAW AUTOMOBILE ENTERPRISE

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CERTIFICATE OF SERVICE

I, C. BRYANT ROGERS, one of the attorneys for the Moving Defendants, do hereby certify that I have this day caused a true and correct copy of the above and foregoing document to be filed electronically with the clerk of court. Notice of this filing will be sent to the counsel for Plaintiff by operation of the electronic filing system.

This the 23rd day of January, 2014.

s/C. Bryant Rogers
C. BRYANT ROGERS