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

MISSISSIPPI ADMINISTRATIVE SERVICE, INC. **PLAINTIFF**

VS. **CASE NO: 3:14-cv-00036-CWR-FKB**

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

PLAINTIFF'S MEMORANDUM BRIEF IN SUPPORT OF ITS RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW, the Plaintiff, by and through its counsel of record and pursuant to the Federal Rules of Civil Procedure, files this, its Memorandum Brief in Support of its Response to Defendants' Motion to Dismiss, and in support thereof, would show the Court the following, to-wit:

A. Summary of Facts and Procedural History

Mississippi Administrative Service, Inc., ("MAS") is a corporation, organized and existing under the laws of the State of Mississippi, with its current principal offices in Brandon, Rankin County, Mississippi. Its processing facilities are in Oxford, Mississippi. It has no location on tribal land.

For over 25 years, MAS served as the benefit services manager/third party administrator for the ERISA plan offered by the Mississippi Band of Choctaw Indians ("MBCI" or "Tribe") and its various businesses to its employees. In doing so, they have executed numerous contracts and extensions of those contracts for services that MAS would provide or did provide.[1] All of the contracts provide for damages associated with the

[1] *See* copies of contract extensions attached to Plaintiff's Complaint as Exhibits "A," "B" and "C."

termination of the agreement, how to terminate the agreement and what happens if no extension or new contract is executed, among others.

The most recent agreement was executed on September 27, 2010, and was to extend until September 30, 2015. The extension states that the agreement was to be made between MAS and the Mississippi Band of Choctaw Indians, who by definition "will include, but not limited to All Tribal Government Services, Programs, Departments, Enterprises, Choctaw Residential Center, Choctaw Shopping Center Enterprise, Choctaw Electronics Enterprise, Choctaw Manufacturing Enterprise, First American Plastics Molding Enterprise, First American Printing Enterprise, Chahtaa Enterprise, Chahtaa Laundry Service, Choctaw Resort Development Enterprise, Pearl River Resort, Silver Star Casino Resort, Golden Moon Casino Resort, Hospitality Training Institute, Choctaw Golf Enterprise, Dancing Rabbit Golf Club, Choctaw Automobile Enterprise and any other acquisitions, start-ups or programs and expansions."[2]

As the entity who governs, manages, directs and/or holds the majority interest in each these entities, the MBCI is able to bind and take actions, whether singly or in a group, on behalf of each of those individual entities. Therefore, their inclusion is proper. To the extent that said entities' business organizations have received a charter or authorization of corporate existence from the MBCI, they enjoy an organizational status separate and distinct which would warrant their inclusion in this lawsuit.

The last agreement, like the prior agreements, contained other relevant provisions. There was a termination clause which provided that the contract could be terminated on

[2] *Id.*

September 30, 2015, with 60 days' notice. The contract further stated that, "the agreement ... shall automatically renew for continuous twelve month periods on the same terms and conditions set forth herein, or as amended in writing by an agreement between the parties." Finally, the agreement states that it "is entered into and shall be governed by, and construed in accordance with, the laws of the State of Mississippi, and 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 or jurisdiction. This agreement was executed by the duly authorized representatives of each party at Jackson, Mississippi." All of the contract extensions that were attached to Defendant's Complaint, which extend back to 2000, contain the same verbage.

On or about November 8, 2012, Donald Kilgore provided the first written notice that the Defendants were going to discontinue its ERISA plan. It is presumed that the rationale for the inclusion of his citation of case law was a saber-rattling of sorts given the knowledge that the Defendants' contract extension included the aforementioned clause applying Mississippi law and Hinds County venue to any dispute regarding the contract. Obviously, MAS disputed this assertion.

In reliance upon a duly executed, authorized agreement (in fact, a series of substantially the same agreements), MAS filed its suit in state court citing Defendants' failure to honor the terms of their contract. In response, the Defendants removed the case claiming that a federal question existed. Plaintiff disputes this claim and move this Court to deny Defendants' Motion to Dismiss.

B. Standard of Review

Defendants have filed their Motion pursuant to Rule 12(b)(6) and, in doing so, assert that the Plaintiff fails to state a claim upon which relief can be granted. A Rule 12(b)(6) Motion is a test of the formal sufficiency of the Complaint, not a procedure to be invoked to resolve a contest about the facts or merits of the claim.[3] Thus, the inquiry is limited to the content of the complaint.[4] To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'"[5] If the Court, after reviewing the pleading as a whole and after assuming all factual allegations of the complaint to be true, finds that the complaint is plausible, then the case should not be dismissed.[6]

C. Discussion of the Issues

In reviewing the Motion, Defendants have not argued anything regarding the Complaint and whether it states a prima facie case against them. Therefore, it is clear that they concede that the Complaint is sufficient. Instead, they argue 1) that tribal exhaustion is required and 2) that the only place for jurisdiction is in the tribal court. Defendants also make a third argument m that MAS has a duty to exhaust tribal remedies because the claims are really governed by tribal law. Essentially, this argument reformulates the prior two arguments to claim that the importance of tribal law is overwhelming and that the case

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[3] *Murray v. Amoco Oil Co.*, 539 F.2d 1385 (5th Cir. 1976).

[4] *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d. 929 (2007).

[6] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 and 558, 127 S. Ct. 1955, 167 L.Ed.2d. 929 (2007).

should be dismissed. However, as is discussed below, the case is and was properly filed in state court.

1. Tribal exhaustion is not required.

The Defendants have relied heavily upon *National Farmers Union Ins. Co.*, *Iowa Mut. Ins. Co.*, and *Bank One* for their assertion that tribal exhaustion is required.[7] In doing so, they articulate an argument that a party must exhaust tribal court remedies by filing a case in federal court. However, this case was originally filed in state court because the Defendants agreed, by contract, that was the proper venue. Nevertheless, the foregoing cases are distinguishable from this proceeding.

First, in those cases, a tribal case was pending before federal court jurisdiction was invoked. This is critical because there is no corresponding Tribal court case pending. This is an important distinction because *National Farmers Union Ins. Co.* and *Iowa Mutual Ins. Co.* Interestingly, "[b]oth decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction."[8] In this case, there has never been an invocation of tribal court jurisdiction; therefore, there is no deprivation of tribal jurisdiction.

In fact, a review of the language of *National Farmers Union Ins. Co.* discloses that it is a more narrow holding than espoused by the Defendants. In that case, National Farmers Union Ins. Co. removed a case from tribal court to federal court claiming that they

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[7] *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 105 S. Ct. 2447(1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002).

[8] *Strate v. A-1 Contractors*, 520U.S. 438, 117 S.Ct. 1404 at 1410. Emphasis not in original.

had a "right to be protected against an unlawful exercise of Tribal Court power."[9] In their finding to remand the case to tribal court for exhaustion of tribal court remedies, the Supreme Court stated that the rationale for exhaustion of tribal court remedies is largely based upon allowing a court whose jurisdiction is being challenged to explain the basis for that jurisdiction.[10] The purpose for this was so that "[t]he forum whose jurisdiction is being challenged [will have] the first opportunity to evaluate the factual and legal bases for the challenge."[11] Thus, the explanation of the basis for such deference being in comity, and not in jurisdiction, is to allow the tribal court to entertain whether it has jurisdiction over the tribal court action in the first place.

This issue was re-examined two years later in *Iowa Mut. Ins. Co.* In that case, Iowa Mut. Ins. Co., after receiving a tribal court ruling that it had jurisdiction over it, filed a second action in Federal Court seeking a declaration that it had no duty to defend or indemnify, in large part because jurisdictional issues were not subject to interlocutory appeal.[12] In its opinion, the Court clarified that "exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."[13] In short, the Court would not allow an end-run around the tribal system when the issue had been addressed by the non-Federal court. However, if there are no underlying tribal court proceedings, there would be nothing for the tribal appellate court

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[9] *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 851 (1985).

[10] *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985).

[11] *Id.*

[12] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 12-13, 107 S. Ct. 971 (1987).

[13] Id. at 17.

to review. However, in this case, "[b]ecause there is no pending proceeding, there will be no competition between this Court and the Tribal Court in this matter."[14] Therefore, comity would not be required.

Alternatively, if the Court were to determine that *National Farmers Union Ins. Co.* were to apply, then abstention is not required if any of three exceptions apply. In a footnote, the Supreme Court said that:

> "[w]e 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. *Judice 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."[15]

In this case, it is apparent that the defense of the case is premised on a desire to harass or is conducted in bad faith. As earlier stated, Defendants have not questioned the authenticity of the signatures of two Chiefs on the three agreements. The signatures provide proof of apparent, if not actual, authority to agree to the terms of the contracts. Now, when the Defendants wish to simply dispense with a bona fide obligation owed to MAS, they seek to raise a cloud of doubt by questioning the validity of the contracts despite paying pursuant to the terms indicated therein.[16] The willingness to take such a position whilst knowing that these provisions are in contracts is patently unfair and creates

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[14]*Drumm v. Brown*, 245 Conn. 657, 684, 716 A.2d 50 (1998). *See also, Vance v. Boyd Mississippi*, Inc., 823 F.Supp. 905, 911 (S. D. Miss. 1996).

[15]*National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 857, 105 S. Ct. 2447 (1985), FN 21.

[16]*See* Defendant's brief, FN 1.

situations wherein the Defendants and others who are similarly situated are deprived of a state court forum to which the Defendants have agreed.

Additionally, the action is violative of jurisdictional prohibitions. The contract(s) at issue clearly state that "any dispute" shall be decided under Mississippi law in the appropriate state or federal court in Jackson, Hinds County, Mississippi.[17] The phrase "any dispute" is quite clear. It means **any** dispute. That would include contract formation and interpretation. The Defendants could have excepted formation and interpretation by inserting four or five words, but they chose not to do so. Therefore, the Defendants' argument seeks to violate what would otherwise be an express prohibition against the assertion of tribal court jurisdiction.

Second, the discussion of *Williams v. Lee* is inapplicable to this case.[18] *Williams* dealt with a fact scenario concerning goods sold on credit to a tribal member in a store located on tribal land. In supporting tribal court jurisdiction, the test that was posited by the Supreme Court was whether state action would infringe "on the rights of reservation Indians to make their own laws and be ruled by them."[19] Central to the Court's denial of state court jurisdiction in the case was the location of the transaction and the citizenship of the parties which formed the basis of the cause of action.[20]

However, Courts have long noted that "Indians that go 'beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise

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[17] *See Complaint, Exhibit "A."*

[18] *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959).

[19] *Id.* at 358 U.S. 220, 79 S.Ct at 271.

[20] *Id.* Generally.

applicable to all citizens of the State.'"[21] In this case, the contract was not entered into on tribal land. The activities governed by the contract, the processing of benefit claims, occurred off-reservation. A review of the applicable law shows that the breach occurred off-reservation. *See infra*. Further, the activities of the Plaintiff in complying with its obligations under the contract took place off-reservation. Therefore, the substance of this agreement occurred off of the reservation, not on the reservation as claimed by the Defendants and as required under *Williams*.

Third, the recitation of *Montana v. United States* is interesting. In *Montana*, the Supreme Court gave two circumstances wherein tribal jurisdiction, in the absence of treaty or federal law providing that authority, can exist.[22]

> "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."[23]

In addressing these exceptions, it is clear that the latter one does not apply. The Defendants' breach of contract suit does not involve conduct on fee lands that threatens the political integrity, economic security or health or welfare of the tribe. Accordingly, the Defendants have not argued it as such.

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[21] *Wells v. Wells*, 451 N.W.2d 402, 405 (S. Dak. 1990); *citing Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114, 119 (1973; *accord State ex rel. Department of Human Services v. Jojola,* 99 N.M. 500, 660 P.2d 590 (1983), *appeal dismissed, cert. denied, Jojola v. New Mexico,* 464 U.S. 803, 104 S.Ct. 49, 78 L.Ed.2d 69, 1983).

[22] *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

[23] *Id.* at 450 U.S. at 565-66 (citations omitted).

That being said, the first exception also does not apply. "'The Supreme Court [has] noted that tribal jurisdiction under the first Montana exception has occurred only when the issue involves 'regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members."[24] The Defendants have not argued that this is a regulatory activity involving issues such as taxation, certification or licensing that is necessitated "by commercial dealing, contracts, licenses or other arrangements." Therefore, none of the *Montana* exceptions are applicable.

In this case, the Defendants do not limit their position solely to the concept that the Tribe has a right to regulate activities on that are occurring on-reservation. Instead, the Defendants argue a more expansive holding that seeks to encompass the off-reservation activities of the Plaintiff as being an on-reservation activity merely by virtue of the contract with the Plaintiff. As stated above, almost all of the processing activity occurred occurred off-reservation in Oxford, Mississippi. Any remainder would have occurred at MAS's corporate offices in Rankin County.

It should also be noted that *Montana* does state that a tribe may regulate certain nonmember activities.[25] May is a permissive word. That also means that a tribe can also opt to not regulate. Given the choice of law and forum clauses in the benefit services management agreement extension(s), it is clear that the Defendants opted for dispute resolution in a forum that is not tribal court. Thus, there is no jurisdiction in Tribal Court and the selected forum, Hinds County Circuit Court, should be respected.

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[24] *Federal Trade Commission v Payday Financial, LLC*, 935 F.Supp.2d 926, 937-38, D. S. D. 2013) (emphasis not in original); *citing Plains Commerce Bank v. Long Family Land and Cattle*, 554 U. S. 316, 332, 128 S.Ct. 2709 (2008). *See also Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998).

[25] *Montana v. United States*, 450 U.S. at 565-66, 101 S.Ct. 1245.

Defendants proffer *Dolgencorp v. Mississippi Band of Choctaw Indians* as further support for their position in saying that the Choctaw Tribal Court, under *Montana*, had jurisdiction.[26] However, that case contains differences which are quite similar to those discussed above. *Dolgencorp* involves a business being run on an Indian reservation and the sexual molestation of an Indian minor by a manager of that store while the tribal member was working at the store.[27] Candidly, the facts are quite similar to that of *Williams v. Lee* and *Kennerly* and it would be interesting to know why the Court upheld their assertion of jurisdiction using *Montana* when *Williams* and *Kennerly* appear to be more on point. Nevertheless, for the reasons cited above, *Montana* is and would not be applicable to this case.

2. Jurisdiction is properly outside of tribal court.

a. The actions took place off-reservation.

Defendants claim that it is the location of the decision to change the provision of insurance to themselves and their employees which establishes that jurisdiction lay with the Tribal Court. However, that reliance is misplaced. "The test of the place of a contract is the place where the last act is done by either of the parties which is necessary to complete the contract and give it validity."[28] In this case, all of the contracts state that they were entered

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[26] *Dolgencorp v. Mississippi Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013).

[27] *Id.* at 411.

[28] *F. T. C. V. Payday Financial, LLC.* 935 F.Supp.2d 926, 938 (D.S.D. 2013); *citing O'Neill Farms Inc. v. Reinart,* 2010 S.D. 25, 780 N.W.2d 55, 59 (S. D. 2010); *quoting Briggs v. United Servs. Life Ins. Co.,* 80 S.D. 26, 117 N.W.2d 804, 807 (1962); *see also* 2 Williston on Contracts §6:62 (4th ed.) ("The general principle applicable to this and any similar question is that the place of the contract is the place where the last act necessary to the completion of the contract was done.")

into in Jackson, Hinds County, Mississippi.[29] Further, "'the general rule is that place of payment of the debt, or contractual obligation, absent clear agreement to the contrary, it is the residence or headquarters of the creditor...the breach of contract, arising from the failure to make payment as agreed, occurred in the county where such offices were located. Accordingly, venue is properly fixed in the county where payment was to be performed.'"[30] Mississippi law further states that venue in a breach of contract action is proper in any venue where a substantial component of the claim occurred.[31] Thus, both Federal and State law provide focus more upon the location where payment was to have been made as a basis for jurisdiction instead of where a decision was made to refuse to pay.

The failure of the Defendants to pay their contractual obligations is the issue, not the decision of the Tribe to move in a different direction with their healthcare plan governs where the breach occurred. It is the failure to pay as agreed which caused damages to the Plaintiff. Those damages were sustained off-reservation. Accordingly, the breach did not occur on tribal land, but off of the reservation. However, it still must not be disregarded that the agreements between the Defendants and MAS state that the law governing any dispute is to be that of the State of Mississippi and that venue is to be in a Court of proper jurisdiction in Jackson, Hinds County, Mississippi. Therefore, jurisdiction is proper outside of tribal court.

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[29] *See* copies of contract extensions attached to Plaintiff's Complaint as Exhibits "A," "B" and "C."

[30] *Resolution Trust Corp. v. Cumberland Development Corp.*, 776 F. Supp. 1146, 1150 (S. D. Miss. 1990); *citing Deering Milliken Research Corp. v. Textured Fibres, Inc.*, 310 F. Supp. 491, 500 (D. S. C 1970).

[31] *Williams v. Edwards*, 880 So.2d 10 (Miss. 2004).

b. Contract clauses have been held to confer jurisdiction in state courts.

In its brief, the Defendants cite primarily to *Kennerly* and *Williams v. Lee* to support their position that contracts can never confer state court jurisdiction over Tribes or their members absent a federal law (IGRA) or action by a state pursuant to statutes such as Pub. L. 83-280. Both of those cases "involve collection actions by merchants with stores on reservations against Native Americans who purchased goods on credit at those stores;" therefore, they provide no guidance under our facts.[32] However, the Supreme Court has long held that Indian Tribes may, by contract, waive sovereign immunity and, by inserting forum selection clauses, provide a basis for state court jurisdiction.

In 1982, the Supreme Court discussed, in some depth, federal, tribal, state and local sovereign power.[33] The Court acknowledged that each government had "different attributes of sovereignty, which may derive from different sources."[34] In doing so, the Court recognized that a sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[35]

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[32] *Department of Health and Human Services v. Maybee,* 965 A.2d 55, 57 (Me. 2009); *citing Williams*, 358 U.S. at 217-18, 79 S.Ct.269; *Kennerly v. District Court*, 400 U.S. 423, 424, 91 S.Ct. 480, 27 L.Ed2d 507 (1971). *Williams v. Lee* 358 U.S. at 223 ("[there can be no doubt that to allow the exercise of state court jurisdiction here would undermine the authority of the tribal courts over Reservation affairs...He was on the Reservation and the transaction with an Indian took place there.")(Emphasis added.)

[33] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982).

[34] *Id.* at 455 U.S. 148, 102 S. Ct. 894. (Emphasis not in original).

[35] *Id.*

In 2001, the Supreme Court issued its ruling in the case of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). In *C&L Enterprises*, the tribe retained a contractor to install a roof on a building owned by the tribe.[36] The contract included an arbitration clause which stated that the contract was to be "governed by the law of the place where the Project was located."[37] The building was off reservation within the boundaries of Oklahoma.[38] The focal question of the case was "whether the Tribe waived its immunity from suit in state court" by contract.[39] The Supreme Court, in a unanimous decision and without referring to Kennerly, ruled that the tribe consented to arbitration and that the contract, which contained a choice of law clause, authorized jurisdiction in Oklahoma state courts, the effect of which waived tribal sovereign immunity.[40] Therefore, the Supreme Court ruled that a tribe, by agreement and without any congressional act or authorization, can waive its sovereign immunity and agree to litigate a dispute in state court.[41] This basic holding has been upheld in other courts.[42] "[I]f contracting parties cannot trust the validity of choice of law and venue

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[36] *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001).

[37] *Id.* at 415.

[38] *Id.*

[39] *Id.* at 419.

[40] *Id.* at 414.

[41] *Id.* at 414.

[42] *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir.)("To refuse enforcement of this routine contract provision [i.e. - forum and choice of law selection] would be to undercut the Tribe's self-government and self-determination."); *Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 67 P.3d 306, 308, 311–12 (2003); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 404, 406 (Colo.Ct.App. 2004).

provisions, ... the Tribe's efforts to improve the reservation's economy may come to naught."[43]

Further the Supreme Court has held that activity that takes place within a reservation but has an impact outside the reservation may be regulated by the states.[44] In *Nevada v. Hicks*, the issue involved the execution of a search warrant. However, in this case, the activity within the reservation, taken in the aggregate, has an impact outside of the reservation in that it affects business organizations, individuals and persons who do business with the Tribe or provide services to tribal members outside of the reservation.[45] The willingness to consider a contract valid until it is no longer desired depicts Defendants cavalier attitude that disregards the impact upon the Plaintiff or others who are similarly situated.

Therefore, the Defendants are correct, to a point, that Mississippi has not acted to obtain jurisdiction over the tribe pursuant to federal law. Mississippi cannot unilaterally obtain jurisdiction. Much more is required. However, Federal law will allow a tribe to select the governing law of a dispute as well as a forum outside of a tribal court and have the dispute resolved that forum. To prohibit such would be to hold that tribes are unequal in economic strength and bargaining power. While that may have been true in the early part of the twentieth century, that is clearly not the fact now and Court rulings/opinions have evolved which support an enforcement of such provisions.

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[43] *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 815 (7th Cir.).

[44] *Nevada v. Hicks*, 533 U.S. 353, 362-66, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

[45] *See generally, Department of Health and Human Services v. Maybee*, 965A.2d 55 (2009); *State of Oregon v. Maybee*, 235 Or. App. 292, 232 P.3d 970 (2010).

3. The breach of contract claims are garden-variety breach of contract claims that do not impair areas of tribal government.

The Defendants have acknowledged that the Federal court would not have jurisdiction to adjudicate contract claims because it does not invoke federal jurisdiction on its face.[46] In large part, that is because a breach of contract case is not a federal case. The Defendants contend that the reason that it is a federal question is because it involves a suit against a Tribe. However, that question is created by the Defendants' denial of the validity of the contract(s) at issue (including the applicable law and forum selection provisions). Unlike *Montana*, there is no attempt to regulate activities on tribal land. Unlike *Williams*, the activities which were governed by the contract took place off of tribal land. In short, this case does not involve regulation of non-member activities on tribal land nor does it involve a cause of action that arose on tribal land. Unlike *Bank One*, *National Farmers Union Ins. Co.,* and *Iowa Mutual Ins. Co.*, there is no pending tribal court case.

This case arose out of a breach that occurred off of the reservation. This case involves a choice of law provision and a venue provision that the Defendants are attempting to renege upon. The Defendants consistently seek respect of tribal choice of law, but it does not respect the terms of the contract which have not varied in over 15 years and which was agreed to by its Chiefs and other authorities.

MAS does not seek to require a change of decision of the Defendants health care options. Indeed, MAS, while providing information prior to the decision, has not demanded nor does it seek that any Court reverse the decision of the Tribal Council. MAS merely

[46]See Plaintiff's Memorandum p. 14, footnote 11.

wants the Defendants to live up to their contractual commitments, including the choice of law and venue provisions.

4. Alternatively, a stay is more appropriate than a dismissal.

Should the Court be predisposed to granting Plaintiff's Motion in favor of ordering this matter to be subjected to exhaustion of tribal remedies, the Plaintiff requests a stay as opposed to a dismissal. The underlying statute of limitations in Tribal Court is one year. The statute of limitations in Mississippi is three years. This suit is now being litigated just over a year after the ERISA plan was terminated and just under a year when the Defendants terminated all relationships with the Plaintiff. If the Court were to dismiss the case, the Plaintiff has reason to believe that the statute of limitations for actions against the Defendants will be asserted in such a way as to preclude the Plaintiff from proceeding in Tribal Court, or possibly State Court or this Court. That fact that a statute of limitations issue could arise has always resulted in a preference for a stay.[47] Consequently, Plaintiff would request a stay rather than a dismissal.

5. Alternatively, if the case is to be converted to a Motion for Summary Judgment, the Plaintiff would request additional time for discovery.

Alternatively, if the Court is inclined to convert Defendants' Motion to Dismiss into a Rule 56 Motion for Summary Judgment based upon the affidavits and other documentation filed herein, Plaintiff would request that this Court grant time for the parties to conduct discovery that would be necessary to refute claims of the Defendants.

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[47] *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003); Allstate Indem. Co. v. Stump, 191 F.3d 1071, 1076 (9th Cir. 1999).

CONCLUSION

Under the case law cited herein above, it is clear that the Defendants have consented and chosen a venue and applicable law that is outside the Tribal Court. This has the effect of a waiver of sovereign immunity and, under the controlling law, no exhaustion of tribal remedies. Accordingly, Defendants' Motion to Dismissed should be denied. The Plaintiff further requests any additional relief this Honorable Court deems appropriate and/or necessary.

Respectfully submitted, this the 6th day of February, 2014.

MISSISSIPPI ADMINISTRATIVE SERVICES, INC., PLAINTIFF

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CERTIFICATE OF SERVICE

I, C. Paige Herring, of counsel for Mississippi Administrative Services, Inc. do hereby certify that I have this date electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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SO CERTIFIED this 6th day of February, 2014.

s/C. Paige Herring
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