IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Elizabeth Rassi, Plaintiff v. Federal Program Integrators, LLC and Penobscot Indian Nation Enterprises, Defendants	)	Civil Action No. 1:12-cv-00354

MOTION OF DEFENDANTS, FEDERAL PROGRAM INTEGRATORS, LLC AND PENOBSCOT INDIAN NATION ENTERPRISES, TO DISMISS (WITH INCORPORATED MEMORANDUM OF LAW)

Pursuant to Rule 12(b)(1) of the Federal Rule of Civil Procedure, Defendants Penobscot Indian Nation Enterprises ("PINE") and Federal Program Integrators ("FPI") (collectively "Defendants") hereby move to dismiss Plaintiff's Third Amended Complaint, without prejudice (or to stay), so that the Penobscot Nation Tribal Court may address the Plaintiff's claims and remedies in the first instance. As more fully set forth below, this course is required by the tribal exhaustion doctrine, grounded in comity owing to the authority of tribal courts. The Defendants vigorously contest the merits of the Plaintiff's claims, but they are of no relevance to this motion.

BACKGROUND

This case arises out of employment relations within a small Indian reservation community on Indian Island, near Old Town, Maine. Indian Island is the principal reservation residence of the members of the Penobscot Nation (the "Nation" or the

"Tribe"), a federally recognized Indian tribe centered on the Penobscot River. Declaration of Miles Francis, attached hereto as Exhibit A ("Francis Dec.") ¶ 3. *See also* S.REP. NO. 96-957 (1980) at 11 (describing the Nation's "aboriginal territory" as "centered on the Penobscot River"). Indian Island is home to 441 Penobscot Tribal members and 26 members of other federally recognized Indian tribes. Francis Dec. ¶ 3. It is also the seat of the Penobscot Nation's government, the Penobscot Nation Chief and Tribal Council. *Id.* ¶ 4.

According to her Complaint, the Plaintiff worked for two tribal enterprises, Penobscot Indian Nation Enterprises ("PINE"), a federally charted corporation established in accordance with the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, and its wholly-owned subsidiary, Federal Program Integrators ("FPI"). Third Amended Complaint ¶¶ 4-6. *See also* Declaration of Steven Holmes, attached hereto as Exhibit B ("Holmes Dec.") ¶¶ 4, 6 (describing FPI); Declaration of Maulian L. Smith, attached hereto as Exhibit C ("Smith Dec.") ¶¶ 6, 9 (describing Plaintiff's employment at Indian Island). Both are unique tribal entities: as described in more detail below, they are owned, controlled, and operated by Penobscot tribal members for the welfare of the Tribe; they provide employment opportunities within the reservation for tribal members and other Native Americans; and they generate revenues to support tribal governmental services and programs. They have also fulfilled unique Congressional goals related to tribal economic development and self-government.

Defendants describe, in some detail, the tribal employment setting at issue, including the nature of PINE and FPI in relation to federal Indian policy goals of

supporting tribal economic independence and self-government because this background informs the application of the tribal exhaustion doctrine in this case.

Federal Indian Policy, PINE, and FPI

In 1934, Congress ushered in the "modern era" of federal Indian policy with the enactment of the IRA to promote strong tribal governments and economic self-sufficiency. *See Morton v. Mancari*, 417 U.S. 535, 543 (1974) (discussing IRA). The IRA reversed years of "assimilationist" policies that had left tribes destitute. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2044-45 (2014) (Sotomayor, concurring) (describing prior policies that "left a devastating legacy" of poverty, unemployment, and loss of tribal lands).

> The intent and purpose of the Reorganization Act was to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism. . . . .
> As Senator Wheeler [a co-sponsor of the legislation] . . . put it: "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." . . .
> Representative Howard [the other co-sponsor] explained that: "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition."

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (citations omitted; quotations omitted in part).

The linchpin provisions of the Act to accomplish these goals are section 16, codified at 25 U.S.C. § 476, which enables tribes to organize their governments pursuant to constitutions approved by the Secretary of Interior, and section 17, codified at 25

U.S.C. § 477, providing for tribes to establish federally-chartered corporations to engage in economic development under charters approved by the Secretary of the Interior.[1] In 2006, the Penobscot Nation took advantage of the latter and formed PINE under section 17 of the IRA in order to generate revenues and employment for the benefit of the Tribe. Francis Dec. ¶ 7. Closely tracking Congress's IRA goals, PINE's stated mission is to "to provide increased income to [the Penobscot] Nation and to offer career opportunit[ies] for tribal citizens." *See* PINE website, http://www.pine-online.com/about/about.htm.

Article VIII(D) of the PINE's federally-approved charter (Exhibit 1 to Francis Dec.) ("PINE Charter") provides that it may "form . . . limited liability companies . . . provided that each . . . shall have the rights and privileges granted by and be subject to the limitations of this Charter." PINE Charter at 5. In 2008, PINE formed FPI, a Maine limited liability company, and became its sole member. Francis Dec. ¶ 13. *See also* FPI Operating Agreement (Exhibit 1 to Holmes Dec.) ("FPI Op Agmt") at 1. PINE has remained the sole member of FPI since its inception. Holmes Dec. ¶ 6. A primary

[1] Section 17 of the IRA provides as follows:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.A. § 477.

purpose of FPI has been to participate in the Small Business Administration's ("SBA") 8(a) Program for tribally certified participants and thereby obtain preferential treatment for government contracts. *See* Third Amended Complaint ¶¶ 7-8; FPI Op Agmt at 1-2, 16 (referencing program). *See also* 13 C.F.R. § 124.109 (outlining tribal participation in SBA 8(a) program).

Like the IRA, the SBA's 8(a) program for tribal participants provides a means for tribal enterprises to engage in economic activity to further the interests of tribal self-determination and economic development. *See Am. Fed'n of Gov't Employees (AFL-CIO) v. United States*, 195 F. Supp. 2d 4, 18 (D.D.C. 2002), *aff'd sub nom*, 330 F.3d 513 (D.C. Cir. 2003) (government explaining that Native American participation in the 8(a) program "furthers the federal policy of Indian self-determination, the United States's trust responsibility, and the promotion of economic self-sufficiency among Native American communities"); *The Role of the SBA 8(A) Program in Enhancing Economic Development in Indian Country: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. (2011) ("consistent with other Congressional policies that advance Indian self-determination and economic development[, t]he 8(a) . . . program brings revenue growth [and] employment . . . to tribal communities") (statement of Jackie Johnson-Pata, Executive Director, Nat'l Cong. of Am. Indians).

Consistent with federal Indian policy goals of tribal self-determination, PINE and FPI are owned, controlled, and operated by Penobscot Nation tribal members, some of whom also serve on the governing Penobscot Nation Tribal Council. PINE is governed by a Board of Directors made up of no less than five, or more than eleven, voting

members. *See* PINE Charter Art. X at 7. The Chief of the Penobscot Nation, or the Chief's designee, must serve ex officio, as a Director during the Chief's elected term, and at least four, and no more than a maximum of ten of the remaining Corporate Directors of PINE must be appointed by the Penobscot Nation Chief and Tribal Council. *Id.* A majority of the Directors must be enrolled members of the Penobscot Nation. *Id.* PINE's five Directors are all enrolled members of the Penobscot Nation. *Id.* They include Penobscot Chief Kirk Francis; Yvonne Francis-Ferland and Ronald Bear, who are members of the Penobscot Nation Tribal Council; and Penobscot tribal members, Gary McGrane and Wayne Mitchell. Francis Dec. ¶ 9.

As noted above, PINE is the sole member of FPI. By the terms of FPI's Operating Agreement, as long as FPI has only one member, its Board of Managers must be a committee of the PINE Board of Directors, appointed by the PINE Board. FPI Op Agmt § 3.01(a) at 3. FPI's Board must have at least three and not more than five members, two of whom must be members of the PINE Board, and the majority of FPI Board members must be members of the Penobscot Nation. *Id*. The FPI Board consists of Wayne Mitchell, Clarice Hildreth, Erlene Paul, Charlene Virgilio, and Gary McGrane, all of whom are enrolled members of the Penobscot Nation. Holmes Dec. ¶ 7. Charlene Virgilio is also a member of the Penobscot Nation Tribal Council. *Id.* ¶ 8.

Tribal Employment and Governmental Services Supported by PINE and FPI

The Supreme Court has said that "in matters concerning tribal . . . reservation employment," Indians have a "unique legal status." *Morton v. Mancari*, 417 U.S. 535, 548 (1974). It is unique in multiple respects, and they are evident in the employment

relations at PINE and FPI. *First*, and perhaps most obviously, reservation employment settings are unique because employment opportunities on Indian reservations are scarce. [2] The Penobscot Indian Reservation is no exception in this regard; the unemployment rate for Native Americans residing at Indian Island runs at about 22%.[3]

Second, employment opportunities within Indian reservations involve economic opportunities within the jurisdictions of sovereign tribal governments. As such, Indian tribes often pass laws or policies to provide reservation employment opportunities first to their own tribal members or other Native Americans before offering them to non-Indians.[4] This is so at the Penobscot Nation, Smith Dec. ¶ 7, and both PINE and FPI follow the Tribe's policy of giving preference for reservation employment to Penobscot Nation tribal members or other members of federally recognized Indian tribes before giving such economic opportunities to non-Indians. Smith Dec. ¶ 8; Francis Dec. ¶ 11.

While seemingly unfair to outsiders like the Plaintiff, these preferences do not involve race discrimination or harassment. Rather, they reflect a sovereign's ability to provide economic opportunities within its jurisdiction to its own citizens before offering

[2] The poverty rate among American Indians stands at about 23%. *See* Dept. of Interior, Office of Assistant Secretary–Indian Affairs, 2013 American Indian Population and Labor Force Report 11 (Jan. 16, 2014), cited in *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. at 2045 n.4 (Sotomayor, J., concurring).

[3] This estimate is from the U.S. Census Bureau website. "S2301. Employment Status: 2008-2012 American Community Survey 5-Year Estimates. Penobscot Island Reservation, Penobscot County, Maine." American FactFinder. 2014. Bureau of the Census. Web. 17 July 2014.

[4] *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990) (describing employment preference law of Tribe); Hoopa Valley Indian Tribe, Tribal Employment Rights Ordinance, tit. 13, available at http://www.hoopa-nsn.gov/tribal-laws (employment preference law.)

them to outsiders. *See Mancari*, 417 U.S. at 553-554; *Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir. 1997). As one court succinctly explained, "[a] preference given to American Indians, although falling heavily on those individuals affected, is neither new nor startling in view of the policy that while race, color, and creed cannot be the basis for discrimination, membership in a political entity can be." *Krueth v. Indep. School Dist. 38*, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993).

Consistent with this legally unique aspect of reservation employment, PINE and FPI have been able to provide training and jobs for Penobscot tribal members and other Native Americans. *See* Smith Dec. ¶¶ 4-5, 9-11. While the Plaintiff was an employee at Indian Island, FPI employed eight individuals on the reservation, and of those, six were Native Americans, who were hired in accordance with the Tribe's Indian preference policy: four Penobscot tribal members, one Passamaquoddy tribal member, and one member of the Houlton Band of Maliseet Indians. Smith Dec. ¶ 9. FPI did not receive applications from qualified members of the Penobscot Nation or other tribes for the accountant position offered to the Plaintiff; otherwise, given the Tribe's preference policy, it is unlikely she would have been offered the position. *See id*. ¶ 8; *see also id*. ¶ 10.[5] PINE employs four individuals at Indian Island. *Id*. ¶ 11. Three are members of the Tribe, who were hired in accordance with the Tribe's Indian preference policy. *Id.*

[5] Today FPI employs seven individuals at Indian Island, and of those seven, six are Native American, the same who were employed during Plaintiff's tenure. Smith Dec. ¶ 10. The seventh, the Plaintiff's replacement, is the only non-Indian employee of FPI at Indian Island, and like the Plaintiff, she was hired for the position because there were no qualified Penobscot or other Native American applicants. *Id*. ¶ 10.

Unique as the reservation employment setting is, so too is the financing of tribal governmental operations. Although, outside of Indian country the "public" (or governmental) and "private" (or commercial) sectors typically are viewed as distinct, those lines are blurred for tribal economies: job creation and the generation of revenue from tribal enterprises go hand in hand with the work of tribal governments. Thus, "commercial-looking" enterprises within Indian reservations

> cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. . . . . And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues. . . . This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. at 2043 (Sotomayor, J., concurring).

Again, this is borne out at the Penobscot Indian Reservation by the functioning of PINE and FPI. The Penobscot Nation has no tax base upon which to generate governmental revenues to support its array of governmental programs and services for its members. Francis Dec. ¶ 18.[6] As a result, it funds its governmental operations largely through so-called Indian Self-Determination Act (or "P.L. 638") contracts, administered

[6] The Penobscot Nation provides multiple governmental services to its members and their families at Indian Island, including health services at the Tribe's health clinic and public safety through its police department. *See* Francis Dec. ¶ 17. The Tribe's governmental departments include Human Services (addressing child and family services, elder care and other human service needs), the Indian Island School (serving the community's elementary school age children), Natural Resources (addressing natural resources management, including conservation, forestry, fish and game, water quality, and overseeing a warden service), and a Housing Authority (administering federal programs to provide housing for tribal members and their families). *See generally* Penobscot Nation website http://www.penobscotnation.org/ (describing departments and programs).

by the U.S. Department of Interior pursuant to Public Law 93-638, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et. seq.*, and other grants, supplemented by revenue it generates from its economic enterprises. Francis Dec. ¶ 18. The Tribe maintains a General Fund with revenues it receives from its enterprises, including forestry operations, high stakes bingo, and the operations of PINE and FPI. *Id.* ¶¶ 17, 19. Overseen by the Penobscot Nation's Chief and Tribal Council, General Fund revenues support a host tribal government services, ranging from the Penobscot Nation Public Safety Department to the Tribe's Health Clinic and other programs. Francis Dec. ¶ 17; *see also* note 6, *supra*. PINE (largely with revenues derived from its subsidiary, FPI) has contributed in the order of thirty to forty percent (30%-40%) of the Tribe's General Fund, thereby enabling the Tribe to provide governmental services and programs to its members that would not have otherwise been available. Francis Dec. ¶ 20.

Plaintiff's Employment at Indian Island and Her Claims

According to her complaint, the Plaintiff worked for both FPI and PINE from December 6, 2010 until April 23, 2012. Third Amended Complaint ¶5. When she was hired, she was informed of the Penobscot Nation's policy of providing employment preferences to Penobscot Nation tribal members and other Native Americans. Smith Dec. ¶ 8. She alleges in her Complaint that PINE and FPI retaliated against her for allegedly questioning, investigating, and reporting PINE's and FPI's conduct in relation to the False Claims Act (Count One); and that PINE and FPI discriminated against her because

of her race in violation of Title VII of the Civil Rights Act (Count Two).[7] As stated at the outset, the Defendants vigorously dispute these allegations.[8]

ARGUMENT

THE CASE SHOULD BE DISMISSED WITHOUT PREJUDICE (OR STAYED) BECAUSE WELL-ESTABLISHED COMITY PRINCIPLES IN FEDERAL INDIAN LAW REQUIRE THE EXHAUSTION OF REMEDIES IN THE PENOBSCOT NATION TRIBAL COURT.

A. Introduction: Federal Indian Law, The Penobscot Nation, And The Tribal Exhaustion Doctrine.

"Indian tribes are 'domestic dependent nations,' that exercise sovereign authority over their territories and their members." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quotations and citation omitted); *accord United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). The governmental authority that they possess "predates the birth of the republic," *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (citation and quotations omitted), and remains intact absent express Congressional abrogation or, in rare instances, where the exercise of such authority (like trade with foreign nations) would be incompatible with overriding national interests. *Iowa Mutual Ins. Co. v. LaPlante*, 480

[7] Before initiating this lawsuit, Plaintiff filed an unemployment compensation claim against FPI. *See* Exhibit D. Her claim was denied, and Plaintiff appealed. *Id.* After a hearing in June 2012, the Administrative Hearing Officer again denied her claim, concluding that Plaintiff was either discharged for misconduct or she left employment voluntarily, but, under either circumstance, she was not entitled to benefits. *Id.* Plaintiff also filed a complaint with the Maine Human Rights Commission, and on August 21, 2012, the Commission dismissed for want of jurisdiction, finding that her employment claims presented "internal tribal matters." *See* Exhibit E.

[8] Regrettably, FPI had to terminate a Penobscot tribal member, Timothy Love, who had served as its CEO. Allegations involving Mr. Love feature heavily in the Plaintiff's Complaint. But Mr. Love was duly removed from FPI well-before the Plaintiff parted company.

U.S. 9, 14 (1987); *Wheeler*, 435 U.S. at 323, 326. *See generally* Felix Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 4.01-4.02 (5th ed.2005).

While, pursuant to the Maine Indian Claims Settlement Act of 1980 (the "Settlement Act"), 25 U.S.C. §§ 1721 *et. seq.*, Congress compromised the sovereignty of the Penobscot Nation by ratifying the application of state law to the Tribe and its members in certain respects, it otherwise confirmed that the Penobscot Nation is subject to federal law governing Indian affairs. *See Fellencer*, 164 F.3d at 712 ("Congress explicitly made existing general federal Indian law applicable to the Penobscot Nation in the Settlement Act.") (quotations and citation omitted). The First Circuit has recognized that one of the "important sovereignty rights retained by the Nation, includ[es] the establishment of tribal courts ... with powers similar to those exercised by Indian courts in other parts of the country." *Id.* at 712 (quotations and citation omitted). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . [and] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Iowa Mut. Ins. Co*, 480 U.S. at 18. Congress did not so limit the Penobscot Nation Tribal Court in the Settlement Act.

In recognition of the importance of tribal courts for building strong tribal governments and to further Indian self-determination, federal courts must dismiss without prejudice (or stay) cases that arise within Indian reservations over which tribes have colorable jurisdiction. *See Ninigret*, 207 F.3d at 32 ("Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they

involve the tribe."). This tribal exhaustion requirement is grounded in comity principles. As the Supreme Court has explained:

> Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation . . . their civil jurisdiction is not similarly restricted. . . . If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. . . . A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.

Iowa Mut. Ins. Co, 480 U.S. at 14-15 (citations omitted). The exhaustion doctrine also fulfills practical functions related to the adjudication of reservation-based controversies. "Exhaustion fosters administrative efficiency," *Ninigret*, 207 F.3d at 31; "[d]eferring to the tribal court . . . promises to yield a record that will enlighten other decisionmakers" if further review becomes necessary. *Id.* at 33.

The doctrine is not, strictly speaking, jurisdictional in nature; rather it "is a product of comity and related considerations." *Id.* at 31. When applicable, however, "this prudential doctrine has force whether or not an action actually is pending in a tribal court." *Id.* Moreover, where, as here, the substantive claims may be defined by federal law, the doctrine still applies. *Id. Accord El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 486 n.7 (1999) ("Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law."). *See Paddy v. Mulkey*, 656 F. Supp. 2d 1241(D. Nev. 2009) (federal Family Medical Leave Act ("FMLA") claim subject to tribal exhaustion doctrine); *Graham v. Applied Geo Technologies, Inc.,* 593 F. Supp. 2d 915 (S.D. Miss. 2008) (claims under 42 U.S.C. § 1981 and Title VII subject to doctrine).

The First Circuit has restated the operation of the doctrine as follows: "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,* 207 F.3d at 31. If that determination is made in the affirmative, litigation over the merits of the controversy proceeds apace through the tribal court, but the matter may later be reviewed by the federal court after the exhaustion of tribal court proceedings. *See Iowa Mut. Ins. Co.,* 480 U.S. at 19.

B. There Is A Colorable Basis For The Penobscot Nation's Jurisdiction Over This Controversy.

So the initial, and essentially determinative, question is whether there is a "colorable" basis for the Penobscot Nation's adjudicatory authority over this reservation controversy, and there most surely is. Indeed, as the First Circuit has pointed out (citing the Supreme Court), civil jurisdiction over reservation controversies brought by nonmembers such as this "presumptively lies in the tribal courts." *Ninigret,* 207 F.3d at 32 (quoting *Iowa Mut.,* 480 U.S. at 18).

First, the most salient principle of federal Indian law grounding that presumption and, therefore, the Penobscot Nation's authority over this matter, is that tribes have "general authority, as sovereign[s], to control economic activity within [their] jurisdiction," and this includes authority over non-Indians, like the Plaintiff here, who enter Indian reservations for economic gain. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 144-45 (1982); *Plains Commerce Bank v. Long Family & Cattle Co.,* 554 U.S.

316, 335 (2008) ("[r]egulatory authority goes hand in hand with the power to exclude"); *Water Wheel Camp Recreational Area, Inc. v. LaRance,* 642 F.3d 802, 808-09, 811-12 (9th Cir. 2011) (citing cases).

Civil disputes arising out of reservation employment relations between a non-Indian, like the Plaintiff, and tribal entities, like the Defendants here, fit squarely within the adjudicatory power of the Penobscot Nation Tribal Court; that authority flows directly from the Plaintiff's presence within the reservation to partake of the economic resources of a unique tribal community. *See Merrion,* 455 U.S. 130, 144-45; *LaRance,* 642 F.3d at 808-09, 811-12. As the Supreme Court has said in an analogous setting where state adjudicatory authority interfered with tribal authority over a contract dispute asserted by a non-Indian arising on the Navajo Reservation, "[t]he cases of this Court have consistently guarded the authority of Indian governments over their reservations." *Williams v. Lee,* 358 U.S. 217, 223 (1958). *See also Fellencer,* 164 F.3d at 711-13 (Penobscot Nation has exclusive adjudicatory authority, relative to Maine, over discrimination claims of non-Indian community health nurse arising from reservation employment).

Second, the Penobscot Nation's authority over the controversy at hand derives from the Court's standards laid out in *Montana v. U. S.,* 450 U.S. 544 (1981), where it addressed tribal authority over the activities of nonmembers on their own lands within the boundaries of an Indian reservation. In that setting, the Court said tribes have inherent power to regulate (a) "consensual relationships" between their members and nonmembers and (b) activities that directly affect the "political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. These tribal powers over nonmembers are

often referred to as the "*Montana* exceptions" to the general view that tribes lack governmental authority over the activities of nonmembers on their own lands. *See generally Water Wheel*, 642 F.3d at 809-19 (discussing *Montana*).

While that standard should not operate where, as here, a controversy arises within an Indian reservation, as opposed to land owned by a nonmember within the exterior boundaries of a reservation, *see id.* at 809 (*Montana* standards apply "almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent"), the Penobscot Nation's authority fits neatly within *Montana*'s first "exception." As alleged in the Third Amended Complaint, the dispute flows from a consensual employment relationship between the Plaintiff and two tribal entities within the reservation. *See Montana*, 450 U.S. at 565; *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1071 (10th Cir. 2007); *Graham v. Applied Geo Technologies, Inc.*, 593 F. Supp. 2d at 915.

For these reasons, there can be no doubt that the Penobscot Nation has colorable jurisdiction over the controversy. Thus, the Court should give the Penobscot Nation Tribal Court "precedence and afford it a full and fair opportunity" to proceed. *Ninigret*, 207 F.3d at 31. To be clear, PINE and FPI are not asserting that the Penobscot Nation Tribal Court has exclusive jurisdiction over the Plaintiff's claims, *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66, (1978) ("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"), but because they arise out of a unique reservation employment setting, principles of comity require that the federal court defer to the Tribal Court for their adjudication. *See Ninigret*, 207 F.3d at

32-33 (recognizing that non-Indian claims arising on-reservation almost always require exhaustion; holding that doctrine applies to contract dispute arising off-reservation).

The case law supporting exhaustion in a setting such as the one presented here is plentiful. *See, e.g., Paddy v. Mulkey,* 656 F. Supp. 2d 1241 (FMLA, civil conspiracy, and breach of contract claims by nonmember employee arising out of reservation employment subject to tribal exhaustion doctrine) (citing *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974 (9th Cir. 2003) (FMLA claim arising out of reservation employment subject to the doctrine)); *Graham v. Applied Geo Technologies, Inc.,* 593 F. Supp. 2d 915 (nonmember employee's race discrimination and retaliation claims under Title VII and 42 U.S.C. § 1981 arising on reservation against "for-profit tribal entity . . . competing for federal contracts as prime contractor" subject to the doctrine); *Hartman v. Kickapoo Tribe Gaming Comm'n,* 176 F. Supp. 2d 1168, 1181 (D. Kan. 2001) *aff'd*, 319 F.3d 1230 (10th Cir. 2003) (court has "no discretion not to defer to" tribal court regarding nonmember's due process claims against tribal enterprise managers); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) (claims related to wrongful denial of ERISA benefits by employees of reservation enterprise subject to the doctrine); *Abdo v. Fort Randall Casino,* 957 F. Supp. 1111 (D. S. D. 1997) (employee claims for wrongful termination and breach of contract arising on reservation subject to the doctrine). *See also Brown v. Washoe Housing Authority,* 835 F.2d 1327, 1328 (10th Cir. 1988) (breach of contract claims by construction company against tribal housing authority subject to the doctrine); *U.S. ex rel. Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273, 1276 (8th Cir. 1987) (breach of construction contract against tribal housing authority subject to

the doctrine) (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1324 (D. Kan. 1997) (claims of breach of contract by consulting group arising on reservation subject to the doctrine).

C. The Exceptions To The Doctrine Are Inapposite.

In a case such as this, where tribal authority is plausible and, therefore, "the tribal exhaustion doctrine normally would apply, the Supreme Court has not demanded exhaustion where [a] an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, [b] where the action is patently violative of express jurisdictional prohibitions, or [c] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Ninigret*, 207 F.3d at 33-34 (citation and quotations omitted). *See also Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (delineating exceptions).

None of these exceptions are relevant in this case. While non-Indians often perceive assertions of tribal court authority to be in bad faith because they think tribal court judges are biased or unfair, these "unfounded stereotypes" hold no weight. *Ninigret*, 207 F.3d at 34. Indeed, the Penobscot Nation's judiciary is made up of lawyers of the highest quality and integrity, and it has produced prominent members of the federal and state judiciaries. *See* Declaration of Mark Chavaree (attached hereto as Exhibit E).[9]

[9] No one serves on the Penobscot Nation Tribal Court or its Appellate Division without a license, in good standing, from a state bar. Declaration of Mark Chavaree (attached hereto as Exhibit F) (Chavaree Dec.) ¶ 6. Prominent members the state and federal judiciaries started as Tribal Court judges at the Penobscot Nation. Andrew M. Mead, Associate Justice of the Maine Supreme

Harassment or bad faith is nowhere present. Nor is there any express jurisdictional bar to the Penobscot Nation Tribal Court's jurisdiction in this case. To the contrary, its authority is firmly grounded in the federal Indian law principles and myriad case law set forth above. Finally, should she choose to do so, the Plaintiff will have every opportunity to challenge the jurisdiction of the Penobscot Tribal Court through its proceedings.

CONCLUSION

For all of the above reasons, the Defendants respectfully request that the Court grant their motion and dismiss this action without prejudice (or stay it) and require the Plaintiff to first exhaust her remedies before the Penobscot Nation Tribal Court.

Respectfully submitted, July 20, 2014

/s/ Kaighn Smith, Jr.

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Judicial Court, started his judicial career as a Judge for the Penobscot Nation, and Louis H. Kornreich, now Chief Judge for the U.S. Bankruptcy Court, once served on the Appellate Division of the Penobscot Nation Tribal Court. Chavaree Dec. ¶¶ 8, 13.

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2014, I served the above motion with attached Exhibits upon the Plaintiff through counsel by means of the Court's ECF system.

Dated: July 20, 2014 */s/ Kaighn Smith, Jr.*

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