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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

In her opposition, Plaintiff raises the issue of Defendants' sovereign immunity from suit. Plaintiff's concession that PINE has sovereign immunity, *see* Plaintiff's Opposition at 1, n.1, immediately begs the question of whether PINE's affiliate, FPI, is also immune. As set forth below, FPI, like PINE, has sovereign immunity from Plaintiff's claims, but even if it did not, as explained in the Defendants' opening memorandum, the tribal exhaustion doctrine requires that this matter be dismissed without prejudice (or stayed) to await the exhaustion of remedies in the Penobscot Nation Tribal Court.

I. FPI, LIKE PINE, HAS SOVEREIGN IMMUNITY FROM PLAINTIFF'S CLAIMS.

The case law confirms that Plaintiff is correct in conceding that PINE has sovereign immunity from her claims. *See, e.g., Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 685 (8th Cir. 2011); *Bales v. Chickasaw Nation Indus.,* 606 F. Supp.2d 1299, 1304 (D.N.M.2009). Given the very nature of IRA section 17 corporations, PINE is, in fact, "imbued automatically" with sovereign immunity from suit. *Id.* at 1306. Plaintiff also correctly points out that PINE has not waived such immunity. She asserts, however, that FPI does not have sovereign immunity

because PINE established it as a Maine limited liability company. She further argues that even if FPI has sovereign immunity, it waived its immunity. She is mistaken on both counts.

The fact that an entity imbued with sovereign immunity (here, PINE) establishes an affiliated entity under state or tribal law does not mean that the affiliate lacks sovereign immunity. *See, e.g., J. L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board,* 842 F. Supp.2d 1163, 1176 (D.S.D. 2012); *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.,* 86 N.Y.2d 553, 563 (N.Y. 1995). *See also Pink v. Modoc Indian Health Project, Inc.,* 157 F.3d 1185, 1188-89 (9th Cir. 1998) (corporation formed by tribe to operate off-reservation tribal health service immune from suit for employee's Title VII and other claims). *Cf. Giedosh v. Little Wound Sch. Bd., Inc.,* 995 F. Supp. 1052 (D.S.D. 1997) (corporation formed to operate on-reservation school immune from discrimination claims under statutory exclusion of "Indian tribes" from Title VII and ADA). Moreover, whether such an entity is "for-profit" or "commercial" is of no moment because the Supreme Court has made perfectly clear that the federal goals that ground tribal sovereign immunity operate when tribal entities pursue economic activity for the welfare of Indian communities. *See Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024 (2014) (refusing to revisit *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 758 (1998) (there is no "commercial activity" exception to tribal sovereign immunity)).

The Minnesota Supreme Court established the following three factors to weigh in determining whether sovereign immunity extends to affiliates of tribes or tribal entities, like PINE, that are imbued with sovereign immunity: (1) whether the affiliate is organized to further governmental purposes; (2) whether it is closely linked to the sovereign tribal entity creating it; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the affiliate. *See Gavle v. Little Six, Inc.,* 555 N.W.2d 284, 294 (Minn.

1996). Other courts have followed this formula. *See Trudgeon v. Fantasy Springs Casino,* 84 Cal. Rptr. 2d 65, 69 (1999). FPI meets each of these factors.

FPI's purpose furthers governmental goals. The first factor should not be confused with the notion that a "commercial-looking" affiliate cannot have sovereign immunity. That would be incompatible with the Supreme Court's decisions in *Bay Mills* and *Kiowa*. *See Bay Mills Indian Community,* 134 S. Ct. at 2043 (Sotomayor, J., concurring) (observing that many tribes have no tax base, and sovereign immunity furthers the federal government's goal of enabling them to fund governmental services through business operations). Indeed, in *Gavle*, the court found the first factor met for a corporation (like PINE and FPI) whose purpose was to "improv[e] the business, financial or general welfare of the Corporation, the Members of the Corporation, and the [Indian] Community" through commercial gaming. *Gavle,* 555 N.W.2d at 294. FPI plainly fits within this criterion: as explained in the Defendants' opening memorandum, it was formed by PINE to participate in the SBA § 8(a) program to improve the economic welfare of Penobscot people, its net revenues support tribal governmental services in substitution for a tax base, and it generates reservation employment for tribal members. *See* Francis Dec. (ECF 33-1) ¶¶ 13-20; Smith Dec. (ECF 33-3) ¶¶ 3, 7-10.

FPI is closely linked to PINE. FPI was formed by PINE pursuant to Article VIII of PINE's IRA section 17 Charter, which empowers it "to form . . . limited liability companies" with the "the rights and privileges granted by and . . . subject to the limitations of [PINE's] Charter." PINE Charter (ECF 33-1) at 5. As recognized by Plaintiff's concession, one such privilege is sovereign immunity. *See id.* at 4 (Article VIII(A), addressing sovereign immunity). PINE is FPI's sole member, and FPI is governed by a Board appointed by PINE's Board. Francis Dec. ¶ 13; Holmes Dec. (ECF 33-2) ¶ 6; FPI Op Agmt (ECF 33-2) § 3.01(a). Two of

FPI's Board members (of between three and five) must be members of the PINE Board. *Id.* Clearly, PINE and FPI are very closely linked and PINE intended FPI to be imbued with sovereign immunity from suit.

Federal policies promoting tribal autonomy are furthered by the extension of immunity to FPI. FPI functions as an economic affiliate of PINE to achieve PINE's goal of generating jobs and revenues for the Penobscot Nation by taking advantage of the SBA section 8(a) program. FPI Op Agmt § 1.07. Section 8(a), like the IRA, "furthers the federal policy of Indian self-determination" and "economic self-sufficiency among Native American communities." *See Am. Fed'n of Gov't Employees (AFL-CIO) v. United States,* 195 F. Supp. 2d 4, 18 (D.D.C. 2002). Thus, extending sovereign immunity to FPI furthers the federal policy of promoting tribal autonomy by protecting economic development and independence at the Penobscot Nation.

In sum, FPI satisfies the considerations that courts weigh to determine whether an affiliate of a tribal entity imbued with sovereign immunity also has immunity from suit.

None of the cases cited by the Plaintiff address a situation similar to the one at bar. *Somerlott v. Cherokee Nation Distributors, Inc.,* 686 F.3d 1144 (10th Cir. 2012) involved an Oklahoma LLC formed by an Oklahoma corporation and allegations of wrongdoing arising out of an off-reservation chiropractic business. *See id.* at 1146. This case involves an affiliate of an IRA section 17 corporation engaged in reservation employment in furtherance of federal Indian policy goals. Moreover, the entire discussion of sovereign immunity in that case is *dictum* because the issue was not preserved for appellate review. *See id.* at 1151-52. *Eaglesun Systems Products, Inc. v. Association of Village Council Presidents,* 2014 WL 1119726 is likewise

distinguishable. The Alaska Native Corporations which formed the defendant entity in that case, unlike IRA section 17 corporations, are not imbued with sovereign immunity. *See id.* at * 6.[1]

The only real question, therefore, is whether FPI has waived its sovereign immunity from suit for the Plaintiff's claims. The Plaintiff argues that the waiver of immunity contained in FPI's Operating Agreement accomplishes that. The SBA requires tribally owned enterprises participating in the section 8(a) program to waive sovereign immunity, but only for specific purposes related to the performance of the program. *See* 13 C.F.R. § 124.109(c)(1) (2011). Tracking the regulation, FPI's Operating Agreement provides, in pertinent part:

> The Company may sue and be sued in any of the United States Federal Courts, which are hereby designated to be among the courts of competent jurisdiction, for all matters relating to SBA's program, including, but not limited to, 8(a) program participation, loans, and contract performance. . . . . *This waiver is granted solely for the purposes required by 13 CFR § 124.109(c)(1), and shall not be interpreted to grant any rights to parties other than those intended by this regulation.*

FPI Op Agmt § 12.07 (emphasis added).

It is well-established that such waivers of sovereign immunity must be strictly construed with any ambiguities interpreted to preserve immunity from suit. *See, e.g., Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Arizona*, 966 F. Supp. 2d 876, 882 (D. Ariz. 2013). By its terms, FPI's waiver is granted "solely" for the purposes required by §124.109(c)(1). That is, to effectuate the enforcement of loans and contracts related to the section 8(a) program.[2] It does *not* waive FPI's sovereign immunity from suit for Plaintiff's

[1] The unreported decision cited by the Plaintiff, *Seaport Loan Products, LLC. v. Lower Brule Community Development Enterprise, LLC,* 41 Misc. 3d 1218(A) (N.Y. App. Div. 2013), involved a Delaware LLC, which "invest[ed] in a failed attempt to enter the New York financial services industry." *Id.* * 4. The court observed that its "contact with the Tribe seems rather limited, since it has no dedicated office space on the Tribe's reservation [and] no full-time employees . . . ." *Id.* * 5. This is a far cry from the situation presented here, where tribal reservation employment and governmental benefits flow directly from FPI's participation in the SBA's § 8(a) program.

[2] A 1989 SBA hearing garnered concerns over the possibility that §124.109(c)(1) might be construed more broadly. *See Minority Small Business and Capital Ownership Development Program,* 54 Fed. Reg. 34698 (proposed Mar. 23,

employment retaliation claims under Title VII and the False Claims Act. *See Graham v. Applied Geo Technologies, Inc.,* 593 F. Supp. 2d 915, 921 (S.D. Miss. 2008) (same language does not waive tribal corporation's immunity from employment discrimination claims).[3]

In short, FPI, like PINE, has sovereign immunity from suit, and it has not waived that immunity for the claims asserted by Plaintiff. Because sovereign immunity goes to subject matter jurisdiction, Plaintiff's claims should be dismissed with prejudice.

II. Even If Sovereign Immunity Did Not Bar This Action, It Should Be Dismissed Without Prejudice Or Stayed Pursuant To The Tribal Exhaustion Doctrine.

Tribal sovereign immunity and tribal court exhaustion are separate and distinct concepts. A court could find that sovereign immunity has been waived, but dismiss without prejudice (or stay) under the exhaustion doctrine, as the First Circuit did in *Ninigret*.

Plaintiff asserts that FPI has waived the exhaustion of tribal court remedies by "recogniz[ing] federal court jurisdiction" and making "no attempt in its organizational documents to retain tribal jurisdiction." *See* Plaintiff's Opposition at 7. The comity principles underlying the tribal exhaustion doctrine are so strong, however, that it cannot be waived. *See Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F. Supp. 2d 1222, 1227 (D.N.M. 1999). Even assuming that it could, FPI's limited waiver *of sovereign immunity* says absolutely nothing about waiving the exhaustion of tribal court remedies in favor of an exclusive federal court forum. It simply states that federal courts are "*among* the courts of competent jurisdiction."

1989) (enacted Aug. 21, 1989). In response, the SBA clarified that the requisite waiver is to "allow[] suit *only* for those matters related to SBA's programs, including, but not limited to 8(a) program participation, SBA direct or guaranty loans, advance payments and contract performance." *Id.* (emphasis added).

[3] Plaintiff seeks to leverage section 112 of the SBA's regulations, establishing EEO guidelines for certain recipients of SBA financial assistance. This section sets forth procedures for the SBA to obtain compliance with funding requirements. *See* 13 C.F.R. §§ 112.9-112.11. Nothing in this section remotely suggests that program participants are subject to actions by private parties under Title VII. If it did, it would run afoul of Congress's exclusion of "Indian tribes" from such actions, which courts readily construe to encompass corporations like FPI, which engage in activities to further important tribal interests. *See, e.g., Pink,* 157 F.3d at 1188; *Giedosh,* 995 F. Supp. at 1056-58.

This cannot possibly be construed to disclaim colorable concurrent jurisdiction of the Penobscot Nation Tribal Court. *See Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1246-47 (D. Nev. 2009) (tribal court jurisdiction not precluded by concurrent jurisdiction; exhaustion required).

Plaintiff's other arguments against the application of the exhaustion doctrine are equally unavailing. The fact that FPI is not a "tribal housing authority whose mission [is] to provide housing for tribal members" (as in *Ninigret*) or a department of tribal government makes no difference in the application of the doctrine. *See Wellman v. Chevron U.S.A., Inc.,* 815 F.2d 577, 578 (9th Cir. 1987) (doctrine invoked by Pennsylvania corporation; exhaustion required because "the dispute [arose] in Indian territory"); *Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F. Supp.2d 1111, 1114-15 (D. Co. 2000) (doctrine invoked by oil and gas corporation; exhaustion required because case arose on reservation); *Graham,* 593 F. Supp. 2d at 915 (applying exhaustion doctrine to discrimination claims arising out of on-reservation employment at a "for-profit" tribal corporation). Finally, her assertion that FPI must "maintain[] a tribal court system" in order to invoke the doctrine makes no sense. Again, any party who is a defendant to a case over which a tribal court has colorable jurisdiction can invoke the doctrine. *See, e.g., Wellman,* 815 F.2d at 577-578; *Petrogulf Corp.* 92 F. Supp.2d at 1114-15; *Graham,* 593 F. Supp.2d at 915.

* * *

For all of the above reasons, PINE and FPI are equally imbued with sovereign immunity and neither has waived that immunity from the Plaintiff's claims in this case. Thus, this action should be dismissed, with prejudice, for want of subject matter jurisdiction. Even if sovereign immunity does not bar this action, however, it should be dismissed without prejudice (or stayed) to allow the exhaustion of remedies in the Penobscot Nation Tribal Court.

Dated: August 20, 2014

/s/ Kaighn Smith, Jr.
Kaighn Smith Jr., Esq.
Adrianne Fouts, Esq.

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Telephone: (207) 772-1941
ksmith@dwmlaw.com
afouts@dwmlaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2014, I served the above Reply upon the Plaintiff through counsel by means of the Court's ECF system.

Dated: August 20, 2014

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.
Drummond Woodsum
84 Marginal Way, STE 600
Portland, ME 04101-2480
Telephone: (207) 253-0559
E-mail: ksmith@dwmlaw.com

Counsel for Defendants