IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ROB CORABI,

Plaintiff,

v. **No. 1:14-CV-01081 MV/LAM**

ENPIC, INC.,

Defendant.

DEFENDANT'S REPLY TO RESPONSE TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO EXHAUST TRIBAL COURT REMEDIES

COMES NOW, Eight Northern Indian Pueblos Council, Inc. (hereinafter "ENIPC"), through its attorneys, CHESTNUT LAW OFFICES, P.A. (Joe M. Tenorio and Peter C. Chestnut) and hereby files this Reply to Plaintiff's Response to Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction or, in the Alternative, For Failure to Exhaust Tribal Court Remedies. This Reply is filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FED. R. CIV. P.") and LR-CV 7 of the Local Civil Rules of the United States District Court for the District of New Mexico ("D.N.M. LR-Civ.").

1. INTRODUCTION

Plaintiff filed the underlying Complaint alleging two related private cause of actions (breach of contract and wrongful termination) against ENIPC, a tribal consortium owned and controlled by the Eight Northern Indian Pueblos of New Mexico, that includes the federally recognized Pueblos of Taos, Picuris, Ohkay Owingeh (formerly known as San Juan Pueblo), Santa Clara, San Ildefonso, Pojoaque, Nambe, and Tesuque. *Affidavit of Governor Phillip A. Perez, ¶4, marked as Attachment A to Defendant's Motion to Dismiss,* (referred to herein as "*Perez Aff.*"). ENIPC filed a Motion to Dismiss arguing that Plaintiff's Complaint should be

dismissed on four grounds: First, by failing to allege diversity jurisdiction under 28 U.S.C. § 1332 and failing to allege federal question jurisdiction under 28 U.S.C. § 1331, Plaintiff's Complaint is subject to dismissal under Rule 12(b)(1) FED. R. CIV. P. Second, because ENIPC is a tribal consortium that shares in the benefits of its member Pueblos' sovereign immunity protection, Plaintiff's complaint can also be dismissed on sovereign immunity grounds pursuant to Rule 12(b)(1) FED. R.CIV.P.[1] Third, since tribal courts have exclusive jurisdiction when an Indian is sued by a non-Indian over an occurrence or transaction arising in Indian Country, Plaintiff's Complaint can also be dismissed pursuant to Rule 12(b)(1) FED. R. CIV. P. And, fourth, any issue concerning whether Ohkay Owingeh Tribal Court has jurisdiction over Plaintiff's Complaint permits this Court to dismiss Plaintiff's Complaint so that the tribal court is the first to address that issue. As noted below, Plaintiff's Response was not only filed out of time, but as to each of Defendant's grounds for dismissal, Plaintiff has not rebutted the arguments in support of dismissal.

2. ARGUMENT

2.1. PLAINTIFF'S RESPONSE WAS FILED OUT OF TIME

Defendant's Motion to Dismiss was filed and served on December 30, 2014. See *Document 6, ("Motion to Dismiss").* According to Local Rule 7.4 of D.N.M. LR-Civ., Plaintiff's Response was due within 14 calendar days from December 30, 2014 or by January 13, 2014. Plaintiff filed his response on January 14, 2014, a day after the due date. *See Document 8, ("Plaintiff's Response").* Plaintiff did not seek leave to file an untimely response. For that reason, this Court should strike Plaintiff's Response and grant Defendant's Motion to Dismiss.

[1] Plaintiff's Response cites to *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board,* 842 F.Supp.2d 1163 (D. SD 2012) for the proposition that "[a]lthough a motion to dismiss on sovereign immunity grounds can be analyzed under Rule 12(b)(1)...the question of whether the tribes' sovereign immunity bars [Plaintiff] from bringing this suit against [Defendant] is a jurisdictional issue separate from subject matter jurisdiction." This just means that the Court must first address whether it has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1332, before considering the separate jurisdictional issue of whether Plaintiff's Complaint is barred by the doctrine of sovereign immunity. *Id., citing Calvello v. Yankton Sioux Tribe,* 899 F.Supp. 431, 435 (D. S.D. 1995).

Local Rules of the District Court of New Mexico provides that "[t]he failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion." LR-CV 7.1(b).

2.2. PLAINTIFF'S COMPLAINT LACKS FACTS TO ESTABLISH SUBJECT MATTER JURISDICTION

2.2.1. Plaintiff's Complaint Does Not Allege Complete Diversity

As to ENIPC's argument that Plaintiff's Complaint does not allege facts that establish diversity jurisdiction, Plaintiff 's untimely response simply states, without authority, that ENIPC cannot be both a New Mexico corporation and a Tribe. *Plaintiff's Response, p. 2.* Plaintiff misunderstands ENIPC's argument. ENIPC acknowledges that it is incorporated under New Mexico law, and that for purposes of diversity jurisdiction, Plaintiff's complaint must allege complete diversity. Instead, Plaintiff has alleged that he is a New Mexico citizen and ENIPC is a New Mexico citizen due to its state of incorporation.[2] The facts, as alleged in Plaintiff's complaint, that both parties are New Mexico citizens are enough to defeat complete diversity. Absent complete diversity, this Court does not have jurisdiction to hear Plaintiff's Complaint under 28 U.S.C. § 1332. *See Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1095-96 (10th Cir. 2003) (citing *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 373-74 (1978)) (28 U.S.C. § 1332(a)(1) requires complete diversity: No plaintiff can be a citizen of the same state as any defendant).

2.2.2. Plaintiff's Complaint Does Not Allege Federal Claims

Concerning ENIPC's argument that Plaintiff's Complaint fails to establish federal question jurisdiction, Plaintiff's untimely Response admits that "there is no comparable

[2] ENIPC also made an alternative argument that as a tribal consortium, ENIPC could be treated as a tribe for purposes of diversity jurisdiction and noted that courts have consistently found that "tribes" are not citizens for diversity jurisdiction purposes. Certainly, since both parties are New Mexico citizens, this Court need not address whether ENIPC can also be treated as a "tribe" for diversity purposes.

legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *Plaintiff's Response, p. 1,* citing *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S 845, 854 (1985). However, Plaintiff asks this Court to review other employment related matters to find federal question jurisdiction. Unfortunately for Plaintiff, and as demonstrated below, the cases referenced in Plaintiff's Response all involve direct questions of federal statutes that are not applicable here and can otherwise be distinguished from the facts of this case. It is important to remember that unlike the cases referenced in Plaintiff's Response, Plaintiff's Complaint is void of any allegation involving violations of any federal law.

2.2.2.1. *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985). In this Ninth Circuit case, the issue was whether the federal Occupational Safety and Health Act ("OSHA") applies to a tribally owned entity. The Ninth Circuit found that OSHA was a law of general applicability that applies to all persons, including Indians. *Id., at* 1115-1119. In the present case, Plaintiff's claims do not allege any violations of OSHA or any other federal statute.

2.2.2.2. *E.E.O.C. v. Peabody Western Coal Co.,* 400 F.3d 774 (9th Cir. 2005). This Ninth Circuit case addressed whether a tribe can be joined under Rule 19 of the FED. R. CIV. P. when the Equal Employment Opportunity Commission ("EEOC") files a complaint against a non-Indian company located on tribal land for violations of Title VII of the Civil Rights Act of 1964 ("Title VII"). This is not that case. Plaintiff's Complaint does not allege violations of Title VII or any other federal law. This case also does not require this Court to consider the feasibility of joining any tribe.

2.2.2.3. *Chao v. Matheson, 2007-WL-1830738 (W.D. WA. 2007). Chao* is an unreported and unpublished case and has no precedential value. *See Duran-Hernandez v.*

Ashcroft, 348 F.3d 1158, 1162, fn3 (10th Cir. 2003) (unpublished opinions are not binding). Further, *Chao* addresses whether the federal Fair Labor Standards Act applies to a private business owned by tribal members located on tribal land. The present case differs from *Chao* in the following ways. First, this case does not involve a private business owned by individual tribal members. Rather, the present case involves a tribal consortium owned by 8 Pueblos. *Aff.* ¶ *4.* Second, this case does not involve any allegations arising from FLSA or any other federal law.

2.2.2.4. *N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1186 (10th Cir. 2002). Of all the cases cited by Plaintiff for support of its argument that his Complaint arises under federal law, the *Pueblo of San Juan* opinion is the only one that comes from the Tenth Circuit. However, just like Plaintiff's other cases, *Pueblo of San Juan* does not provide the support that Plaintiff seeks. *Pueblo of San Juan* addresses whether the National Labor Relations Act ("NLRA") preempts the Pueblo of San Juan from enacting a right-to-work ordinance. The Tenth Circuit found that the NLRA did not preempt the Pueblo of San Juan from exercising its sovereign rights in enacting a right-to-work ordinance. Plaintiff's Complaint does not involve any allegations of NLRA violations and it does not raise questions of any tribe's right to enact any employment ordinances.

2.2.2.5. *Myrick v. Devils Lake Sioux Mfg. Corp.,* 718 F.Supp. 753 (D. ND 1989). The *Myrick* case addresses whether Title VII and the federal Age Discrimination in Employment Act ("ADEA") apply to a North Dakota company that is majority-owned by a tribe. The Court did not dismiss the case, because the complaint properly invoked questions of federal law. Here, Plaintiff's Complaint does not allege any violations of Title VII or ADEA or any other federal law.

2.2.2.6. *San Manuel Indian Bingo and Casino v. National Labor Relations Board,* 475 F.3d 1306 (D.C. Cir. 2007). This *San Manual* case addresses whether the NLRA, a federal statute, applies to a casino owned by a tribe. While the Court agreed that the NLRA is applicable to a casino, our case is easily distinguishable because our case does not ask this court to determine whether the NLRA applies to Plaintiff's claims.

None of Plaintiff's cases rebut ENIPC's argument that Plaintiff's Complaint does not allege federal claims. *Motion to Dismiss, p. 5-7.* At most, Plaintiff's cases tend to show that federal courts may exercise jurisdiction when a complaint asks a court to determine whether a particular federal law has been violated or whether a particular federal law is applicable. That type of circumstance is not alleged in Plaintiff's Complaint.

Further, even where a federal statute is found applicable, that finding does not automatically mean that the federal statute is enforceable against a tribe. *See e.g., Florida Paraplegic Association, Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126, 1130 (11th Cir. 1999) (whether or not a tribe may be subject to a statute and whether or not a tribe may be sued for violating a statute are two entirely different questions). As provided in Defendant's Motion to Dismiss, and in the section below, ENIPC's sovereign immunity protections provide another basis for dismissal.

2.3. ENIPC IS IMMUNE FROM SUIT

Plaintiff's Response does not dispute the fact that ENIPC is a tribal consortium with sovereign immunity protections. Instead, Plaintiff now claims for the first time that because ENIPC had previously availed itself to state jurisdiction in a separate matter that ENIPC *should* similarly consent to be sued in this Court. *See Reply, p.3, referring to Vigil v. Eight Northern Indian Pueblos Council, Inc.,* (D-117-CV-201000004). Plaintiff refers the Court to a state court

case in which ENIPC did not raise sovereign immunity as a defense. That state court action involved an alleged violation of a lease agreement between ENIPC and its landlord, Eddie Vigil. Plaintiff Corabi was not a party to that action and that action did not involve any claims related to Plaintiff's breach of contract or wrongful termination claims.

Since a sovereign is not required by law to waive its immunity at all, "it is free to 'prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *See e.g., R&R Deli, Inc. v. Santa Ana Star Casino,* 2006-NMCA-020, 139 N.M. 85. It may choose to be sued in one matter and not in others. Here, ENIPC specifically preserved its tribal sovereign immunity protection when it entered into the Employment Agreement with Plaintiff. *Perez Aff.,* ¶ 22.

Plaintiff next argues that the Employment Agreement contained a mediation provision, that he requested mediation under that provision, that ENIPC refused to participate in mediation, and that the next step is litigation. *Plaintiff's Response, p. 5-6.* These new "facts" are not alleged in Plaintiff's Complaint, and no basis for these new allegations is provided. Regardless, the dispute resolution provision contained in the Employment Agreement does not open the doors to litigation if ENIPC decides not to participate in mediation. Rather, if mediation is not successful, then the terms of the Employment Agreement provides that the next step is arbitration, not the filing of a lawsuit. *See Exhibit A-3, Employment Agreement, to the Perez Affidavit.*

This case is not like the dispute resolution provision considered by the U.S. Supreme Court in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 352 U.S. 411 (2001). Under *C&L*, if an arbitration award against a tribe is reduced to a judgment, and if the judgment is enforceable in a state court pursuant to rules of arbitration, the Supreme Court

has ruled that the Tribe has waived sovereign immunity to compel enforcement of an arbitration award. *C&L,* at 420. Here, the Employment Agreement expressly excludes Rule 48(c) of the Commercial Arbitration Rules of the American Arbitration Association which was in effect in 2011. Rule 48(c) provides that "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." By excluding Rule 48(c) from the Employment Agreement, the parties agreed that no federal or state court would have the power to enforce an arbitration award.

Tribal waivers of sovereign immunity must be explicit and unequivocal. In reviewing tribal waivers of immunity, they must be narrowly construed according to the express language of the waiver. *See Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181 (10th Cir. 1999); *Flint v. Salamanca Indian Lease Auth.,* 928 F.2d 542, 545-46 (2nd Cir. 1991); *Ute Distribution Corp. v. Ute Indian Tribe,* 149 F.3d 1260, 1267 (10th Cir. 1998); *Chemehuevi Indian Tribe v. California State Bd. Of Equalization,* 757 F.2d 1047, 1053 (9th Cir. 1985). As noted above, since an Indian tribe is not required by law to waive its immunity at all, "it is free to 'prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *See e.g., R&R Deli, Inc. v. Santa Ana Star Casino,* 2006-NMCA-020, 139 N.M. 85. When consent is given, the terms of the consent establish the bounds of a court's jurisdiction. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir. 1982). A waiver of immunity "must be clear" and when a tribe consents to suit, "any conditional limitation it imposes on that consent must be strictly construed and applied." *Missouri River Servs. Inc. v. Omaha Tribe of Nebraska,* 267 F.3d 848, 852 (8th Cir. 2001); *R&R Deli,* 2006-NMCA-020.

The Employment Agreement provides that any arbitration award is not subject to state or federal judicial enforcement by excluding any reference to Rule 48(c) of the Commercial Arbitration Rules in effect in 2011. To further support the argument that ENIPC would not be subject to suit for any reason arising from the Employment Agreement, the Employment Agreement clearly provides that ENIPC does not waive its sovereign immunity protections. *Perez Aff.* ¶ *23.* When ENIPC decides to waive its sovereign immunity, its general practice is to issue a written board resolution expressly providing the terms of that waiver. *Perez Aff.* ¶ *24.* No such resolution exists in this matter. *Perez Aff.* ¶ *24.* By not providing this Court with any allegations that could establish either congressional abrogation or tribal waiver of sovereign immunity, Plaintiff's complaint fails to allege facts necessary to show the existence of this federal court's jurisdiction over ENIPC.

2.4. OHKAY OWINGEH TRIBAL COURT HAS EXCLUSIVE JURISDICTION OVER CLAIMS ARISING ON TRIBAL LAND

ENIPC argued that this Court should dismiss Plaintiff's Complaint because tribal courts retain exclusive jurisdiction over lawsuits arising on tribal lands against tribes, tribal members and tribal entities. *See e.g., Williams v. Lee,* 358 U.S. 217 (1959). In response to this argument, Plaintiff now claims, without factual support, that the termination of his employment did not occur on tribal land since the termination letter was allegedly delivered to him in Santa Fe, and that the lawsuit will not affect tribal sovereignty. *Plaintiff's Response, p. 4.* The lone legal support provided by Plaintiff is *Tempest Recovery Services, Inc. v. Belone,* 2003-NMSC-019, 134 N.M. 133, a state court case.

ENIPC provides its support, by way of affidavit, that the hiring and termination occurred on Ohkay Owingeh land. *Perez Aff.* ¶¶ 19-22. Plaintiff's Complaint is artfully silent on the locus of these events, and his Response provides, without support, that the "termination did not

occur on tribal land." *Plaintiff's Response, p. 4.* When a defendant properly challenges a fact, and has produced evidence in support thereof by affidavit, the complaining party must come forward with competent proof of facts to show otherwise. *See e.g., Battenfeld of America Holding Co., Inc. v. Barid, Kurtz & Dobson,* 45 F.Supp.2d. 1109 (D. Kan. 1999) (applying rule to challenge a personal jurisdictional fact); *See also Phillips USA, Inc. v. Allflex USA, Inc,.* 857 F.Supp. 789, 792-93 (D. Kan. 1994) (holding that plaintiffs failed to adequately rebut the defendant's detailed declaration challenging jurisdiction when the plaintiffs merely offered conclusory allegations in their complaint and briefs rather than providing additional evidence alleging specific facts). Here, Plaintiff not only filed his Response late, which constitutes consent to the granting of the motion under LR-CV-7.1(b), but also fails to support his argument that his termination occurred off tribal land. Statements made by attorneys are not evidence.

Tempest Recovery Services actually supports Defendant's argument that Ohkay Owingeh tribal court has exclusive jurisdiction over Plaintiff's complaint. *Tempest Recovery Services* recognizes that tribes retain exclusive tribal court jurisdiction where "an action involves a proprietary interest in Indian land; or when an Indian sues another Indian on a claim for relief recognized only by tribal custom and law; or when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country." *Tempest Recovery Services,* 134 N.M. at 137, citing *Found. Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 516 (N.M. 1987). There, the court found that a breach of contract arises where the contract was formed. *Tempest Recovery Services,* 134 N.M. at 138. The Court found that the State and Tribe could exercise concurrent jurisdiction, because the contract was formed off tribal lands. *Tempest Recovery Services,* at 138. Here, because the Employment Agreement was entirely formed and terminated within the

lands of Ohkay Owingeh, these facts leave no room for state concurrent jurisdiction. *Perez Aff.* ¶¶ *21-22.*

2.5. EVEN IF THE COURT FINDS FACTS ARE ALLEGED IN THE COMPLAINT TO SUPPORT SUBJECT MATTER JURISDICTION, THE TRIBAL-EXHAUSTION RULE PREVENTS THIS COURT FROM PROCEEDING WITH THIS CASE.

Plaintiff argues that the "tribal exhaustion rule" is not applicable here because Ohkay Owingeh tribal court does not have jurisdiction over his claims and because none of the three comity concerns supporting application of the "tribal exhaustion rule" are present. First, whether or not Ohkay Owingeh tribal court has jurisdiction is exactly the type of question that the tribal exhaustion rule was designed to address. The tribal exhaustion rule requires the parties to present the issue of jurisdiction to be determined, in the first instance, by the Ohkay Owingeh tribal court. *National Farmers,* 471 U.S. at 856. Second, Plaintiff does not contest that no exception to the tribal exhaustion rule is available, he contends that none of the three comity concerns that would prompt this Court to apply the tribal exhaustion rule exist in this case.

When no exception to the Tribal Exhaustion Rule applies, the Court engages in an analysis, "based on comity concerns for Indian Tribes in maintaining their remaining sovereignty." *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498, 1507 (10th Cir. 1997). The U.S. Supreme Court articulated the following comity concerns: 1) furthering congressional policy of supporting tribal self-government, 2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court, and 3) obtaining the benefit of tribal expertise if further review becomes necessary. *National Farmers,* 471 U.S. at 856-857. Because the underlying dispute arose on Ohkay Owingeh lands, comity concerns weigh heavily in favor of requiring that the parties exhaust their remedies in the Ohkay Owingeh Tribal Court before resorting to a federal forum. *See Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F.Supp.2d

1222, 1227 (D.N.M. 1999); *See also., Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F.Supp. 1321, 1329 (D. Kan. 1997). Permitting Ohkay Owingeh Tribal Court to determine whether it has jurisdiction over Plaintiff's claims supports self-government, furthers the orderly administration of justice by allowing a full record to be developed in tribal court, and encourages the use and availability of tribal expertise should review become necessary.

When a Court finds that comity requires the parties to exhaust their tribal court remedies, then U.S. Supreme Court precedent authorizes federal district courts to either dismiss the federal case without prejudice or to stay federal court proceedings. *See e.g., National Farmers,* 471 U.S. at 857; *Iowa Mutual Ins. Co. v. La Plante,* 480 U.S. 9, 20, n.14 (1987).

2.6. PRESERVATION OF CERTAIN DEFENSES

Pursuant to Rule 12(h) of the FED. R. CIV. P, ENIPC continues to preserve its defense of failure to state a claim upon which relief can be granted.

3. CONCLUSION

Wherefore, Defendant ENIPC requests that the Complaint be dismissed for lack of subject matter jurisdiction, or, in the alternative, for failure to exhaust tribal court remedies, and for any other relief the Court deems appropriate.

Respectfully submitted,

CHESTNUT LAW OFFICES, P.A.

Joe M. Tenorio
Peter C. Chestnut
121 Tijeras NE, Suite 2001
Albuquerque, NM 87102
Office: (505) 842-5864
Fax: (505) 243-4464
Email: jmt@chestnutlaw.com
pcc@chestnutlaw.com