IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ROB CORABI,
Plaintiff,

No. 1:14-CV-01081

ENPIC, INC.,
Defendant.

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

Defendant filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, for Failure to Exhaust Tribal Court Remedies ("Motion to Dismiss"), *Doc. 6*, making four claims: (1) there is no diversity of citizenship, (2) ENPIC is protected from suit because of tribal sovereign immunity, (3) tribal court should hear this matter, and (4) the tribal exhaustion rule was not fulfilled. Since this Court does have jurisdiction, and the tribal exhaustion rule is not properly applied to this matter, the Motion to Dismiss should be denied.

STANDARD OF REVIEW

Defendant filed the current motion pursuant to Fed. R. Civ. Pro. 12b(1). *See, Doc. 6*, generally. However, "the question of whether a tribes' sovereign immunity bars [Plaintiff] from bringing this suit against [Defendant] is a jurisdictional issue **separate** from subject matter jurisdiction." *See, J.L. Ward & Associates Inc. v Great Plains Tribal Chairman's Health Board*, 842 F.Supp.2d 1163, 1170 (2012) (emphasis added). Since Defendant has raised a jurisdictional question, it is important to note that "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *See, National Farmers Union Ins Companies v Crow Tribe of Indians*, 471 U.S. 845,

854, 100 S.Ct. 2447 (1985). Rather, this Court must review case law regarding these employment related matters and, as discussed below, this Court has jurisdiction and the Motion to Dismiss should be denied.

ARGUMENT

As the Court is aware, this matter is a breach of contract and wrongful termination case. *See, Doc. 1*, Complaint, generally, filed November 27, 2014. This case does not address or touch on issues of tribal sovereignty or government. Said another way, this matter does not hinder any of the eight tribes' ability to self-govern or impinge their sovereignty as independent tribes. This context is important for the discussions below.

Before addressing the specifics regarding the immunity issue raised by Defendant, a discussion regarding subject matter and personal jurisdiction is appropriate. Defendant claims that this Court lacks jurisdiction because there is not diversity between the parties or federal claims alleged. *See, Doc. 1*, p6-7. This position is inconsistent with the remainder of Defendant's Motion to Dismiss where it claims that is a separate sovereign entity. Either Defendant is a resident of New Mexico or a separate sovereign entity – it cannot be both.

In the same breath, Defendant claims that Indian **Tribes** are not "citizens" for purpose of diversity jurisdiction. *See, Doc. 1*, p7. Defendant, however, is not a tribe. Rather, Defendant is a New Mexico Corporation. Again, Defendant cannot do both.

I. This Court Has Jurisdiction.

Federal courts have regularly presided over issues involving tribes. This jurisdiction has extended in to the realm of employment matters which are at issue in the current case. For instance, tribal farms have been held subject to OSHA standards. *See, Donovan v Couer d'Alene Tribal Farm*, 751 F.2d 1113. The EEOC may sue a tribe for employment violations. *See, EEOC v Peabody*

Western Coal Company, 400 F.3d 774 (2005). The FLSA applies to tribal businesses. *See, Chao v Matheson*, 2007-WL-1830738. Finally, permitting employees of a tribe to formally organize is permitted under the NLRA if the tribe allows. *See, NLRB and Local Union 1385 v Pueblo of San Juan*, 276 F.3d 1186 (2002).

In addition to employment statutes applying to tribes, the courts have held that tribal businesses are **not** exercises in self-government. *See, Myrick v Devils Lake Sioux Manufacturing Corp.*, 718 F.Supp.753 (1989); *see also, San Manuel Indian Bingo and Casino v NLRB*, 475 F.3d 1306 (2007). Since they are not self-government exercises, there is no sovereignty impingement.

Finally, ENIPC, Inc. has previously subjected itself to the jurisdiction non-tribal courts in a breach of a lease agreement and did not raise sovereignty as an issue. *See*, Exhibit 2, attached.[1] Therefore, ENIPC, Inc. has availed itself to jurisdictions outside of the tribal cases and should do so here as well.

II. Tribal Court is Not Appropriate.

Defendant claims that this matter should be heard in tribal court. Specifically, Defendant claims that the proper court to hear Plaintiff's Complaint is the Ohkay Owingeh tribal court. *See, Doc. 6*, p16. In making this claim, Defendant relies in *Williams v Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959) for the assertion that the "termination occurred on Ohkay Owingeh lands and involves a tribal consortium that has Ohkay Owingeh has a member" the tribal court of Ohkay Owingeh has jurisdiction. *See, Doc. 6*, p16. Thus, it appears that Defendant is claiming that the tribal court should have jurisdiction because the firing occurred on tribal lands. As discussed below, the analysis is not that cut and dry.

[1] Plaintiff is aware that the attached Exhibit 2 is a state court matter. However, the issue involves a breach of contract, as is the case here. Also, of note, Defendant has requested that this matter be remanded to tribal court in its relief. The attached is to show that Defendant has availed itself to courts outside of tribal courts for breach of contract matters.

First, the termination did not occur on tribal land. As shown in Exhibit 1, the termination letter that ended Plaintiff's employment was hand delivered to him at his address – in Santa Fe, New Mexico. Santa Fe is not tribal land. Therefore, the termination did not occur on tribal land which undercuts the basis of Defendant's desire to access tribal court.

Second, this is a breach of contract and wrongful termination case and neither claim will impinge or affect tribal sovereignty. As discussed above, federal courts have repeatedly resolved employment disputes regarding tribal corporate entities and the federal employment statutes have been deemed to apply to tribes. Further, the New Mexico Supreme Court has specifically discussed jurisdiction over contract claims and **could not see** "how concurrent jurisdiction would impinge upon tribal sovereignty [in the breach of contract case]." *See, Tempest Recovery Services, Inc. v Belone*, 2003-NMSC-019 at {15}. Thus, the tribal court is not the appropriate court and the Motion to Dismiss should be denied.

III. Tribal Exhaustion Rule

In the current case, Defendant asserts that tribal court remedies must be exhausted before Plaintiff can proceed with the current action in the current court. *See, Doc. 6*, p19-20. Specifically, Plaintiff's **only** contention is that "[b]ecause 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 this forum." *See, Doc. 6*, p20. The underlying dispute referenced by Defendant is the act of termination. *Id.* Again, this sole statement falls far short of demonstrating that (1) comity exists and (2) tribal court is appropriate.

"The basic dilemma the doctrine of comity is meant to solve is that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority derived." Thus, comity "is the recognition which one nation allows within its territory to the legislative, executive

or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *See, MacArthur v San Juan County,* 497 F.3d 1057, 1067 (2007) (citations omitted). As shown above, tribes as well as their corporate entities have repeatedly been found to fall under federal court jurisdiction for employment related matters. Therefore, that recognition should also be made here.

In the current case, the tribal court has no jurisdiction over the breach of contract claim or the wrongful termination claim asserted by Plaintiff.

> "In *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Supreme Court laid down a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. There are, nevertheless, two narrow exceptions to the general rule against tribal authority over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts leases, or other arrangements."
>
> Second, "[a] tribe may ... 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."

See, MacArthur v San Juan County, 497 F.3d 1057, 1067-8 (2007) (citations omitted).

In this case, Plaintiff did not enter in to an agreement with an Indian tribe. Rather, Plaintiff's employment agreement was with a corporate entity – which is subject to federal court jurisdiction. This corporate entity required Plaintiff to participate in mediation prior to filing this matter. *See, Doc. 6, exhibit A-3,* p5. Plaintiff requested mediation, however, on the eve of mediation, Defendant cancelled the mediation session entirely and the present matter was filed. Thus, even under the terms of the breached contracted, Plaintiff attempted to resolve this matter pursuant to the corporate entity's request in the contract and Defendant refused to participate at

all. Thus, the next step is the current litigation.

Under the second part of the Supreme Court's rule in *Montana*, "[t]ribal assertion of regulatory authority over nonmembers must be connected to the right of the Indians to make their own laws and be governed by them." *See, MacArthur, supra* at 1075. This the exception requires that "the conduct of non-Indians on fee lands within [the] reservation ... has some direct effect on the **political integrity, the economic security, or the health or welfare** of the tribe." *Montana,* 450 U.S. at 566, 101 S.Ct. 1245 (emphasis added). The current matter – breach of contract and wrongful termination – do not have any "effect on the political integrity, the economic security or the health or welfare" of any tribe or ENPIC, Inc. Rather, the current matter is before the court consistent with other federal courts analyzing employment matters involving tribes as well as their corporate entities.

For the tribal exhaustion rule to **properly** be applied, three things must be satisfied: " (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." *See, Kerr-McGee Corp v. Farley*, 27 Envtl. L. rep. 21,522, 97 CJ C.A.R. 1085, 97 CJ C.A.R. 1376, 1507 (citing National Farmers, 471 U.S. at 856-7, 105 S.Ct. at 2454); *see also, National Farmers Union Ins. Co. v Crow Tribe of Indians*, 471 U.S. 845 (1985). Defendant fails to demonstrate that **any** of these are at issue. Said another way, no congressional policy of self-government is advanced with a tribal court hearing the current breach of contract and wrongful termination claims – and Defendant has failed to demonstrate otherwise in its current Motion to Dismiss. There is no need for a full record to be developed in tribal court on this matter – and Defendant has failed to demonstrate otherwise in the current Motion to Dismiss. Likewise, there is no need for tribal expertise in the current matter –

and Defendant has failed to demonstrate otherwise in the current Motion to Dismiss. As shown, the tribal exhaustion rule is not applicable to the current matter.

The single reason Defendant offers the Court is that "the underlying dispute arose on Ohkay Owingeh lands". *See, Doc 6*, p20. Notably, however, this assertion is false. The termination occurred at Plaintiff's personal residence – in Santa Fe, New Mexico. *See,* Letter of Termination, attached as Exhibit 1. Since the termination did not occur on Ohkay Owingeh lands as Defendant claims, the basis for Defendant's reliance on the tribal exhaustion rule is undermined. Since no basis for the tribal exhaustion rule applies, the current Motion to Dismiss should be denied.

Finally, Defendant makes an assertion that it preserves its defense regarding "failure to state a claim." *See*, Doc. 6, p21. This argument does not require a response by Plaintiff. However, to the extent a response is required, Defendant should be required to file all defenses pursuant to the Federal Rules of Civil Procedure.

WHEREFORE Plaintiff requests that Defendant's Motion be denied and for such other relief this Court deems just and proper.

Respectfully Submitted:

Electronically Signed
/s/ JoHanna Cox, January 14, 2015
JoHanna Cox, Esq.
PMB #251
5901 J Wyoming Blvd NE
Albuquerque, NM 87109
Phone: 505.225.8001
Fax: 505.214.5674
Email: johannacoxlaw@yahoo.com
Counsel for Plaintiff.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on January 14, 2015, a copy of the foregoing was electronically filed with the Court and the following parties or counsel were served by electronic mail as follows:

Peter Chestnut
121 Tijeras Ave NE, Ste 2001
Albuquerque, NM87102
Fx: 505.843.9249
Email: pcc@chestnutlaw.com

Electronically Signed
/s/ JoHanna Cox January 25, 2015
JoHanna C. Cox