UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JEANNINE BRUGUIER,

Plaintiffs,

v.

Court File No.
16-cv-604

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, and HENRY ST. GERMAINE,

Defendants.

JONI R. THEOBALD,

Plaintiffs,

v.

Court File No.
16-cv-605

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, L.D.F. BUSINESS DEVELOPMENT CORPORATION, and HENRY ST. GERMAINE,

Defendants.

Defendants' Joint Brief in Support of Joint Motion to Dismiss

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Introduction

By these cases, Plaintiffs Jeannine Bruguier and Joni R. Theobald (collectively, the "Employees"), both former employees of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"), seek federal intervention in a purely tribal affair. But federal law does not support the Employees' claims against the Tribe, President Henry St. Germaine,[1] and the L.D.F. Business Development Corporation (the "Corporation") (collectively, the "Employers").[2] Instead, federal law affirmatively blocks the relief the Employees request. Therefore, the Court must dismiss these cases.

Statement of the Facts and Case

These cases involve the Tribe and its members. *Bruguier Charge*, No. 443-2016-00482 at 4 (Jan. 25, 2016) (Exhibit A); *Bruguier Compl.* ¶ 10; *Theobald Compl.* ¶¶ 12, 15. They involve government employees who serve the Tribe and its members. *Bruguier Compl.* ¶¶ 10-11; *Theobald Compl.* ¶¶ 11-13. They involve the Tribe acting in a supervisory role over those employees. *See Bruguier Compl.* ¶¶ 20, 22; *Theobald Compl.* ¶¶ 25, 27. And they only allege conduct occurring within the Tribe's reservation. *See Bruguier Compl.* ¶¶ 14-17, 19-21, 23-26; *Theobald Compl.* ¶¶ 11, 16-21, 23, 25-30, 32, 39. From start to finish, the Employees' allegations involve an on-reservation tribal affair.

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[1] Since the Employees filed these cases, President Joseph Wildcat was elected into the presidency. President St. Germaine no longer holds office.

[2] Despite the moniker they chose for convenience, the Employers refute that they are, in fact, employers for purposes of Title VII.

The Tribe employed Bruguier and Theobald as the Tribal Administrator and the Gikendaasowin-Education and Workforce Development Director, respectively. *Bruguier Compl.* ¶¶ 10-11; *Theobald Compl.* ¶¶ 11-12. But following a review of their conduct, the Tribal Council resolved to terminate both Employees for cause. *Bruguier Compl.* ¶¶ 20, 22; *Theobald Compl.* ¶¶ 25, 27.

The Employees filed separate charges with the Equal Employment Opportunity Commission (the "EEOC"), both alleging sex and race discrimination and retaliation. *Bruguier Charge* at 1; *Theobald Charge*, No. 443-2016-00481 at 1 (Jan. 25, 2016) (Exhibit B). The Employees brought their charges against the Tribe, and only the Tribe. *Bruguier Charge* at 3; *Theobald Charge* at 3.

When the EEOC dismissed both charges for lack of jurisdiction, *Bruguier Dismissal*, No. 443-2016-00482 at 1 (June 3, 2016) (Exhibit C); *Theobald Dismissal*, No. 443-2016-00481 at 1 (June 3, 2016) (Exhibit D), the Employees filed complaints with the Court. *Bruguier Compl.*; *Theobald Compl.* But whereas Bruguier lodged her EEOC charge solely against the Tribe, her *complaint* names the Tribe *and* President St. Germaine as defendants to her Title VII claims. *Compare Bruguier Charge* at 3, *with Bruguier Compl.* ¶¶ 29-46. Theobald's complaint also departs from her EEOC charge by including the Corporation and President St. Germaine, in addition to the Tribe. *Compare Theobald Charge* at 3, *with Theobald Compl.* ¶¶ 40-57. In addition to these expanded Title VII claims, the Employees lodge a host of additional state-law claims. *Bruguier Compl.* ¶¶ 5-6, 47-59; *Theobald Compl.* ¶¶ 6-7, 58-74. The Employers move the Court to dismiss all of these claims.

Argument

I. The Court Must Dismiss All of the Employees' Claims for Lack of Subject-Matter Jurisdiction.

a. The Court must dismiss the Title VII Claims in both complaints against the Tribe, President St. Germaine, and the Corporation—Counts I, II, III, and VI—because they are frivolous.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). If a claim lies outside this limited jurisdiction, "Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss a claim for lack of subject matter jurisdiction." *Hallinan v. Fraternal Order of Police of Chicago*, 570 F.3d 811, 820 (7th Cir. 2009).

"It is standard learning that federal question jurisdiction arises only when the complaint standing alone establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294, 298 (7th Cir. 2003). But relevant to the Employees' cases, "[a] claim invoking federal-question jurisdiction . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (quotation omitted); *see also In re African-American Slave Descendants Litigation*, 471 F.3d 754, 757 (7th Cir. 2006) ("A frivolous federal law claim cannot successfully invoke federal jurisdiction."); *McCurdy v. Sheriff of Madison Cnty.*, 128

F.3d 1144, 1145 (7th Cir. 2002) ("A frivolous suit does not engage the jurisdiction of the federal courts."). Dismissal is warranted where a federal claim is "insubstantial, implausible, foreclosed by prior decisions . . . , or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation v. Oneida Cnty.*, 414 U.S. 661, 667 (1974).

i. The Title VII Claims in Both Complaints Against the Tribe—Counts I, III, and IV—Are Meritless, Because Title VII Expressly Excludes "Indian Tribes."

The Seventh Circuit has, on numerous occasions, affirmed dismissals of claims for lack of subject-matter jurisdiction where the claims were raised under color of federal law but were nevertheless without merit. In *Sanders-Bey v. United States*, the court concluded that claims purportedly raised under "numerous federal statutes and constitutional provisions" did not establish federal-question jurisdiction, because "none of them entitle[d the plaintiff] to the relief he s[ought]." 267 Fed. App'x 464, 465 (7th Cir. 2008). Similarly, in *Lawrence v. Interstate Brands*, the court concluded that the plaintiff had failed to establish federal-question jurisdiction under 42 U.S.C. § 1983 because the right he claimed he was deprived of—a particular outcome in an administrative proceeding—was not protected by the Constitution or laws. 278 Fed. App'x 681, 684 (7th Cir. 2008).

Jagla v. Lasalle Bank is directly analogous to the Employees' claims against the Tribe. 253 Fed. App'x 597 (7th Cir. 2007). In *Jagla*, the Seventh Circuit concluded that the plaintiff failed to establish federal-question jurisdiction under two federal laws. *Id.* at 598-99. First, and of less import, the plaintiff relied on 18 U.S.C. § 1746. *Id.* That law, the court explained, does not create a private right of

action. *Id.* Second, and relevant here, the plaintiff relied on the Fourteenth Amendment. *Id.* The defendants, however, were private parties, and the court explained that the Fourteenth Amendment applies only to government action. *Id.*

As in *Jagla*, the Employees bring their Title VII claims against the Tribe, which is plainly not subject to Title VII claims. Under Title VII, "employer" is defined as

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, *but such term does not include . . . an Indian tribe*.

42 U.S.C. § 2000e(b) (emphasis added). As the Employees readily admit, the Tribe "is a federally recognized Indian Tribe." *Bruguier Compl.* ¶ 3; *Theobald Compl.* ¶ 3. Thus, just as in *Jagla*, where the Fourteenth Amendment plainly did not apply to or create a right against the private party defendants, Title VII plainly does not apply to or create a right against the Tribe. As in *Jagla*, the Court must dismiss Counts I, III, and IV against the Tribe for lack of subject-matter jurisdiction.

Indeed, it appears that every circuit court to consider the question has held that Title VII claims against tribes fail for lack of jurisdiction. For example, in *Johnson v. Choctaw Management/Services Enterprise*, the Tenth Circuit affirmed a dismissal of Title VII claims against an entity entitled to status as an "Indian tribe" under the statute for lack of subject-matter jurisdiction. 149 Fed. App'x 800, 801-03 (10th Cir. 2005). The Fifth, Eighth, Ninth, and Tenth Circuits have all reached the same conclusion on this point. *E.g.*, *Thomas v. Choctaw Mgmt. Servs. Enter.*, 313

F.3d 910, 911 (5th Cir. 2002) ("Title VII's express exemption of Indian tribes from employer status eschews subject matter jurisdiction of the federal courts to hear employment discrimination complaints . . . ."); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1124-26 (10th Cir. 1999); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187-88 (9th Cir. 1998); *Nawls v. Shakopee Mdewakanton Sioux Cmty. Gaming Enter.*, No. 15-2769 ADM/HB, 2016 WL 593514 at *1 (D. Minn. Feb. 12, 2016), *aff'd* ___ Fed. App'x ___ (8th Cir. 2016).

Following the reasoning underlying the Seventh Circuit's decision in *Jagla*, and in keeping with Fifth, Eighth, Ninth, and Tenth Circuit precedent, this Court should dismiss Counts I, III, and IV in both complaints against the Tribe for lack of subject-matter jurisdiction.

ii. The Title VII Claims in Both Complaints Against the Corporation—Counts I, III, and IV—Are Meritless Because the Corporation Is Also an "Indian Tribe" Under Title VII.

The Ninth and Tenth Circuits have both observed that Congress's purpose in exempting "Indian tribes" from Title VII "was to promote the ability of sovereign Indian tribes to control their own economic enterprises." *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 375 (10th Cir. 1986); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (adopting the Tenth Circuit's explanation in *Dille*). Relying on this reasoning, those courts have collectively upheld numerous dismissals of Title VII claims against various types of entities formed by Indian tribes.

In *Dille*, the Tenth Circuit affirmed a dismissal of Title VII claims against a council comprised of 39 Indian tribes, formed for the purpose of managing the tribes' energy resources. 801 F.2d at 374, 377. The court reasoned that the council was formed for the precise purpose contemplated by Congress: "to advance the economic conditions of its thirty-nine member tribes." *Id.* at 375. The court went on to note that "[b]ecause the council is entirely comprised of the member tribes and the decisions of the council are made by the designated representatives of those tribes, [it] falls directly within the scope of the Indian tribe exemption that Congress included in Title VII." *Id.* at 376.

Similarly, In *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, the Tenth Circuit affirmed a dismissal of Title VII claims against a tribal housing authority for lack of subject-matter jurisdiction. 199 F.3d 1123, 1124, 1126 (1999). The court reasoned that the housing authority was entitled to status as an "Indian tribe" because it was "an enterprise designed to further the economic interests of the . . . tribe, and the tribe ha[d] exclusive control over the appointment and removal of its decisionmakers." *Id.* at 1125.

In *Pink*, the Ninth Circuit affirmed a dismissal of Title VII claims against a nonprofit organization incorporated by two Indian tribes for lack of subject-matter jurisdiction. 157 F.3d at 1187. It observed that the nonprofit

> served as an arm of the sovereign tribes, acting as more than a mere business. [Its] board of directors consisted of two representatives from each [tribe]. Like the collection of tribes in *Dille*, [it] was organized to control a collective enterprise and therefore falls within the scope of the Indian Tribe exemption of Title VII.

Id. at 1188.

In *Charland v. Little Six, Inc.*, the Eighth Circuit affirmed a dismissal of a Title VII claim against a tribal gaming enterprise for lack of subject-matter jurisdiction, noting that the enterprise was "an extension of the [tribe's] governing body, the General Council." 198 F.3d 249 (Table) (8th Cir. 1999). The court reasoned that "[v]oting members of [the enterprise's] board of directors [had to] be [tribal] members and [the enterprise's] meetings [were] required to be held as General Council meetings." *Id.*

In *Nawls*, another case from the Eighth Circuit, the district court dismissed a Title VII claim against a gaming enterprise for lack of subject-matter jurisdiction, noting that "Title VII claims cannot be brought against Indian tribes *or their agencies or businesses*." 2016 WL 593514 at *1 (quotation omitted). The Eighth Circuit affirmed. *Nawls v. Shakopee Mdewakanton Sioux Cmty. Gaming Enter.*, ___ Fed. App'x ___ (8th Cir. 2016).

And in *Thomas*, the Fifth Circuit affirmed a dismissal of Title VII claims against a sole proprietorship of an Indian tribe. 313 F.3d at 911-12. Notably, the Fifth Circuit concluded that, because the sole proprietorship was entitled to status as an "Indian tribe," the plaintiff's Title VII claims were "*wholly without merit and thus legally frivolous*." *Id.* at 911 (emphasis added).

In this case, the Corporation mirrors both the purposes and structures of the entities in *Dille*, *Duke*, *Pink*, *Charland*, *Nawls*, and *Thomas*. The Tribal Council created the Corporation to "promote the economic development of the [Tribe]," the

precise purpose for which Congress exempted Indian tribes from Title VII. *Compare Dille*, 801 F.2d at 375, *with* Tribal Council Res. 370(12) (Exhibit E); L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 5 (Exhibit F).[3] The Tribe solely owns the Corporation, L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 6, and as in *Charland* and *Pink*, the Corporation serves as an arm of the Tribe. *Compare Charland*, 198 F.3d at 249; *Pink*, 157 F.3d at 1188, *with* L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 5. Moreover, as in *Duke*, the Tribal Council "has exclusive control over the appointment and removal of its decisionmakers." *Compare* 199 F.3d at 1125, *with* L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 7; L.D.F. Bus. Dev. Corp. By-Laws art. 8. And as in *Dille*, the appointed board members make all decisions pertaining to operation of the Corporation. *Compare* 801 F.2d at 376, *with* L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 7; L.D.F. Bus. Dev. Corp. By-Laws art. 3 (Exhibit G). Thus, the Corporation "falls within the scope of the Indian Tribe exemption of Title VII." *Pink*, 157 F.3d at 1188.

Following the reasoning of the Seventh Circuit's decision in *Jagla*, and in keeping with unbroken Fifth, Eighth, Ninth, and Tenth Circuit precedent, this Court should dismiss Counts I, III, and IV in both complaints against the Corporation for lack of subject-matter jurisdiction.

[3] "On a motion to dismiss under Rule 12(b)(1), the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt." *Bastien v. AT & T Wireless Servs., Inc.*, 205 F.3d 983, 990 (7th Cir. 2000).

iii. The Title VII Claims in Both Complaints Against President St. Germaine—Counts II—Are Meritless Because Seventh Circuit Precedent Precludes Title VII Claims Against Supervisors and Agents in Their Individual Capacity.

As both Supreme Court and Seventh Circuit precedent underline, federal claims that are foreclosed by prior precedent cannot form the basis for subject-matter jurisdiction. *See Oneida Indian Nation*, 414 U.S. at 667; *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1256 (7th Cir. 1994) (stating that a claim must be dismissed if it is "no longer open to discussion" (quotation omitted)). *Walton v. Neslund*, 248 Fed. App'x 733 (7th Cir. 2007), is instructive. In that case, the plaintiff brought federal and state-law claims against his retained criminal-defense attorney. *Id.* at 733. In affirming the dismissal of his claims, the court noted that the plaintiff's federal claim under 42 U.S.C. § 1983 was "patently frivolous" because prior precedent established that "under 42 U.S.C. § 1983 . . . a lawyer is not a state actor when he performs the traditional function of counsel to a defendant in a criminal case." *Id.* at 733-34.

As in *Walton*, the Employees' Title VII claims against President St. Germaine are no longer open to discussion. "It is by now well established in [the Seventh Circuit] that a supervisor does not, in his individual capacity, fall within Title VII's definition of employer." *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1168 (7th Cir. 1998) (quotation omitted); *see also Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Bryson v. Chicago State University*, 96 F.3d 912, 917 (7th Cir. 1996). Indeed, "[t]he Court of Appeals for the Seventh Circuit has held repeatedly that Title VII does not authorize suits filed against supervisors in their individual capacities." *Sullivan v.*

Village of McFarland, 457 F. Supp. 2d 909, 914 (W.D. Wis. 2006); *see also Matthews v. Marten Transp., Ltd.*, 354 F. Supp. 2d 899, 903 (W.D. Wis. 2005) ("Title VII does not create individual liability for either supervisory agents of the employer or owners of the business.").

Here, the Employees sued President St. Germaine as an official of the Tribe. *Bruguier Compl.* ¶ 4; *Theobald Compl.* ¶ 5. While he certainly exercised supervisory authority over the Employees, he was not their employer. The Employees do not allege otherwise. *Bruguier Compl.* ¶ 4; *Theobald Compl.* ¶ 5. Indeed, they expressly allege that they were employed by the Tribe, and Theobald alleges that she was also employed by the Corporation. *Bruguier Compl.* ¶¶ 3, 10-11; *Theobald Compl.* ¶¶ 3-4, 11-12. Because President St. Germaine was not the Employees' employer, Title VII claims cannot lay against him. *See Sullivan*, 457 F. Supp. 2d at 914; *Matthews*, 354 F. Supp. 2d at 903; *see also Sattar*, 138 F.3d at 1168; *Williams*, 72 F.3d at 555; *Bryson*, 96 F.3d at 917.

As the Seventh Circuit did in *Walton*, this Court should follow well-settled controlling precedent and dismiss Counts II in both complaints against President St. Germaine for lack of subject-matter jurisdiction.[4]

[4] In addition to failing for lack of subject-matter jurisdiction, case law supports dismissal of all of the Employees' Title VII claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. The Employers move for dismissal under both rules, and the Court may consider dismissal under either. *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 (7th Cir. 1995) ("This Court ordinarily may modify a dismissal for lack of jurisdiction and convert it to a dismissal on the merits if warranted."); *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992) ("If a defendant's Rule 12(b)(1) motion is an indirect attack on the merits of the plaintiff's claim, the court may treat the

b. The Court should dismiss the state-law claims against the Tribe and the Corporation—Counts V, VI, and VII in both complaints and Count VIII in Theobald's complaint—for lack of subject-matter jurisdiction.

Under 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The Employees rely on this statute to hang numerous state-law claims from their Title VII claims. *Bruguier Compl.* ¶¶ 47-59; *Theobald Compl.* ¶¶ 58-74. But where a "federal law claim cannot successfully invoke federal jurisdiction . . . [,] it cannot provide a perch on which to seat nonfederal claims in the name of the federal courts' supplemental jurisdiction." *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 757-58 (7th Cir. 2006) (citations omitted).

Here, the Employees have not raised a colorable federal claim under Title VII. Thus, they have failed to invoke this Court's jurisdiction. Accordingly, this Court *cannot* exercise supplemental jurisdiction over the Employees' state-law claims and must dismiss them for lack of subject-matter jurisdiction.

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motion as if it were a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.").

II. The Court Must Dismiss All of the Claims Raised Against All of the Employers Under Controlling Federal Indian Law.

a. The Court should dismiss all the Claims against the Tribe and Corporation—Counts I, III, IV, V, VI, and VII in both complaints and Count VIII in Theobald's complaint—because the Tribe and Corporation are immune from suit.

"Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030-31 (2014) (quotation and citation omitted). The Supreme Court has "treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver [by the tribe])." *Id.*

The bar for congressional abrogation or tribal waiver of immunity is high. The Supreme Court has "often held" that for Congress to abrogate tribal immunity, it "must unequivocally express that purpose." *Id.* at 2032 (quotation omitted). "Similarly, to relinquish its immunity, a tribe's waiver must be clear." *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citations and quotations omitted).

i. The Tribe and Corporation are immune from suit.

Here, there is no dispute that the Tribe is a federally recognized Indian tribe, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019, 5,021 (Jan. 19, 2016), as the Employees expressly acknowledge, *see Bruguier Compl.* ¶ 3; *Theobald Compl.* ¶ 3. It is therefore immune from suit unless Congress or the Tribe itself expressly allows a suit.

Moreover, this Court has recognized that an Indian tribe's sovereign immunity extends to tribal corporations. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010) ("In the absence of a clear waiver, suits against tribes (*and tribal corporations*) are barred by sovereign immunity." (emphasis added)); *see also Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 n.7 (7th Cir. 2011) (noting that the parties' assumption regarding tribal corporation's sovereign immunity was "compatible with the general assumption prevailing among courts and commentators").

In *Wells Fargo*, this Court considered the immunity status of a similarly situated corporation of the Lac du Flambeau Band of Lake Superior Indians. 677 F. Supp. 2d at 1057, 1061. This Court noted that the corporation was chartered by the Tribe, wholly-owned by the Tribe, and established under tribal law. *Id.* at 1057. Like the corporation in *Wells Fargo*, the Corporation here was created by the Tribe. Tribal Council Res. 370(12). It, too, is wholly-owned by the Tribe and established under tribal law. Tribal Council Res. 370(12); L.D.F. Bus. Dev. Corp. Articles of Incorporation art. 6. Thus, like the corporation in *Wells Fargo*, the Corporation here shares the Tribe's sovereign immunity. "The upshot is this: Unless Congress has authorized [the Employees'] suit[s]" or the Tribe or the Corporation have waived their own immunity, the Supreme Court's "precedents demand that [these cases] be dismissed." *Bay Mills*, 134 S. Ct. at 2032.

ii. No waiver allows these cases.

The Employees correctly abstain from arguing that Title VII waives the Tribe's immunity. *Barker v. Menominee Nat. Casino*, 897 F. Supp. 389, 394 (E.D. Wisc. 1997) ("Nor has Congress statutorily waived the Tribe's immunity in Title VII employment cases."). Instead, the Employees identify two purported waivers by the Tribe and the Corporation themselves. Neither argument holds water.

First, the Employees rely on a sue-and-be-sued clause in the corporate charter of a *different* Section 17 corporation that they have not named in this suit. *Bruguier Compl.* ¶ 5; *Theobald Compl.* ¶ 6. Certainly, one corporation cannot waive another's immunity. In fact, circuit courts agree that waivers in tribal corporate charters—limited-purpose subordinate entities of a tribe—do not even flow upstream to the actions of tribes acting in their governmental capacities. *See, e.g.*, *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998); *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d 560, 563 (8th Cir. 1995).

In *Rosebud Sioux*, a tribe sued a contractor, which in turn raised counterclaims against the tribe for breach of contract and various torts. 50 F.3d at 561, 563. The contractor argued that a sue-and-be-sued clause in the tribe's corporate charter supported its tort claims against the Tribe. *Id.* at 562-63. On review, the Eighth Circuit disagreed:

> [W]e find that the 'sue and be sued clause' in the Tribe's corporate charter does not operate as a general waiver of the Tribe's immunity from suit. The record shows that the Tribe entered into the contract as a sovereign governmental entity. The construction contract was signed by the tribal chairman, and the Tribe oversaw the contract through the Tribal Council and the Medical Center Management Committee. There

> is no evidence that [the contractor] was dealing with a tribal corporate entity.

Id. at 563 (citation omitted).

As in *Rosebud Sioux*, the Employees dealt directly with the Tribe as a sovereign governmental entity. The Employees held government offices, to which they were hired by the Tribal Council. They were supervised by the Tribal Council, as evidenced by the Employees' own admission that the Tribal Council terminated their employment. *Bruguier Compl.* ¶¶ 20, 22; *Theobald Compl.* ¶¶ 25, 27. The Employees plead no facts suggesting that they worked for the Section 17 tribal corporation. Thus, its sue-and-be-sued clause cannot waive the Tribe's immunity or the immunity of a different tribal corporation.

Second, the Employees rely on an unrelated tribal ordinance to waive the Tribe's immunity. *Bruguier Compl.* ¶ 5; *Theobald Compl.* ¶ 6. That ordinance states: "The provisions of the Federal Labor Act, United States Code Title 29, and any rules or orders of any Federal administrative agency promulgated thereunder, are hereby incorporated as tribal law as if fully set forth herein." Lac du Flambeau Tribal Code § 47.102, *available at* https://www.ldftribe.com/uploads/files/Court-Ordinances/CHAP47%20Labor%20Ordinance.pdf.

Importantly, *none* of the Employees' claims arise under Title 29, which concerns labor. Title VII is a chapter of Title 42 of the United States Code, which concerns public health and welfare. And all of the Employees' other claims are brought under Wisconsin statute or common law. By its terms, whatever waiver of

sovereign immunity Section 47.102 effectuates does not waive immunity to the claims the Employees plead.

But even if the Section 47.102 silently reached across more than a dozen Titles of the U.S. Code to include the Employees' claims, the language in Section 47.102 is not the "clear" waiver of sovereign immunity that *C&L Enterprises* requires. In *C&L Enterprises*, the tribe was a party to a contract with a binding arbitration clause, which stated that "[a]ll claims or disputes . . . shall be decided by arbitration" and that "arbitral awards may be reduced to judgment in accordance with applicable proceedings in any court having jurisdiction thereof." 532 U.S. at 415, 419. The Supreme Court noted that the clause also referenced the American Arbitration Association Rules, which provided that parties to those rules "shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction." *Id.* Finally, the Court noted that Oklahoma had jurisdiction under a combination of (1) the arbitration contract's choice-of-law clause, which effectively adopted Oklahoma law, and (2) Oklahoma's Uniform Arbitration Act, which stated that "making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." *Id.* at 415-16, 419 (quotations omitted). Consequently, the Court found that a binding arbitration clause served as a clear waiver of the tribe's immunity. *Id.* at 418.

Here, Section 47.102 incorporates Title 29 of the United States Code. But unlike in *C&L Enterprises*, Section 47.102 does not bind the Tribe to *any* forum for

dispute resolution. *See id.* at 415, 419. In fact, it makes no reference to the Tribe, *at all*. Nor does it provide or reference any rules or statutes that provide for "consent" of the Tribe to entry of judgment. *See id.* Unlike in *C&L Enterprises*, the Tribe did not clearly waive its immunity with respect to any suit under Section 47.102.

Because the Tribe and the Corporation have not waived their sovereign immunity and Congress has not abrogated that immunity, as in *Bay Mills*, the Supreme Court's "precedents demand that [these cases] be dismissed." 134 S. Ct. at 2032.

b. The Court should dismiss all of the Employees' claims for failure to exhaust their tribal-court remedies.

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain attributes of sovereignty over both their members and their territory." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (footnote omitted) (citations and quotation omitted). "Tribal courts play a vital role in tribal self-government . . . ." *Id.* (citation omitted). And "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16.

Accordingly, the Supreme Court, "concerned with implementing Congress's policy of tribal self-government," *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993), established the tribal-court-exhaustion rule. That rule

"requires litigants, in some instances, to exhaust their remedies in tribal courts before seeking redress in federal courts." *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 195 (7th Cir. 2015). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N.R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991); *accord Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003) ("Exhaustion is mandatory, however, when a case fits within the policy . . . ."). In the Seventh Circuit, application of the rule turns on the fact-sensitive inquiry into "whether the issue in dispute is truly a reservation affair." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993); *accord Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, ___ F. Supp. 2d ___, ___, 2014 WL 12489707, at *9 (W.D. Wis. 2014).

For example, in *Altheimer*, the Seventh Circuit addressed whether tribal-court exhaustion was required in a contract dispute involving a non-tribal corporation, its attorneys, and a tribal corporation. 983 F.2d at 806-07. The court did not require tribal-court exhaustion because, *inter alia*, both parties agreed through a choice-of-law clause that the contract would be interpreted under Illinois law, so compelling exhaustion "would place before the tribal court a dispute that must be resolved by laws of distant jurisdictions." *Id.* at 814. The court also noted that "the dispute d[id] not concern a tribal ordinance as much as it d[id] state and federal law." *Id.* at 815. But "[m]ore importantly, [the court] believe[d] the application of the tribal exhaustion rule would not serve the policies articulated" by

the Supreme Court, because, through contractual provisions regarding venue and jurisdiction, the tribal corporation "wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum." *Id.*

Similarly, in *Stifel*, the tribe entered into a bond transaction evidenced by a collection of contracts. 2014 WL 12489707 at *2. In certain of the contracts, the parties included provisions agreeing to litigate disputes in Wisconsin state and federal courts, and others stated that Wisconsin law would apply. *Id.* at *10. This Court, analogizing to *Altheimer*, explained that the dispute could not properly be viewed as "truly a reservation affair." *Id.*

In contrast to *Altheimer* and *Stifel*, the Employees plead no facts suggesting a tribal intent to "avoid characterization" of their employment with and termination by the Tribe as "a reservation affair." *Altheimer*, 983 F.2d at 815. Rather, they expressly invite examination of tribal immunity and tribal ordinances. As the Supreme Court has stated, "[a]djudication of such matters by any nontribal court . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut.*, 480 U.S. at 16.

Furthermore, these cases involve significantly different circumstance from *Altheimer* and *Stifel*. Whereas those cases involved commercial relationships between tribal parties and non-tribal parties, these cases involve a dispute solely between the Tribe and its member governmental employees. The Employees, who are tribal members, only complain of actions—including official actions of the Tribal Council, the Tribe's governing body—that occurred on the Tribe's reservation. And

these cases implicate the sovereign authority of the Tribe to determine who administers its governmental services and how those services are administered. That is nothing if not "truly a reservation affair." *Altheimer*, 983 F.2d at 814. For these reasons, the Court should dismiss the Employees' claims for failure to exhaust their tribal court remedies.

III. Numerous Additional Grounds for Dismiss of the Employees' Claims Exist.

a. The Court should dismiss all claims against the Corporation–Counts I, III, IV, V, VI, VII, and VIII in Theobald's complaint—for failure to state a claim upon which relief may be granted.

"To survive a motion to dismiss, the plaintiffs' complaint need contain only a short and plain statement of the claim showing that the pleader is entitled to relief." *Olson v. Champaign Cnty.*, 784 F.3d 1093, 1098 (7th Cir. 2015) (quotation omitted)); *accord* Fed. R. Civ. P. 8(a)(2). But "[w]hile specific facts are not necessary, the complaint 'must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 1098-99 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation omitted)) (omission in original). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* at 1099. "A claim should survive a Rule 12(b)(6) motion to dismiss [*only*] if the complaint contains well-pled facts—that is, not just legal conclusions—that permit the court to infer more than the mere possibility of misconduct." *Id.*

Here, Theobald has alleged precisely *one* fact related to the Corporation: that it is "a joint employer" with the Tribe. *Theobald Compl.* ¶ 4. Throughout the remainder of her complaint Theobald does not allege any facts related to her

"employment" with the Corporation, or a single fact suggesting an act of misconduct by the Corporation. In fact, she does not even allege that the Corporation terminated her "employment."

While Theobald was not required to advance "specific facts," she was required to "give the [Corporation] fair notice of what the claim[s] [are] and the grounds upon which [they] rest[]." *Olson*, 784 F.3d at 1098-99 (quotation omitted). Without a single allegation related to the conduct of the Corporation, Theobald has certainly not given it fair notice. *Id.* at 1099. Because they fail to state claims against the Corporation, the Court should dismiss Counts I, III, IV, V, VI, VII, and VIII of Theobald's complaint against the Corporation.

b. The Court should dismiss all claims against President St. Germaine—Counts II in both complaints—for failure to join an indispensable party.

To decide a motion under Rule 12(b)(7) of the Federal Rules of Civil Procedure, courts undertake a two-step analysis:

> First, a court must determine if a person is a necessary party. A person is necessary if in the person's absence a court cannot accord complete relief to those already parties or if the person claims an interest relating to the subject of the action and disposition in their absence may impair their ability to protect that interest or leave any of those already parties subject to a substantial risk of multiple or inconsistent obligations. If a court deems a party necessary, it should be joined if feasible.
>
> However, if the party cannot be joined the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or if it should be dismissed because the absent party is indispensable.

> The factors a court considers when it determines whether a party is indispensable are first to what extent a judgment rendered in the party's absence may be prejudicial to the party or those already parties to the action, second the extent to which the judgment can be shaped to lessen or avoid prejudice, third whether the judgment rendered in the party's absence will be adequate and fourth whether the plaintiff will have an adequate remedy if the court dismisses the action.

CFI Wisconsin, Inc. v. Hartford Fire Ins. Co., 230 F.R.D. 552, 553-54 (W.D. Wis. 2005) (citations and quotation omitted).

Here, Counts II in both complaints ask the court to order President St. Germaine to reinstate the Employees. *Bruguier Compl.* ¶ 37; *Theobald Compl.* ¶ 48. But as the Employees explain, the Tribal Council—not President St. Germaine—terminated their employment. *Bruguier Compl.* ¶ 22; *Theobald Compl.* ¶ 27. Under tribal law, President St. Germaine does not have unilateral authority to reinstate the Employees. Thus, in the Tribal Council's absence, the Court "cannot accord complete relief" to the Employees. *CFI Wisconsin*, 230 F.R.D. at 553-54. The Tribal Council is, therefore, a necessary party. But as the legislative body of the Tribe, the Tribal Council is immune from this suit, which means it is an indispensable party that "cannot be joined." *Id.* at 554.

In the absence of the Tribal Council, the equities weigh in favor of dismissing Counts II in both complaints. First, granting the Employees their requested relief would prejudice President St. Germaine by imposing on him an obligation to exercise governmental power that he does not legally possess. *Id.* Second, aside from denying relief, the judgment the Employees request cannot be shaped to "lessen or avoid" this prejudice. *Id.* Third, because the Tribal Council must exercise its own

authority to reinstate the Employees, and because it will not be bound by a judgment against President St. Germaine, in its absence, no relief will be adequate. Finally, the Employees can still obtain an "adequate remedy" by pursuing reinstatement under tribal law. *Id.* In this case that involves a purely tribal governmental affair, a tribal-law remedy is not only an adequate alternative; it is most appropriate. Because the Employees have failed to join an indispensable party concerning Counts II in both complaints, the Court should dismiss those Counts.

c. The Court should dismiss the state-law claims against the Tribe and the Corporation—Counts V, VI, and VII in both complaints and Count VIII in Theobald's complaint—under 28 U.S.C. § 1367(c).

Under 28 U.S.C. § 1367(c), a court "may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." In *Groce v. Eli Lilly & Co.*, the Seventh Circuit acknowledged that "it is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial." 193 F.3d 496, 501 (7th Cir. 1999). This presumption is harnessed only by the Seventh Circuit's admonition that courts "should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *Id.* (quotations omitted).

Ross ex rel. Ross v. Board of Education, 486 F.3d 279 (7th Cir. 2007), provides an apt analogy. There, one month after the district court entered summary judgment against the plaintiff in a discrimination case brought under the

Individuals with Disabilities Education Act, the Americans with Disabilities Act, and the Rehabilitation Act, the plaintiff filed a second case, raising new claims under the ADA, the Rehabilitation Act, and the Civil Rights Act. The second case also lodged state-law claims of medical malpractice, battery, and violations of the state mental health code. *Id.* at 282, 285. The district court held that claim preclusion and res judicata barred the federal claims in the second case, and dismissed the state-law claims under 28 U.S.C. § 1367(c). *Id.* The Seventh Circuit affirmed. *Id.* at 285. It emphasized that the federal claims were dismissed at an "early stage" in the litigation "on a purely legal ground." *Id.* at 285.

These cases—still at the pleading stage—are far from trial, so the "usual practice" of dismissal, *Groce*, 193 F.3d at 501, is appropriate. Indeed, dismissal at this early stage supports *Groce*'s considerations of "judicial economy, convenience, fairness, and comity." *Id.* As in *Ross*, the parties—and the Court—have yet to invest significant resources in these cases. *Ross*, 486 F.3d at 285; *Groce*, 193 F.3d at 501. And as in *Ross*, the Employees' Title VII claims fail on purely legal grounds. *Ross*, 486 F.3d at 285. Because there is no reason for an Article III court of limited jurisdiction to review state-law claims concerning purely reservation affairs, this Court should decline to exercise supplemental jurisdiction over Counts V, VI, and VII in both complaints and Count VIII in Theobald's complaint.

Conclusion

The Employees seek federal intervention in purely tribal governmental affairs. But federal law does not support—and in fact expressly denies—their claims for relief. Therefore, the Employers respectfully request that the Court dismiss the Employees' claims.

Dated: November 7, 2016

/s/ Andrew Adams III

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Certificate of Service

I hereby certify that on November 7, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: November 7, 2016

/s/ Andrew Adams III

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