**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW MEXICO**

**DINE DEVELOPMENT CORPORATION**
**and NOVA CORPORATION**

**v.** **Case No. 1:17-CV-00015**

**ERIN FLETCHER**

**APPLICATION FOR PRELIMINARY INJUNCTION**

Plaintiffs Dine Development Company (DDC) and NOVA Corporation (NOVA)— two tribal entities that are economic development arms of the Navajo Nation—are entitled to sovereign immunity under well-established law recognizing that Indian tribes and tribal entities are immune from suit. Despite the well-established immunity of entities like DDC and NOVA, Defendant Erin Fletcher, a former employee of DDC and NOVA, initiated arbitration against DDC and NOVA before the American Arbitration Association (AAA). If Fletcher proceeds with her claims before the AAA, DDC and NOVA will suffer irreparable harm defending themselves in a forum that lacks jurisdiction over Fletcher's claims. DDC and NOVA thus request that the Court enter a preliminary injunction barring Fletcher from proceeding with her claims before the AAA pending resolution of DDC and NOVA's Complaint for Declaratory and Injunctive Relief [Doc. No. 1].

**BACKGROUND**

**A. Dine Development Corporation**

DDC is a holding company that establishes, invests in, owns, and operates subsidiary corporations for purposes of creating private sector job opportunities for members of the Navajo Nation. DDC was formed in 2004 by the Navajo Nation Council "as a wholly-owned corporation of the Navajo Nation." *See* Resolution of the Navajo Nation Council CJY-34-04 (NNC

Resolution), attached as Exhibit A. The Articles of Incorporation for DDC, which was incorporated under the Navajo Nation Corporation Act, make clear that DDC is wholly owned by the Navajo Nation. As set forth in the Articles

> The Navajo Nation for its benefit shall own all shares of the Corporation. No individual or legal entity other than the Navajo Nation shall acquire any shares in the Corporation and its interest may not be sold, transferred, pledged, or hypothecated, either voluntarily or involuntarily.

Article IV of Articles of Incorporation for the Dine Development Corporation, attached as Exhibit B. When DDC distributes dividends, those dividends "shall be distributed with 60% of dividends declared going to the General Fund of the Navajo Nation and 40% of dividends declared going to the Navajo Nation Business and Industrial Development Fund." *Id.*

Pursuant to the NNC Resolution, DDC is "an instrumentality of the Navajo Nation and is entitled to all of the privileges and immunities of the Navajo Nation." *Id.* Consequently, "[t]he corporation and its directors, officers, employees and agents while acting in their official capacities are immune from suit." *Id.* Under certain circumstances, and after satisfying specific pre-requisites, DDC is permitted to waive its sovereign immunity. As set forth in the NNC Resolution

> The Board of Directors of the Corporation with thirty (30) days written notice to the Navajo Nation Council of the intention of the Board to waive sovereign immunity, may by resolution duly adopted waiving the immunity of the corporation, the directors, officers, employees or agents for any particular agreement, matter of transaction as may be entered into to further purposes of the corporation.

*Id.* DDC's sovereign immunity is thus *only* validly waived if (1) DDC's Board of Directors adopts a resolution waiving immunity; and (2) DDC's Board of Directors gives the Navajo Nation Council notice of its intention to waive its immunity. DDC's Board of Directors has not adopted any resolution waiving DDC's sovereign immunity with respect to any claim related to

or arising from Fletcher's employment with either entity. *See* Affidavit of Calista Pinnecoose at ¶ 7, attached as Exhibit C.

**B. NOVA Corporation**

NOVA is an IT services company that was incorporated in 2004 under the Navajo Nation Corporation Act. *See* Articles of Incorporation for NOVA Corporation (the "NOVA Articles"), attached as Exhibit D. Per the terms of the NOVA Articles, Dine Development Corporation is the parent corporation of NOVA and owns all shares of NOVA. *See id.* at Article IV; *and see* Pinnecoose Affidavit at ¶ 4.

The NOVA Articles make clear that NOVA, like DDC, is an instrumentality of the Navajo Nation that is entitled to sovereign immunity. As set forth in Article VIII

> The Corporation is an instrumentality of the Navajo Nation and is entitled to all of the privileges and immunities of the Navajo Nation, except as provided in this Article. The Corporation and its directors, officers, employees and agents while acting in their official capacities are immune from suit, and the assets and other property of the Corporation are exempt from any levy or execution.

*Id.* NOVA is permitted to waive its sovereign immunity in certain situations and subject to specific prerequisites. Any waiver by NOVA "must be expressed and must be agreed to by the Board of Directors prior to the time any alleged cause of action accrues." *Id.* at (B). The waiver must "be in the form of a resolution duly adopted by the Board of Directors" and the resolution must "identify the party or parties for whose benefit the waiver is granted, the agreement or transaction and the claims or classes of claims for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the Corporation may be brought." *Id.* NOVA has no authority to waive DDC's sovereign immunity, and DDC has no authority to waive NOVA's sovereign immunity.

### C. Erin Fletcher's Employment

This controversy arises from Fletcher's employment with NOVA and DDC. Fletcher was hired by NOVA on April 1, 2014 as a Vice President for Human Relations (VP of HR). Fletcher's employment with NOVA ended on June 30, 2015 as a result of corporate restructuring. Fletcher then became an employee of DDC. Fletcher worked for DDC until June 9, 2016. Fletcher's employment with DDC was terminated on June 9, 2016 due to corporate restricting within DDC that resulted in the elimination of Fletcher's position.

While working as the VP of HR for NOVA and later as an employee of DDC, Fletcher's job duties consisted solely of human resources work. Fletcher did not work directly on any projects that NOVA or DDC were involved in, did not bill her time to any specific contract or project, and had no involvement in the performance of any contracts held by NOVA.

Fletcher contends in her Arbitration Complaint that she entered into an Employment Agreement with NOVA that governs her relationship with both NOVA and DDC. DDC is not a signatory to that agreement (and the agreement is thus not binding on DDC), and there are numerous issues regarding the manner in which the agreement was created that render the agreement unenforceable even as to NOVA. But assuming for purposes of the sovereign immunity issues raised in this Application only that the Employment Agreement is valid and binding on both NOVA and DDC, the Employment Agreement was not authorized by the Board of Directors of either NOVA or DDC. Thus, the arbitration provision contained in the Employment Agreement does not waive NOVA or DDC's sovereign immunity as it does not comply with the specific waiver requirements set forth in the articles of incorporation for both entities.

**D. The Arbitration**

On or about November 30, 2016, Fletcher initiated arbitration against DDC and NOVA before the AAA by filing the Arbitration Complaint.[1] In her Arbitration Complaint Fletcher seeks approximately $640,000 in monetary damages for alleged wrongdoing related to Fletcher's employment with NOVA and DDC. Fletcher claims that DDC and NOVA have waived their sovereign immunity by participating in the United States Small Business Administration's 8(a) Business Development Program (the "8(a) Program") federal contracts and that they have waived their sovereign immunity as a result of the Employment Agreement. *See* Arbitration Complaint at ¶5-6. Fletcher asserts numerous claims against DDC and NOVA arising from and relating to her employment with both companies. *See id.* at ¶10-120.

On December 9, 2016, the AAA notified DDC and NOVA that Fletcher had paid a required filing fee and that the AAA was thus commencing its administration of the arbitration. On account of their sovereign immunity, neither DDC nor NOVA filed an answer with the AAA. Instead, DDC and NOVA filed this declaratory judgment action seeking to bar Fletcher from proceeding with her claims before the AAA. On January 10, 2017, the AAA stayed its administration of Fletcher's arbitration on account of a provision in the AAA's rules that provide for an automatic stay when a party to an arbitration provides documentation that judicial intervention has been sought related to the arbitration. Absent a court order or an agreement by the parties, the AAA will automatically resume its administration of the arbitration at the end of the 60 day automatic stay. Thus, in the absence of a court order,[2] the arbitration will

[1] While the Arbitration Complaint was filed by an attorney, Fletcher has made clear to DDC and NOVA that she is no longer represented by that attorney.

[2] DDC and NOVA have requested that Fletcher agree to a stay of the arbitration pending resolution of this declaratory judgment action to avoid the necessity of preliminary injunctive relief, but Fletcher has refused to agree to such a stay. *See* January 10, 2017 email from Erin Fletcher, attached as **Exhibit E.**

recommence on or about March 10, 2017. Injunctive relief from this Court is thus necessary to avoid the irreparable harm that DDC and NOVA will face if the arbitration continues.

**DISCUSSION**

DDC and NOVA are economic development arms of the Navajo Nation. Both are entitled to the full sovereign immunity afforded to the Navajo Nation, and are thus immune from suit in federal court, state court, and private forums such as the AAA. Despite the existence of this sovereign immunity, Fletcher is attempting to take action against DDC and NOVA before the AAA. Fletcher should be enjoined from continuing her claims before the AAA and she should be enjoined from asserting any claims against DDC or NOVA in state or federal Court.

## I. TRIBAL SOVEREIGN IMMUNITY GENERALLY

It does not appear that Fletcher contests that DDC and NOVA are entitled to sovereign immunity in the absence of a valid waiver of that immunity. Fletcher's Arbitration Complaint expressly acknowledges the existence of DDC and NOVA's general entitlement to sovereign immunity. *See* Complaint at ¶6. Even absent such an acknowledgement by Fletcher, federal law clearly establishes that the Navajo Nation and tribal corporations like DDC and NOVA are entitled to tribal sovereign immunity. *See e.g. Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 575 (10th Cir. 1984) ("The fact that Indian tribes enjoy limited sovereign immunity from suit is well-established."); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) ("Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities."). The United States Supreme Court has recently re-affirmed this principle, noting that "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Native Indian Cmty,* 134 S.Ct. 2024, 2030 (2014).

It is beyond dispute that the Navajo Nation and its tribal entities are entitled to sovereign immunity. *See Kerr McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985) (recognizing the Navajo Nation's sovereign immunity with respect to the authority to levy taxes, and stating that the "legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question"). And the Navajo Nation's own laws, specifically the Navajo Sovereign Immunity Act, establish that "[t]he Navajo Nation is a sovereign nation which is immune from suit." 1 N.N.C. §553(A). The Navajo Nation is thus "acknowledged to have the immunities and privileges available to federally recognized Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such tribes." *Id.*

While clear that DDC and NOVA are entitled to sovereign immunity, DDC and NOVA are permitted to waive their immunity. But, "it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotations omitted); *and see Native Am. Distrib.,* 546 F.3d at 1293. To move forward with any claim against DDC or NOVA, Fletcher must point to some express and unequivocal waiver of DDC and NOVA's sovereign immunity for the particular types of claims that Fletcher has asserted. Fletcher cannot do so.

## II. DDC AND NOVA ARE ENTITLED TO INJUNCTIVE RELIEF DUE TO THEIR SOVEREIGN IMMUNITY

### A. Standard for Relief.

To obtain a preliminary injunction, DDC and NOVA must show that "immediate and irreparable injury, loss, or damage will result" unless the order is issued. Fed. R. Civ. P. 65(b). They must demonstrate 1) likelihood of success on the merits; 2) the likelihood that they will suffer irreparable harm if an injunction is not issued; 3) that the balance of equities tips in their favor; and 4) the injunction is in the public interest. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d

1140, 1157 (10th Cir. 2011); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). Additionally,

> there is one slight wrinkle to [the] four-factor test. If the party seeking the preliminary injunction can establish the last three factors listed above, then the first factor becomes less strict—i.e., instead of showing a substantial likelihood of success, the party need only prove that there are questions going to the merits . . .so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.

*Prairie Band of Potawatomi Indians*, 253 F.3d at 1246-47 (quotation marks and citations omitted). "While economic loss is usually insufficient to constitute irreparable harm, the imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe & Dunlevy*, 640 F.3d at 1157 (quotation marks and citation omitted). As demonstrated here, DDC and NOVA have satisfied each necessary element. The Court should thus issue a preliminary injunction enjoining Fletcher from taking any action to prosecute the claims she has filed with the AAA or from otherwise asserting any claims against DDC or NOVA that relate to or arise from Fletcher's employment.

**B. DDC and NOVA are Likely to Prevail on the Merits of Their Claim that the AAA Lacks Jurisdiction Because Fletcher Cannot Point to any Express and Unequivocal Waiver of DDC or NOVA's Sovereign Immunity.**

With respect to the first factor of the four-part test for assessing the necessity of injunctive relief, there is a substantial likelihood that DDC and NOVA will prevail on the merits of their Complaint for Declaratory Judgment and Injunctive Relief. DDC and NOVA have sovereign immunity, and Fletcher cannot point to any valid waive of that sovereign immunity. DDC and NOVA are thus likely to prevail on their request that the Court enter a declaratory judgment recognizing DDC and NOVA's sovereign immunity and enjoining Fletcher from proceeding before the AAA or otherwise making any claim against DDC or NOVA that arises from or is related to her employment.

**i. The Small Business Administration's Section 8(a) Business Development Program Does Not Waive Immunity for Fletcher's Claims.**

Fletcher contends that NOVA and DDC have waived their sovereign immunity by participating in the Small Business Administration's Section 8(a) Business Development Program. Fletcher is wrong. As to DDC, Fletcher is wrong because DDC does not participate in the Section 8(a) Program. As to NOVA, Fletcher is wrong because her claims do not arise from NOVA's Section 8(a) Program activities, and NOVA thus has not waived its sovereign immunity with respect to any of her claims.

**a. DDC Does Not Participate in the Section 8(a) Program.**

A prerequisite of Fletcher's argument that participation in the Section 8(a) Program constitutes a waiver of sovereign immunity is that DDC must be a participant in the program. But, DDC does not participate in the Section 8(a) Program. *See* Pinnecoose Affidavit at ¶10. It is NOVA, not DDC, that has participated in the Section 8(a) Program. *See id.* Since it does not participate in the Section 8(a) Program, DDC could not have waived its sovereign immunity under that Program, and Fletcher should be enjoined from making any claims against DDC on account of DDC's sovereign immunity.

**ii. NOVA's Prior Participation in the SBA's 8(a) Business Development Program Does Not Waive NOVA's Sovereign Immunity.**

NOVA, unlike DDC, was a participant in the Section 8(a) Program. NOVA graduated from the program on May 4, 2014—a month after the start of Fletcher's hire date and long before the December 1, 2015 date written on the Employment Agreement[3] which forms the basis of some of Fletcher's claims. *See* Pinnecoose Affidavit at ¶15. As a result of this graduation, NOVA is no longer eligible to procure new contracts under the program and, with the exception of the first month of Fletcher's employment, NOVA did not and could not procure any new Section 8(a) contracts while Fletcher was employed by NOVA. *See id.* at ¶16.

[3] There are numerous issue, which are not pertinent to the sovereign immunity issues raised in this case, regarding the validity of the Employment Agreement, the manner in which it was created, and the actual date on which it was signed. DDC and NOVA expressly reserve their rights to raise these issues at a later date if necessary.

Fletcher's assertion that NOVA's participation in the Section 8(a) Program constitutes a waiver of NOVA's sovereign immunity appears to stem from a federal regulation that provides that to participate in the Section 8(a) Program, a tribal company's articles of incorporation "must contain express sovereign immunity waiver language, or a 'sue and be sued' clause which designates United States Federal Courts to be among courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance." 13 C.F.R. 124.109(c)(1). Fletcher contends that because NOVA participates in the Section 8(a) Program (and because its Articles of Incorporation contain this waiver language), she is entitled to bring suit against NOVA.

In so arguing, Fletcher fails to recognize that NOVA's waiver of sovereign immunity is limited to "matters relating to SBA's programs." Fletcher's claims are not matters relating to SBA's programs—they are matters relating to her employment with NOVA. Thus, Fletcher's reliance on NOVA's Section 8(a) waiver is misplaced.

There appears to only be one case that has analyzed the scope of waiver under the Section 8(a) Program. That case, a non-binding opinion from a federal district court in the District of Maine, *Rassi v. Fed. Program Integrators, LLC*, 69 F.Supp.3d 288, 292 (D.Maine 2014), concluded that racial discrimination and retaliation claims can be within the scope of Section 8(a) waiver *if* the claims arise from the defendant's performance of or participation in the Section 8(a) program. As the court explained, 13 C.F.R. 124.109(c)(1) "encompasses [plaintiff's] racial discrimination claim as a 'matter' which relates to [the tribal entity's] 'program participation' insofar as [the entity] is alleged to have violated SBA anti-discrimination regulations *in the performance of its* §8(a) contracts." *Id.* (emphasis added). The court similarly concluded that the sovereign immunity waiver required by §124.109(c)(1) permitted the plaintiff's claim for retaliation under the False Claims Act because the alleged retaliation was "a matter which relates to [the entity's] participation, i.e. its performance of its §8(a) contracts." *Id.* Notably, the actions that the *Rassi* plaintiff complained of (and which thus formed the basis of her retaliation claim), was "illegal conduct involving the performance of [the defendant's] §8(a) contracts." *Id.* at 290.

Even if *Rassi* is viewed as persuasive precedent (which it should not be for the reasons explained below), Fletcher's claims here are so dissimilar from the claims at issue in *Rassi* that an opposite result must be reached. None of Fletcher's claims involve allegations that NOVA (or DDC) violated the law in the course of their performance of Section 8(a) Program contracts. Instead, the claims all stem solely from Fletcher's employment relationship with NOVA and have no connection (other than the fact that NOVA performs some work under the Section 8(a) Program) to Section 8(a) Program Contracts. NOVA only waived its sovereign immunity with respect to claims that relate to Section 8(a) Program participation, not the types of claims that Fletcher asserts here.

Fletcher's first cause of action is for breach of contract—a claim stemming from the alleged breach of the Employment Agreement. *See* Arbitration Complaint at ¶ 19. But the Employment Agreement is completely unconnected to any Section 8(a) Program in which NOVA participated. Fletcher's second cause of action is for "adverse employment action without just cause." Assuming for the sake of argument that such a cause of action even exists, the claim is based solely on the termination of Fletcher's employment with *DDC* and thus has nothing to do with any of NOVA's Section 8(a) Program contracts. Fletcher's third, fourth, and fifth causes of action are for: adverse, hostile, harassing, and intimidating working environment (Count III); discrimination based on race, ethnicity, or national origin (Count IV); and discrimination on the basis of sex (Count V). There are no allegations in Plaintiff's Arbitration Complaint linking the supposed hostile environment or discrimination to NOVA's performance of any Section 8(a) Program contracts. Fletcher's sixth and final cause of action is for retaliation. But, Fletcher does not identify any actions she took for which she was supposedly retaliated against that are connected to NOVA's performance of contracts under the Section 8(a) Program.

While Fletcher fails to make any allegations that link any of her claims to NOVA's performance of 8(a) Program contracts, Fletcher makes clear allegations linking her claims to her employment with NOVA and DDC. It is thus evident that Fletcher's claims arise not from some

unique contract performance issue that is related to 8(a) Programs, but instead from Fletcher's ordinary employment relationships with NOVA and DDC.

To the extent that *Rossi* could be read to have allowed a claim merely because the employee was employed by an entity that had waived immunity for claims related to Section 8(a) Programs, *Rossi* is wrong. It is well-established in the Tenth Circuit Court of Appeals that "a waiver of tribal immunity must be clear and unequivocal; it cannot be implied." *Santana v. Muscogee (Creek) Nation*, 508 Fed.Appx. 821 (2013). Applying the limited waiver required for 8(a) Program participation to every claim that an employee of an 8(a) Program participant might conceive stretches an 8(a) waiver from a clear and unequivocal waiver of claims that directly relate to Section 8(a) contracts to an implied waiver that is utterly inappropriate. If the intent of a Section 8(a) waiver was to waive immunity for *everything* a Section 8(a) participant does, then the federal regulation would have to clearly and unequivocally provide for such a broad waiver. Since 13 C.F.R. 124.109(c)(1) does not require waiver of all claims that might be asserted against a Section 8(a) participation, the waiver provided for under that regulation must be narrowly read to only waive immunity for claims that have a direct connection to Section 8(a) contracts. Fletcher thus cannot establish that NOVA's 8(a) Program participation constitutes an express and unequivocal waiver of NOVA's immunity from claims related to Fletcher's employment.

**iii. The Employment Agreement Does Not Waive Sovereign Immunity.**

Fletcher also appears to be asserting that the arbitration provision in the Employment Agreement constitutes a waiver. But, the Employment Agreement on which Fletcher relies, an agreement that if even valid[4] is only between Fletcher and NOVA, is not a valid waiver of NOVA's sovereign immunity (and is certainly not a waiver of DDC's sovereign immunity given that DDC is not even a party to the contract). In order for the Employment Agreement to

[4] There are a number of issues regarding the enforceability of the Employment Agreement that are not pertinent at this time. DDC and NOVA expressly reserve their rights to challenge the enforceability of the Employment Agreement.

constitute a valid waiver of sovereign immunity, there would need to be a resolution of NOVA's Board of Director's that: (1) authorized the waiver; (2) identified Fletcher as a person for whose benefit waiver was granted; (3) specified the agreement or transaction and claims or classes of claims for which the waiver was granted; (4) identified the property of NOVA subject to execution in the event of a judgment; and (5) identified the court or courts in which suit could be brought. *See* NOVA Articles at Article VIII. There is no such resolution by NOVA's Board of Directors. *See* Pinnecoose Affidavit at ¶13-14. The Employment Agreement's arbitration provision thus cannot constitute a waiver of NOVA's sovereign immunity.

**iv. DDC and NOVA are Likely to Prevail on the Merits.**

Given that there is no clear and unequivocal waiver of DDC or NOVA's sovereign immunity for claims arising from or related to Fletcher's employment with DDC or NOVA, both DDC and NOVA are substantially likely to prevail on the merits of their request for a declaratory judgment and permanent injunctive relief.

**C. Injunctive Relief Will Protect the Status Quo.**

The second part of the test for issuing a preliminary injunction—preservation of the status quo and prevention of irreparable injury—is satisfied here. The primary purpose of a preliminary injunction is to preserve the last uncontested status existing before the litigation. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (stating that the primary goal of a preliminary injunction is to preserve the status quo). In *Dominion Video Satellite, Inc. v. EchoStar Satelllite Corp.*, 269 F.3d 1149 (10th Cir. 2001), the Tenth Circuit was presented with a situation where a contract provided a right to refuse to provide services if certain criteria were not satisfied. The defendant had, nonetheless, provided such services without requiring all criteria to be satisfied until four days prior to being sued. For purposes of the status quo the Tenth Circuit stated:

> In determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights.
>
> Here, the last uncontested status of the parties was the four years in which EchoStar activated Dominion subscribers regardless of whether the subscriber had met the QRS criteria. Even if EchoStar had the legal right under the contract to refuse activating new, non-QRS Dominion subscribers, the reality was that EchoStar activated Dominion subscribers whether or not they qualified for QRS status.

*Id.* at 1155 (citation omitted). Thus, it is not necessarily a snapshot of the situation on the ground the instant a lawsuit is filed that forms the status quo; rather, the status quo consists of the "last uncontested status between the parties which preceded the controversy." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 n.8 (10th Cir. 1991) (quotation marks and citation omitted), *overruled in part on other grounds by O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004).

In requesting this injunctive relief, DDC and NOVA simply seek to maintain the uncontested status that existed before Fletcher altered the status quo by initiating proceedings before the AAA. Prior to the initiation of those proceedings, DDC and NOVA were not subject to litigation by Erin Fletcher arising from or related to her employment, and they were thus inuring the benefits of their immunity from suit—namely an absence of any need to defend against claims that are barred by their immunity. Accordingly, the preliminary injunction being sought here seeks to preserve—not modify—the last uncontested status between the parties and should be granted.

**D. DDC and NOVA Will Suffer Irreparable Harm if Fletcher is Not Enjoined From Proceeding With Her Claims.**

Unless an injunction is issued restraining Fletcher from prosecuting her Arbitration Complaint, DDC and NOVA will suffer irreparable harm. DDC and NOVA will suffer harm because they will incur substantial inconvenience, unrecoverable expenses, and delay in

adjudicating claims in a forum that plainly lacks jurisdiction to hear them. The Tenth Circuit Court of Appeals has expressly recognized that this type of harm justifies a preliminary injunction. *Seneca-Cayuga Tribe of Okla.*, 874 F.2d at 716 (concluding that two tribes were entitled to a preliminary injunction enjoining a state court suit because the tribes would be "forced to expend time and effort on litigation in a court that does not have jurisdiction over them, and risk inconsistent binding judgments from state and federal courts"). And in the analogous context of enjoining tribal court proceedings when no tribal court jurisdiction exists, courts have held that exactly these considerations amount to a showing of irreparable harm. *See, e.g., Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000); *Chiwewe v. Burlington N. & Santa Fe Rwy. Co.*, 2002 WL 31924768, at *2 (D.N.M. 2002).

Given that the AAA plainly lacks jurisdiction over DDC and NOVA, injunctive relief is appropriate to ensure that DDC and NOVA are not subject to the costs and burdens associated with defending themselves when they are in fact immune from suit.

**E. The Balance of Equities Weighs in DDC and NOVA's Favor.**

The balance of equities weighs heavily in favor of granting a preliminary injunction. DDC and NOVA's face certain harm if Fletcher is not enjoined from moving forward with her claims before the AAA. Fletcher, on the other hand, will suffer no harm if a preliminary injunction is issued. If, after granting preliminary relief, the Court were to ultimately find in Fletcher's favor, Fletcher will have suffered no harm as a result of the stay of the AAA proceedings and will be able to move forward with her claims. That is, in the absence of a preliminary injunction, DDC and NOVA will be forced to expend time and resources defending themselves and will never be able to recover those losses. Fletcher, in the presence of a preliminary injunction, will be able to simply pick up where she left off if the injunction is ultimately lifted.

**F. Enjoining Fletcher Serves the Public Interest.**

As the Tenth Circuit Court of Appeals has explained, there is a "paramount federal policy that Indians develop independent sources of income and strong self-government." *Seneca-Cayuga*, 874 F.2d at 716. There is a strong public interest in preserving tribal sovereignty, and the issuance of a preliminary injunction will further that public interest. Allowing Fletcher to litigate against DDC and NOVA in the AAA when the immunity of DDC and NOVA is being resolved is not in the public's interest. *See Crowe & Dunlevy*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over Crowe, a non-consenting, nonmember, is in the public's interest.").

## CONCLUSION

As is fully established above, DDC and NOVA will likely prevail on the merits of their jurisdictional challenge, and will suffer irreparable injury if they are nevertheless forced to litigate with Fletcher. As a consequence, DDC and NOVA are plainly entitled to the relief sought, and their request for a preliminary injunction should be granted. DDC and NOVA thus respectfully request that this Court grant a preliminary injunction restraining Fletcher from continuing any further proceedings before the AAA or otherwise asserting any claims related to or arising from her employment. DDC and NOVA respectfully request that an expedited hearing be held on this Application if the Court deems a hearing to be necessary.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/ Jeremy K. Harrison*

Jennifer A. Noya (jnoya@modrall.com)
Jeremy K. Harrison (jkh@modrall.com)
*Attorneys for Plaintiffs Dine Development Corporation and NOVA Corporation*
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

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