UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James V. Nguyen,

Plaintiff,

Civil No. 18-522 (SRN/KMM)

vs.

Amanda G. Gustafson; Henry M. Buffalo, Jr., in his official capacity as Tribal Court Judge of the Shakopee Mdewakanton Sioux Community Tribal Court; the Shakopee Mdewakanton Sioux Community Tribal Court,

Defendants.

DEFENDANTS TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY AND JUDGE HENRY M. BUFFALO, JR.'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This is the *fourth* Court presented with the question of whether a state court or the Shakopee Mdewakanton Sioux Community Tribal Court ("Tribal Court" or "SMSC Tribal Court") can and should address the marriage-dissolution proceeding between Amanda Gustafson and James Nguyen, which includes deciding child custody and child support for their minor child. Gustafson and the parties' minor child are members of the Shakopee Mdewakanton Sioux Community ("Community" or "SMSC"), a federally recognized Indian tribe.

California and Minnesota state courts have either stayed or dismissed cases filed by Nguyen in favor of the Tribal Court exercising jurisdiction. The Tribal Court accepted jurisdiction and denied Nguyen's motion to dismiss for lack of jurisdiction. Nguyen sought interlocutory appellate review of the Tribal Court's decision from the Tribal Court of Appeals, but discretionary review was denied. The Tribal Court determined that the jurisdictional appeal could be heard after a final judgment was issued.

Without exhausting his tribal court remedies—as federal law requires—Nguyen filed this action against Gustafson, the Tribal Court, and the Tribal Court's Judge, Judge Henry M. Buffalo, Jr. ("Tribal Court Judge") (collectively, the Tribal Court and the Tribal Court Judge are referred to as the "Community Defendants"). Nguyen asserts that all of the courts before this one have incorrectly decided that the Tribal Court has jurisdiction over the dissolution proceeding involving a tribal member and a member child. He is requesting that this Court preliminarily enjoin the Tribal Court (the only

court actually proceeding to resolve the dispute) from continuing to exercise jurisdiction while this suit is pending.

This Court should refuse Nguyen's request. Nguyen (1) has failed to show irreparable harm, (2) does not have the balance of the equities in his favor, (3) has not shown a substantial likelihood of succeeding on the merits, and (4) has not shown that a preliminary injunction would be in the public's interest. On the merits, Nguyen's claim will likely be dismissed because (1) the Tribal Court and the Tribal Court Judge are immune from suit; (2) the Tribal Court of Appeals has not considered Nguyen's jurisdictional challenge, which is required before a federal court can decide whether the exercise of jurisdiction was proper; (3) the Community has jurisdiction to address divorce proceedings involving a tribal member and child custody and child support issues for a member child; and (4) although the Court should decline to review the Tribal Court's finding of personal jurisdiction over Nguyen, that finding was correct.

Because Nguyen has not met his burden to establish the elements required to obtain the extraordinary remedy of a preliminary injunction, the Court should deny his motion.

BACKGROUND

Gustafson and Nguyen's Marriage and Child

As found by the Tribal Court, Gustafson is an enrolled member of the Community. J. Miller Decl., Ex. F at 2, ECF 7-6. Nguyen is not. *Id.* They met each other through their mutual friend Mike Bryant, a member of the Community who lives on the Community Reservation. *Id.* at 14. Nguyen served as caretaker for Bryant (who is disabled) from

2007 to 2010. *Id.* Nguyen and Gustafson were married on June 13, 2014 in Las Vegas, Nevada. *Id.* at 2. They have a minor child, A.N., who was born later that year. *Id.* A.N. is also an enrolled member of the Community. *Id.*

Three Tribal Court Proceedings in 2014

Nguyen has actively participated in three separate Tribal Court proceedings related to his marriage and the care of the member child, preceding the current dissolution action. Shortly before the parties were married in 2014, the Tribal Court initiated conservatorship-of-estate-and-person proceedings over Gustafson. *Id.* at 3. Gustafson had been subject to conservatorship proceedings dating back to 2007 when she turned 18. *Id.* The conservatorship was closed in 2012, but reopened in April 2014 after someone (likely Nguyen) reached out to the Community concerned about Gustafson. *Id.* at 14. Nguyen participated and supported the 2014 proceedings until they were closed in September 2014. *Id.* at 3, 30.

Four months after Nguyen and Gustafson were married, on October 8, 2014, Gustafson filed a dissolution petition in Tribal Court. *Id.* at 3. While Nguyen objected to the Tribal Court's subject-matter and personal jurisdiction in his answer and counter-petition, he actively participated in the merits of the litigation. *Id.* Gustafson moved the Tribal Court to hold that the marriage was void due to her being subject to a conservatorship. *Id.* at 3-4. Nguyen opposed the motion. *Id.* at 4. The Tribal Court ruled in Nguyen's favor and held the marriage valid. *Id.* Nguyen never filed a motion to dismiss the proceedings. *Id.* The parties ultimately filed a stipulation to dismiss on June 26, 2015, after they reconciled. *Id.*

The Community's Family and Child Services Department filed a petition for a child in need of services regarding the couple's minor child in November 2014. *Id.* The Tribal Court appointed a guardian ad litem for the child. *Id.* Both Nguyen and Gustafson "actively participated in those proceedings and in the counseling and related social services required by those proceedings." *Id.* The proceedings were closed in July 2015, but the Tribal Court ordered that the child would remain a ward of the Tribal Court. *Id.* at 4-5.

Ties Between the Marriage and the Community

Financial distributions from the Community to Gustafson supported the family. According to Nguyen, he and Gustafson were not employed during the marriage. *Id.* at 15. Nguyen testified in the California court that he elected not to work because Gustafson "has plenty of money," which came from per-capita payments made by the Community to Gustafson. *Id.* Nguyen testified that these per-capita payments were the family's primary source of income. *Id.* at 32. That income allowed the couple to purchase property including houses and vehicles. *Id.*, Ex. D at 4-5, ECF 7-4.

The Community provided benefits and services to the family. The parties received medical insurance and medical care from the Community. *Id.*, Ex. F at 32. Nguyen was eligible for these benefits from the Community because of his marriage to Gustafson. *Id.* Their minor child, as an enrolled member of the Community, is eligible for and has received daycare, preschool, social services, and health care from the Community. *Id.*

Throughout the marriage, Gustafson maintained a residence with her family members on the Reservation. *Id.* at 25-26. Nguyen and Gustafson also periodically stayed

at Bryant's home. *Id.* at 24, 27. Gustafson's legal address has remained at her grandmother's home on the Reservation since she turned 18. *Id.* She used that address for her tax returns, driver's license, and passport. *Id.* at 25, 27. Nguyen used a reservation address as well. *Id.* at 31. He testified that he used the address "to avoid sales tax." *Id.*

Two State Courts Decline to Hear the Case, and the Tribal Court Accepts It

On June 28, 2017, Nguyen filed a petition in California Superior Court for divorce, child custody, spousal support, and a division of marital property. *Id.* at 5. Gustafson filed a petition in the Tribal Court on July 20, 2017, which initiated the divorce action that Nguyen is challenging in federal court ("Action"). *Id.* at 6. In her petition, Gustafson seeks a judgment granting her custody of their child, reserving the issues of child support, denying spousal support, allocating bills and obligations, granting her non-marital property, and dividing the marital property. *Id.*

Gustafson moved the California court to dismiss Nguyen's petition. *Id.* After a two-day evidentiary hearing, the California court found that the parties' child had not resided in the state for the time required for California to have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act and found that the forum was inconvenient. *Id.* The California court found the Tribal Court to be a suitable venue. It issued a temporary order on August 3, 2017, addressing custody and visitation, but otherwise stayed the proceedings "pending orders of the Shakopee Mdewakanton Sioux Community Tribal Court or other court with jurisdiction over [the child] pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act." *Id.* (quoting J. Miller Decl., Ex. C, ECF 7-3).

Four days later, on August 7, 2017, the Tribal Court issued an order confirming the pendency of the Action and its intent to proceed with the case. *Id.* at 7. It entered a temporary order of joint physical custody and shared parenting. *Id.* The Tribal Court recognized that it "maintains exclusive, ongoing child welfare jurisdiction over the minor child pursuant to the final order issued in the child welfare proceeding commenced by this Community." *Id.* The California court dismissed Nguyen's petition three days later. *Id.*

Nguyen filed another dissolution petition on August 23, 2017, this time in Hennepin County District Court ("State court"). *Id.* Gustafson moved the State court to stay the case pending resolution of the dissolution and custody proceedings in the Tribal Court. *Id.*, Ex. E at 11, ECF 7-5. After extensive briefing, the State court granted the stay in an order dated January 9, 2018. *Id.* at 12.

The State court found that it shared concurrent jurisdiction with the Tribal Court, *id.* at 4, but identified several reasons why the Tribal Court was the most appropriate forum with jurisdiction. The State court found that, "the Tribal Court is clearly more familiar than this Court with the parties and their background. . . . Moreover, because the Tribal Court has already issued orders and is actively exercising jurisdiction over the parties' dissolution, any order from this Court risks interfering or conflicting with the Tribal Court's proceedings." *Id.* at 10. Ultimately, after addressing the numerous factors dictated by Minn. Gen. R. Practice 10, the State court decided that "the principles of comity compel this Court to defer to the Tribal Court." *Id.*

Because of the California court's dismissal of Nguyen's petition, and the Hennepin County District Court's stay of Nguyen's action, Nguyen is in the unusual position in this Court of moving to halt proceedings in the only forum that has exercised jurisdiction to address the merits of the divorce and child custody proceeding.

Nguyen's Challenge to the Tribal Court's Jurisdiction

Around the same time that Gustafson moved to stay the State court case, Nguyen filed a motion to dismiss the Action in the Tribal Court for lack of subject-matter jurisdiction and personal jurisdiction. *Id.*, Ex. F at 1. The Tribal Court, in its November 10, 2017 order, held that it had subject-matter jurisdiction over the Action under federal law and under the Community's Domestic Relations Code. *Id.* at 12-27. It held that it had specific personal jurisdiction over Nguyen based on the minimum contacts doctrine as adopted by the Tribal Court. *Id.* at 28-35.

On December 4, 2017, Nguyen filed a Notice of Basis for Appeal and Request for a Stay of Proceedings in the Tribal Court. *Id.*, Ex. H at 1. Nguyen requested that the tribal trial-court proceedings be stayed and his appeal be permitted because the Tribal Court's November 10, 2017 order was a "collateral order" under 28 U.S.C. § 1292;[1] alternatively, he requested that the Tribal Court certify the order for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at 2.

[1] A trial court order in Tribal Court "can be appealed only if, under federal law, such an order would be appealable had it been issued by a federal court." *Id.*, Ex. I at 1, ECF 7-9.

A week later, on December 11, 2017, the Tribal Court Judge issued an order denying Nguyen's request for a stay and certification for interlocutory appeal. *Id.* at 8. The Tribal Court Judge held that Nguyen's motion to dismiss did not fall within the collateral-order doctrine, which the Tribal Court (like federal courts) construes narrowly. *Id.* at 4. It reasoned that the "jurisdictional decisions [raised in Nguyen's motion to dismiss] can be fully and effectively reviewed by the Court of Appeals after a final judgment is entered." *Id.* at 5. The Tribal Court also declined to certify the order for interlocutory appeal, finding no legal basis for a substantial difference in opinion about the issues decided in the order. *Id.* at 7. The Tribal Court of Appeals agreed and concluded that the Tribal Court's November 10, 2017 order could not properly be appealed to the Court of Appeals because the Tribal Court did not certify the order for interlocutory appeal and the order was not a collateral order under the standards of 28 U.S.C. § 1292. *Id.*, Ex. I at 2, 6.

Nguyen filed this action on February 23, 2018, seeking declaratory and injunctive relief. Compl. at 8-10. Nguyen now requests the Court to restrain and enjoin the Community Defendants from continuing to prosecute and adjudicate the Action pending the outcome of this case.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003); *see Winter v. Natural Res. Def. Council*, 129 S.Ct. 365, 376 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of

right."). The injunction Plaintiff seeks here is granted particularly rarely. "[O]nly in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (J. Stevens, concurring in part and dissenting in part).

"Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigating; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys. Inc.v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). In *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877 (8th Cir. 2013), the United States Court of Appeals for the Eighth Circuit reviewed the preliminary-injunction standard in the context of a motion to enjoin a tribal court action, denying such relief. "The probability of the moving party's success on the merits [is] the 'most significant' preliminary injunction factor." *Id.* at 882 (quoting *S&M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992)).

ARGUMENT

I. NGUYEN HAS NOT DEMONSTRATED THAT HE WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Nguyen alleges irreparable harm because he "would be forced to litigate dissolution proceedings," including discovery, "while simultaneously fighting in Federal Court that the Tribal Court does not have jurisdiction." Pl.'s Mem. at 6-7, ECF 6. The Eighth Circuit has refused to endorse the argument that irreparable harm results when a

party is "forced to litigate in a Tribal Court that likely does not have jurisdiction." *DISH Network*, 725 F.3d at 881-82. Rather, the Eighth Circuit held that "the normal costs of litigation," which is all that Nguyen faces in the Tribal Court, do not qualify as irreparable harm.[2] *Id.* at 882. In so holding, the Eighth Circuit expressly refused to follow the Tenth Circuit decision cited by Nguyen in his memorandum to support his assertion of irreparable harm, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011). *See* Pl.'s Mem. at 7.[3] Furthermore, Nguyen will have to participate in discovery regardless of the forum.

[2] In other legal contexts, the Supreme Court has recognized that bearing the burden of litigation is not a form of irreparable harm. *E.g.*, *Younger v. Harris*, 401 U.S. 37, 46 (1971) ("Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term.").

[3] Two unpublished out-of-circuit district court decisions that Nguyen cites, *Rolling Frito-Lay Sales LP v. Stover*, No. CV 11-1361-PHX-FJM, 2012 WL 252938 (D. Ariz. Jan. 26, 2012), and *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042 (N.D. Okla. Jan. 9, 2018), are not persuasive. The courts in both cases found that tribal jurisdiction was clearly lacking. *Frito-Lay* did not address tribal-court jurisdiction over an action where at least one party is a tribal member, and appears intentionally inconsistent with binding Ninth Circuit precedent in *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), which finds inherent tribal authority over non-members coming onto a reservation. *See* 2018 WL 252938, at *3. *McKesson* involved a tribal court action challenging the conduct of opioid manufacturers and distributors who were remote from the reservation. It is more akin to the decision in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), which involved non-Indians who never visited Indian land and had no connection to the tribe, and which the Eighth Circuit found "inapposite" to its decision in *DISH Network*, which found no irreparable harm to the movant from litigating in tribal court where jurisdiction was colorable. *See DISH Network*, 725 F.3d at 884.

Nguyen is still in the process of exhausting his Tribal Court remedies. Nguyen will not be irreparably harmed because, not only may he prevail in Tribal Court as he has previously, but any decision of the Tribal Court can be appealed to the Tribal Court of Appeals and once appellate review is complete Nguyen can contest Tribal Court jurisdiction in Federal Court.

Nguyen speculates that irreparable harm may occur because the Tribal Court "may address a change to parenting time." Pl.'s Mem. at 7. A potential change in parenting time is not unique to the Tribal Court and may occur in any family court, including his preferred forum of Hennepin County. It is also well established that speculative harm does not constitute harm sufficient to justify injunctive relief. *See Winter v. Natural Res. Def. Council,* 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."); *Minn. Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis,* 825 F. Supp. 238, 242 (D. Minn. 1993) (denying temporary injunctive relief where allegations of harm were "speculative").

Nguyen also speculates that he will be forced to start the divorce process "over in another jurisdiction," Pl.'s Mem. at 7, yet California has declined to accept jurisdiction and dismissed his divorce petition, while the Hennepin County District Court has stayed his case there, in explicit deference to the Tribal Court. There is no jurisdiction other than

the Tribal Court that is poised to address this divorce and its child-custody and related issues. "[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). Nguyen has failed to make that showing.

Nguyen's failure to sustain his burden of proving irreparable harm is sufficient to deny the motion for a temporary restraining order. *See Watkins*, 346 F.3d at 844 ("Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction."); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) ("No single factor in itself is dispositive . . . [h]owever, a party moving for a preliminary injunction is required to show the threat of irreparable harm.") (internal quotation and citation omitted); *DISH Network*, 725 F.3d at 882 ("the absence of irreparable injury is by itself sufficient to defeat a motion for a preliminary injunction").

II. THE BALANCE OF HARM FAVORS THE COMMUNITY DEFENDANTS

If the Court determines that there is a threat of irreparable harm to the moving party, "it must balance this harm with any injury an injunction would inflict on other interested parties." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1039 (8th Cir. 2016). As discussed above, Nguyen speculates that he will suffer an adverse decision in Tribal Court, speculates that the Tribal Court of Appeals will also rule against him, and speculates as to harm to his parenting time, which is insufficient to show a likelihood of irreparable harm. Because Nguyen has failed to show that he is likely to suffer irreparable harm, the Court need not balance the harm.

However, the Community Defendants would suffer harm that also weighs against granting a preliminary injunction.

Nguyen seeks an extraordinary remedy—a federal court injunction issued against a tribal court—even though the general rule is that the federal courts will allow tribal courts the first opportunity to determine questions of tribal court jurisdiction. "A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court." *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 21 (1987) (Justice Stevens concurring in part and dissenting in part).

Both California and Minnesota have deferred to the Tribal Court to determine its own jurisdiction and Minnesota has determined to give full faith and credit to Judge Buffalo's jurisdictional ruling.[4] This Court should also allow the Tribal Court to fully examine its jurisdiction, including review by the Tribal Court of Appeals, which has yet to occur. *See DISH Network*, 725 F.3d at 883 ("prudence may caution a tribal appeals court from deciding jurisdictional questions until after trial is completed and the factual record developed and clarified"). The Court should refuse to reverse the decision of three different tribunals that all point to the Tribal Court as being the proper forum for the

[4] By comparison, when federal courts are faced with a request to enjoin state court proceedings, the Supreme Court has "consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975).

Action. Family law matters, which traditionally find their home in state or tribal courts, should not be federalized by the mere presence of a tribal-court forum.

III. NGUYEN IS UNLIKELY TO SUCCEED ON THE MERITS

Nguyen is unlikely to succeed on any of his claims made against the Tribal Court or the Tribal Court Judge. This factor thus weighs decisively against granting his motion for a preliminary injunction.

A. The Community Defendants Are Immune From Suit

Sovereign immunity is a threshold jurisdictional question that must be addressed before the merits. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009); *Amerind Risk Mgmt.Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Plaintiff "bear[s] the burden of proving that either Congress or [the Community] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685-86; *Smith v. Babbitt*, 875 F. Supp. 1353, 1357 (1995) (this court adheres to a "strong presumption in favor of tribal sovereign immunity").

"The SMSC Court . . . [is] entitled to the same sovereign immunity that bars any claims against SMSC[.]" *Watso v. Piper*, No. 17-CV-562-ADM-KMM (D. Minn. Dec. 5, 2017); *see also Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel C.M.B.*, 786 F.3d 662, 670 (8th Cir. 2015). Plaintiff does not allege that the Tribal Court waived its sovereign immunity. Therefore, all claims against the Tribal Court should be dismissed.

A tribal official named in his official capacity, as the Tribal Court Judge is here, shares the Community's immunity. *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007). The *Ex Parte Young* doctrine provides a narrow exception to that rule that allows a tribal official to be sued for acting outside the scope of his or her authority under federal law. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993). However, the exception "applies only to prospective relief, does not permit judgments against [tribal] officers declaring that they violated federal law in the past, and has no application in suits against [Indian tribes] and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf*, 506 U.S. 139, 146 (1993). Therefore, even if Nguyen can establish that the *Ex Parte Young* exception applies, his claims for declaratory relief against the Tribal Court Judge will be dismissed.

To establish the *Ex Parte Young* exception, a party must show that "the sovereign did not have the power to make a law" that the official acted under because "then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit." *Prairie Island*, 991 F.2d at 460. In other words, Nguyen must show that the Tribal Court Judge's exercise of jurisdiction over the dissolution Action in accordance with Community law was invalid under federal law. *Id.* As long as he acted within the scope of his authority or power under federal law, he remains "clothed with the Tribe's sovereign immunity." *Baker Elec.*, 28 F.3d at 1471. As discussed in Part III.C below, the Community has jurisdiction over the dissolution proceedings and therefore the Tribal Court Judge is immune from suit.

B. This Case Should Be Dismissed Because Nguyen Failed To Exhaust His Tribal Court Remedies

The tribal-court-exhaustion doctrine derives from the federal question of whether a tribal court "has the power to exercise civil subject-matter jurisdiction over non-Indians." *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). A unanimous Supreme Court determined that tribal courts should be accorded, as a matter of comity, the first opportunity to examine their jurisdiction over non-Indians:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *We believe that examination should be conducted in the first instance in the Tribal Court itself.*

Nat'l Farmers, 471 U.S. at 855–56 (emphasis added). "The issue of tribal exhaustion is a threshold one because it determines the appropriate forum." *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003).

The Tribal Court, as "the forum whose jurisdiction is being challenged," must have "the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers*, 471 U.S. at 856. The "federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning the appropriate relief is addressed." *Id.* To avoid the risk of a "procedural nightmare," the Tribal Court must have "a full opportunity to determine its own jurisdiction," to rectify any errors, and explain "the precise basis for accepting jurisdiction." *Id.* at 857.

Two years after *National Farmers*, the Supreme Court affirmed the tribal-court exhaustion doctrine in *Iowa Mutual*, 480 U.S. at 18. "Regardless of the basis for [federal court] jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction." *Id.* at 16.

1. Exhaustion Of Tribal Court Remedies Must Include Tribal Appellate Review

Exhausting tribal remedies in the Tribal Court includes exhausting appellate review by the Tribal Court of Appeals:

> The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Iowa Mut., 480 U.S. at 16–17; *see Gaming World Int'l*, 317 F.3d at 850-51; *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 517 (8th Cir. 1989) (non-Indian father required to appeal tribal court's child custody decision regarding member child to tribal court of appeals).

Nguyen's attempt to hasten tribal appellate review by prematurely seeking a discretionary, interlocutory appeal, which was denied, does not constitute an exhaustion

of Tribal Court remedies. In *Colombe v. Rosebud Sioux Tribe*, the Eighth Circuit held that a tribal court's denial of a discretionary, interlocutory appeal does not constitute exhaustion because the tribal court of appeals has yet to address the jurisdictional issue still pending before the tribal court. *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014). Similarly, in *DISH Network*, the court required exhaustion of tribal appellate remedies in a situation where, "the tribal trial court issued a decision and the tribal court of appeals had discretionary authority to review it though it chose not to exercise its authority at that time." *DISH Network*, 725 F.3d at 883. Although the Eighth Circuit determined that this argument was waived by *DISH Network*, because it was not raised in the initial brief, the court still reasoned that "prudence may caution a tribal appeals court from deciding jurisdictional questions until after trial is completed and the factual record developed and clarified." *Id.* That is the situation here.[5]

Nguyen must exhaust his remedies in Tribal Court, which is currently scheduled to include a trial that can reasonably be anticipated to further develop the record as to Nguyen's ties to the Community and his time spent on the Community's Reservation, and then Nguyen may appeal the final judgment of the Tribal Court, including its jurisdictional determination, to the Tribal Court of Appeals. *See Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991-92 (8th Cir. 1999) (federal-court complaint

[5] *Colombe* and *DISH Network*, from the Eighth Circuit, preclude this Court from following the holding in the Ninth Circuit case cited in Pl's Mem. at 21, *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007), to the effect that an unsuccessful attempt at interlocutory appeal could constitute exhaustion of tribal court remedies.

dismissed for failure to exhaust tribal remedies when appeal to tribal court of appeals is dismissed by the tribal court of appeals for failure to timely file a notice of appeal). If the "determination that the tribal courts have jurisdiction" is upheld on appeal to the Tribal Court of Appeals, then Nguyen "may challenge that ruling" in federal court. *Iowa Mut.*, 480 U.S. at 19. "Unless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." *Id.*; *see, e.g.*, *DISH Network*, 725 F.3d at 884 ("Unless jurisdiction is plainly absent, the question of tribal jurisdiction is one for the tribal courts to make in the first instance."); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554,559 (8th Cir. 1993) ("The tribal courts interpreted the constitutional language as allowing the tribal courts to exercise personal jurisdiction over the [non-Indian] appellees, and we defer to the tribal courts' interpretation, even though non-Indians are involved.").

2. None Of The Exceptions To Exhaustion Apply

Exhaustion is not required: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith," (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 856 n.21; *Iowa Mut.*, 480 U.S. at 19, n.12. None of those situations is present here.

a. The Tribal Court's Exercise Of Jurisdiction Is Not Motivated By A Desire To Harass, Nor Conducted In Bad Faith

Nguyen only offers a bare assertion that the "Tribal Court is motivated by a desire to harass Nguyen and keep jurisdiction in tribal court as an effort to avoid State laws regarding marital property." Pl.'s Mem. at 19. The fact that Tribal law may differ from Minnesota law on the definition of marital property does not, by itself, constitute an institutional desire by the Tribal Court and its Judge to harass. Further, Nguyen's desire-to-harass argument is refuted by the decisions of two State courts to defer to Tribal Court jurisdiction over this divorce and child-custody proceeding involving a member child.

Nguyen offers no facts that the Tribal Court is motivated by a desire to harass or is conducted in bad faith, and his argument must be rejected. "The Supreme Court has declined to permit parties to excuse themselves from the exhaustion requirement by *merely alleging* that tribal courts will be incompetent or biased . . . . Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial." *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994).

b. The Tribal Court's Exercise Of Jurisdiction Does Not Patently Violate Express Jurisdictional Prohibitions

This exception should apply only "if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." *DISH Network*, 725 F.3d at 883.

Nguyen's significant contacts with the Community, see Section III.C-D below, cannot be refuted merely by asserting that a Tribal Court does not possess jurisdiction over events occurring, in part, outside of Indian country.[6] To the contrary, Tribal Courts routinely exercise jurisdiction over cases between members and nonmembers that involve a mixture of on- and off-reservation activity and property. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 50 (1978) ("Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians."); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) ("[T]here must be at least one court with jurisdiction to hear [the] divorce action. Federal courts traditionally refuse jurisdiction over marriages and divorces. Jurisdiction must therefore lie in state or tribal court, or in both concurrently."); *DeMent*, 874 F.2d at 513 ("we cannot overlook the fact that the basic dispute in this case is whether California or the tribe had jurisdiction [over a child-custody proceeding arising from divorce]"); *In re Larch*, 872 F.2d 66, 69 (4th Cir. 1989) (neither state court nor tribal court possess exclusive jurisdiction of custody determination in divorce proceeding); *Garcia v. Gutierrez*, 217 P.3d 591, 593 (N.M. 2009) ("The state and tribal

[6] Generally, a nonmember's complete lack of any contacts with the reservation may excuse exhaustion. *See Hornell Brewing*, 133 F.3d at 1091 ("The activities at issue in this case are the Breweries' manufacture, sale, and distribution of Crazy Horse Malt Liquor. It is undisputed that the Breweries do not conduct those activities on the Rosebud Sioux Reservation or within South Dakota."). The court in *DISH Network* appropriately characterized *Hornell Brewing* as "inapposite" to the dispute before it, *DISH Network*, 725 F.3d at 884, a characterization just as appropriate in this case given the Tribal Court's findings of significant connections between Nguyen and the Community, and the presence of a member child in the relationship.

courts must share jurisdiction under principles of comity and work out their differences, guided by universally accepted principles of doing what is in the best interests of the children.").

The exception tends to apply in obvious and rare circumstances. For example, an express jurisdictional prohibition that excuses exhaustion typically derives from a federal statute, such as the Price-Anderson Act, which provides an "unusual preemption provision" for original jurisdiction in federal court. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 (1999); *see also Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (the Resource Conservation and Recovery Act provides exclusive jurisdiction in federal court). An Indian tribe's lack of criminal jurisdiction over non-Indians is also an obvious and express jurisdictional prohibition because of how well-settled the law is. *See Greywater v. Joshua*, 846 F.2d 486, 488 (8th Cir. 1988) ("We hold that *Oliphant v. Suquamish Indian Tribe* is direct authority that exhaustion of tribal court remedies is not required."). Even when a portion of a case is exclusively delegated to a federal agency, the remaining questions of federal and tribal law should be addressed first by the Tribal Court.[7] Here, Nguyen cannot point to any obvious or express jurisdictional

[7] *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420-21 (8th Cir. 1996) ("NIGC has exclusive authority to determine a contract's compliance with IGRA. . . . Questions regarding whether IGRA or the NIGC divest the Tribal Court of authority to rule on the issues regarding the contract's validity, whether IGRA is applicable to the Tribal Court action, and whether the validity of the management contract can be affected by an interpretation of Tribal law are issues relating to the Tribal Court's jurisdiction which should be dealt with first by the Tribal Court itself.").

prohibition to the Tribal Court's exercise of jurisdiction over a divorce proceeding brought by a tribal member, including custody of a minor tribal member.

c. Nguyen Has An Adequate Opportunity To Challenge The Tribal Court's Jurisdiction, So Exhaustion Is Not Futile

This exception applies narrowly to only the most extreme cases, such as where there is no functioning tribal court and no opportunity to challenge a tribal court's jurisdiction. *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997). If the tribal forum "was instituted, operating, and available by the time [plaintiff] filed its federal petition," then this exception does not apply. *Gaming World Int'l*, 317 F.3d at 850. "Speculative futility is not enough to justify federal jurisdiction." *Colombe*, 747 F.3d at 1025 (quoting *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). Here, the Tribal Court was instituted in 1988 and the Tribal Court Judge was one of the initial judges appointed to the court. The Tribal Court was long-operating and available when Nguyen filed the Complaint.

C. The Tribal Court Properly Exercised Its Subject Matter Jurisdiction Over A Divorce, Child Custody, and Child-Support Proceeding Involving Two Members

If this Court decides to reach the merits of Nguyen's claim and review whether the Tribal Court had subject-matter jurisdiction over the Action, then it should decide questions of federal law *de novo*, but review the Tribal Court's "findings of fact under a deferential, clearly erroneous standard." *Duncan Energy Co.*, 27 F.3d at 1300.

1. The Community Has Subject Matter Jurisdiction Over The Action Based On Its Inherent Sovereignty

Tribes have inherent authority to adjudicate marriage dissolutions involving a member and a non-Indian, child-custody proceedings regarding a member child, and child-support proceedings involving a member child. That authority was not affected by the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), which Plaintiff relies on heavily. *See Sanders*, 864 F.2d at 632-33 (affirming tribal-court jurisdiction over a divorce proceeding involving a member and a nonmember in which the tribal court decided custody, support, and marital-property division without applying *Montana*); *State v. Center Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 272 (Alaska 2016) (holding that a tribe's decision to exercise jurisdiction over a nonmember to decide child support for a member child is not subject to the *Montana* framework because the decision was "intimately tied to the identified basis of inherent tribal sovereignty"); *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999) (holding that a tribe's decision to exercise jurisdiction over a nonmember to decide custody of member child is not subject to *Montana*); *Kelly v. Kelly*, 759 N.W.2d 721, 726 (N.D. 2009) (holding that a state court and a tribal court shared concurrent jurisdiction over a divorce between a member and a nonmember that involved Indian child custody and child support issues without applying *Montana*; the couple was married in Las Vegas and often lived off of the reservation).

Here, as the Tribal Court found, the Community has by its Domestic Relations Code exercised its inherent authority over domestic relations, including marriage and

divorce involving tribal members, and child custody and support of tribal children. *See* Miller Dec. Exh. F at 22-23.

There is no dispute that much of Nguyen and Gustafson's life and marriage was spent on tribal land where nonmembers remain "subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). *Merrion* was decided shortly after *Montana*, yet the Supreme Court did not apply the *Montana* exceptions to the tribe's jurisdiction over nonmembers on tribal land. As *Merrion* instructs, "[r]equiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself." *Merrion*, 455 U.S. at 147. As the Eighth Circuit correctly distinguished, "the Tribe does not seek to assert jurisdiction over non Indian fee land," therefore, the Tribe may regulate "entry and conduct upon tribal land." *Attorney's Process & Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010). Accordingly, "where tribes possess authority to regulate the activities of nonmembers, [c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

Montana was never meant to apply to a tribe's exercise of jurisdiction stemming from its authority over its members. *See Center Council*, 371 P.3d at 268-72 (discussing why the *Montana* framework does not apply to domestic relations). Because the Action involves domestic relations among multiple Community members, this Court should hold

that the Community retains jurisdiction over the Action without applying the *Montana* framework.

Furthermore, Plaintiff suggests that *Montana* does not apply outside of Indian land and that Indian tribes *per se* lack jurisdiction over non-Indian activities occurring on non-Indian land. Pl.'s Mem at 13-14. This is incorrect. As *Merrion* and *Attorney's Process and Investigation* provide, *Montana* ***only*** applies to limit tribal jurisdiction on non-Indian land. *See also Water Wheel*, 642 F.3d at 813 ("Because none of th[e] circumstances [from *Nevada v. Hicks*][8] exist here, we must follow precedent that limits *Montana* to cases arising on non-Indian land."). Tribes retain their inherent authority over non-Indian activities on Indian land without regard to *Montana*'s limitations. *Id.* at 812.

Here, the couple's marriage was intricately tied to the Community Reservation. Before and after they were married, Nguyen and Gustafson actively participated in Gustafson's conservatorship proceedings in the Tribal Court. J. Miller Decl., Ex. F at 3. After they were married, when their child was born, they applied successfully to have their child enrolled as a member of the Community. *Id.* at 2. They litigated a prior dissolution action in Tribal Court and resolved their differences there. *Id.* at 4. Their child has been and remains a ward of the Tribal Court after they participated in child-welfare proceedings in the Tribal Court. *Id.* at 4-5. Both of them use reservation addresses for tax

[8] *Hicks* was expressly limited to "the question of tribal court jurisdiction over state officers enforcing state law." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). In *Hicks*, the Supreme Court "did not overrule its own precedent specifying that Montana ordinarily applies only to non-Indian land." *Water Wheel*, 642 F.3d at 813.

purposes and Gustafson has kept her legal residence on the Reservation. *Id.* at 31. They also lived and stayed on the Reservation continually throughout the marriage. *Id.* at 31. "[T]he fact that the couple was married off the reservation [does not] affect the result." *Sanders*, 864 F.2d at 633.

Their marriage benefited greatly from resources generated by the Community on the Reservation. As a member of the Community, Gustafson receives per-capita payments that Nguyen testified were the family's "primary source of income." *Id.* at 32. Nguyen (because he was married to Gustafson), Gustafson, and their child received medical insurance, medical care, child care, and social services from the Community on the Reservation. *Id.* Because of the close ties between the parties' marriage and the Reservation, this Court should determine that the Tribal Court has inherent jurisdiction over the Action unaltered by *Montana.*

2. Even If *Montana v. United States* Applies, Nguyen's Actions Implicate Both *Montana* Exceptions

According to *Montana* and its progeny, an Indian tribe has jurisdiction over non-Indian activities on non-Indian land when either (1) the non-Indian enters into a consensual relationship with the tribe or its members or (2) when the activities of the non-Indian have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. These are colloquially referred to as the "*Montana* exceptions." As the Tribal Court held in an extensive discussion, both of the exceptions also apply to the Action. *See* J. Miller Decl., Ex. F. at 13-18.

Nguyen entered into a consensual relationship with a Community member when he married Gustafson, a relationship that gives the Community jurisdiction over the Action. J. Miller Decl., Ex. F at 13. *See, e.g.*, *Kelly v. Kelly*, 2008 WL 7904116, at *7 (Standing Rock Sioux Tribal Ct. June 23, 2008) ("[B]y marrying an enrolled member of this Tribe and fathering an enrolled dependent, [non-Indian defendant has] engaged in 'activities of nonmembers who enter consensual relationships with the Tribe or its members.'"); *Walker v. Tiger*, 10 Okla. Trib. 650 (Muscogee (Creek) Nation S. Ct. 2004) (holding the same). The consensual relationship test "depends on what non-Indians 'reasonably' should 'anticipate' from their dealings with a tribe or tribal members on a reservation." *Water Wheel*, 642 F.3d at 817. When Nguyen married Gustafson, he was well aware of Gustafson's membership status as he was already involved in her conservatorship proceeding in the Tribal Court. J. Miller Decl., Ex. F at 13. In marrying a Community member, he reasonably should have anticipated that he would be subject to the Action in that same Tribal Court if the parties' relationship soured.

His relationship with Gustafson led to the birth of the child for whom they sought enrollment and who is now a member of the Community. *Id.* at 14. This is also a consensual relationship under *Montana*. As the Alaska Supreme Court eloquently stated:

> When two people bring a child into being each should reasonably anticipate that they will be required to care for the child and perhaps may need to turn to a court to establish the precise rights and responsibilities associated with the resulting family relationship. This may require litigating in a court that is tied to the child but with which the parent has more limited contacts.

Center Council, 371 P.3d at 272. The Alaska Supreme Court, like the Tribal Court, found that having a child with a tribal member formed a consensual relationship that allowed the tribal court to exercise jurisdiction over child support and child custody matters. *Id.* at 272-73. This is especially proper here where the child is a ward of the Tribal Court and the parties have such an extensive history before the Tribal Court.

Nguyen's acceptance of and reliance on Community resources is another consensual relationship that is intertwined with the Action. Plaintiff is seeking an equitable distribution of marital property and spousal support from Gustafson. J. Miller Decl., Ex. F at 17. Nguyen asserts that he is unemployed and that Gustafson's per-capita payments, which she receives from the Community as a Community member, were the family's primary source of income. *Id.* at 32. Nguyen willingly accepted funds from per-capita payments to Gustafson during the marriage and now willingly seeks more funds as part of his spousal maintenance claim. *Id.* Nguyen should reasonably have anticipated that accepting such funds from Gustafson and seeking future resources would subject him to the Community's jurisdiction.

Nguyen relies on the statement in *Montana* that a tribe has jurisdiction over "activities of nonmembers who enter consensual relationships with the tribe or its members, through *commercial* dealing, contracts, leases, or other arrangements," to argue that the consensual relationship is limited to commercial dealings. Pl.'s Mem. At 13. (quoting *Montana*, 45 U.S. at 565) (emphasis added). The Supreme Court has never held that consensual relationships that trigger the *Montana* exceptions are limited to commercial dealings. Other courts have consistently rejected that argument. For example,

The Alaska Supreme Court has held that "relationships that give rise to the birth of a child" are consensual relationships under *Montana*. *Center Council,* 371 P.3d at 272-73. The Ninth Circuit held that the consensual-relationship exception applied to a non-business relationship in *Smith v. Salish Kootenai College*. 434 F.3d 1127, 1140-41 (9th Cir. 2006) (en banc) (the list in *Montana* "is illustrative rather than exclusive"). The Fifth Circuit also refused to adopt the same argument made by Nguyen: "We decline to impose such a restriction, which does not appear to be supported by any compelling rationale." *Dolgencorp, Inc.v Miss. Band of Choctaw Indians,* 746 F.3d 167, 173 (5th Cir. 2014), *aff'd*, 136 S.Ct. 2159 (2016).[9]

[9] Nguyen cites the following quote from a South Dakota Supreme Court case *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007), "marrying a tribal member, allowing children to be enrolled members of the tribe and receiving tribal services do not qualify under the consensual relationship exception in *Montana*." Pl.'s Mem. at 14. Factually, the family in *J.D.M.C.* apparently did not have any significant ties to the reservation. 739 N.W.2d at 811.

Legally, the quote from *J.D.M.C.* that Nguyen relies on is not supported by the precedent the court cites. The South Dakota Supreme Court cited *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001), and *In re Application of Defender*, 435 N.W.2d 717, 718-21 (S.D. 1989)—neither of which actually support the proposition. *Atkinson* dealt with tribal taxation of non-Indians on non-Indian lands. *Atkinson*, 532 U.S. at 647. The page cited by the South Dakota Supreme Court contains a discussion of why the "generalized availability of tribal services," such as police and fire, is insufficient to support jurisdiction over nonmembers on non-Indian land. *Id.* at 655. The case contains no mention of marriage or enrolling a child in a tribe or the receipt of member-specific services. *In re Application of Defender* was a child custody case in which the father, after hardly being involved with his child's life, essentially kidnapped the child and obtained an ex parte custody order over the child from the tribal court. 435 N.W.2d at 719. The court in *Defender* analyzed the case under the Indian Child Welfare Act and decided that the tribe did not have *exclusive* jurisdiction (as opposed to concurrent jurisdiction). *Id.* The *Defender* court never cited *Montana*. Therefore, *J.D.M.C.* holds no persuasive value.

Nguyen's marriage and fathering of a member child meets the second *Montana* exception too. The divorce of the parties involves and certainly affects their child. When passing the Indian Child Welfare Act ("ICWA"), Congress found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3) (2012).[10] And "ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe—like that of any society—requires no less." *Center Council*, 371 P.3d at 273. As a result, the Alaska Supreme Court in *CenterCouncil* held that both child-support and child-custody proceedings implicate the second *Montana* exception by imperiling the subsistence of the tribal community. *Id.* at 273-74.

Nguyen attempts to distinguish *CenterCouncil* on the basis that Nguyen's "child support obligation to Gustafson is not at issue and likely will never be at issue in the dissolution or child custody proceeding in Tribal Court, given the parties' substantial disparity in income in favor of Gustafson, the holding is not relevant." Pl.'s Mem. at 16-17. That argument ignores the reasons stated by the court in *Central Council* for why child-support proceedings implicate the second *Montana* exception—all of which apply equally to child-custody proceedings. Proper child-custody determinations are just as important to the health or welfare of the tribe as proper child-support determinations, if

[10] ICWA does not directly regulate child custody as between divorcing parents. However, Congress's findings as to the importance of their children to the survival of Indian tribes remain true and compelling.

not more. Furthermore, Alaska decided 17 years before *Central Council*, in *John v. Baker*, that tribes had jurisdiction over Indian-child-custody proceedings involving a member child and a nonmember parent. *John v. Baker*, 982 P.2d 738 (Alaska 1999). *Central Council* was an extension of the principles from *John*. *Central Council*, 371 P.3d at 275 ("[W]hat was true in 1999, when *John I* was decided, remains true today[.]").

D. The Tribal Court Properly Exercised Personal Jurisdiction Over Nguyen

Nguyen argues that the Tribal Court failed to afford him due process by wrongfully asserting personal jurisdiction over him. Pl.'s Mem. at 9; Compl. at 3. The Due Process Clauses of the 5th and 14th Amendments to the Constitution do not apply to the Tribal Court.[11] A statutory version of the Due Process Clause is included in the Indian Civil Rights Act ("ICRA"). 25 U.S.C. § 1302(a). The Tribal Court is bound by ICRA. *Id.* This Court does have jurisdiction to review a violation of ICRA, but the "exclusive means for federal-court review" of a violation of ICRA is through a petition for habeas corpus. *Santa Clara Pueblo*, 436 U.S. at 67; *Sanders*, 864 F.2d at 634 ("Any claim of due process violations (other than a petition for habeas corpus) must be asserted under the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* Sanders is limited to pursuing relief under that Act in tribal court."). ICRA "does not [expressly or] impliedly authorize

[11] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," including the Due Process Clause. *Santa Clara Pueblo*, 436 U.S. at 56. That exemption extends to the Tribal Court. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (refusing to apply the 5th Amendment to actions of the Cherokee Nation criminal court).

actions for declaratory or injunctive relief against either the tribe or its officers." *Santa Clara Pueblo*, 436 U.S. at 51. Nguyen has not brought a habeas petition and he seeks only declaratory and injunctive relief. Compl. at 10. Because there is no basis in Nguyen's Complaint for this Court to examine the Tribal Court's findings on personal jurisdiction over Nguyen, the Court should refuse to do so. But even if the Court proceeds to the merits of Nguyen's personal jurisdiction claim, it should find that the Tribal Court properly exercised personal jurisdiction over Nguyen.

To ensure due process for litigants in Tribal Court, the Tribal Court—as a matter of Community law—has adopted a personal jurisdiction requirement similar to that of federal common law. J. Miller Decl., Ex. F at 28. Under federal law, a plaintiff can establish that a forum has personal jurisdiction over a defendant by showing either specific personal jurisdiction or general personal jurisdiction. *Toomey v. Dahl*, 63 F.Supp.3d 982, 989 (D.Minn. 2014), cited in J. Miller Decl., Ex. F at 30 n. 10, 32. "Specific jurisdiction is jurisdiction over causes of action arising from or related to the defendant's actions in the forum state."*Wessels, Arnold & Henderson v. Nat'l Medical Waste, Inc.*, 65 F.3d 1427, 1432 n.4 (8th Cir. 1995). General jurisdiction refers to the power of the forum to adjudicate any cause of action against the defendant. *Toomey*, 63 F.Supp.3d at 989.

The Tribal Court found that the record contained sufficient evidence to establish specific personal jurisdiction and did not reach the question of whether Nguyen was subject to general personal jurisdiction. J. Miller Decl, Ex. F at 29-30 n.10. To establish specific personal jurisdiction, a plaintiff must first show that the defendant has "minimum

contacts" with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). "Once it has been decided that a defendant purposefully established minimum contacts within the forum," the burden shifts to the party challenging jurisdiction to "present a compelling case" that the assertion of personal jurisdiction does not comport with the notion of fair play and substantial justice. *Id.* at 476-77.

1. The Tribal Court's Finding That Nguyen Had Minimum Contacts With The Reservation Was Not Clearly Erroneous

To decide if a defendant has minimum contacts to a forum sufficient to withstand a due process challenge, courts analyze whether the defendant purposefully availed himself to the benefits of the forum. *Id.* at 474-75. The plaintiff's cause of action must arise from or relate in some way to those minimum contacts. *Wessels*, 65 F.3d at 1432 n.4. The Tribal Court correctly found that Nguyen purposefully availed himself to benefits from the Community in connection with his marriage to Gustafson in several ways and this Court should defer to those findings, which are not clearly erroneous.

The Tribal Court found that Nguyen, through Gustafson, received monetary benefits in the form of per-capita payments made by the Community. Gustafson receives per-capita payments from the Community, which it distributes to its members. J. Miller Decl., Ex. F at 32. Nguyen alleged in his answer and counter-petition in the Tribal Court that neither he nor Gustafson were employed during the marriage because of funds she received from the Community. *Id.* at 15. Nguyen called the per-capita payments the family's "primary source of income." *Id.* at 32.

As part of the division of marital property, Nguyen seeks a division of money from per-capita payments already made to Gustafson. J. Miller Decl., Ex. D at 6 (requesting a division of marital property), Ex. F at 17. He also seeks payment from her in the future as part of permanent spousal maintenance payments. Pl.'s Mem. at 20; J. Miller Decl., Ex. D at 6 (requesting temporary or permanent spousal maintenance).

Nguyen also received medical insurance and was eligible for medical care from the Community because he married a Community member. J. Miller Decl., Ex. F at 32. Nguyen's child A.N., as a Community member, "is eligible for and received daycare, preschool, social services and health care from the Community." *Id.* The benefits from the Community that Nguyen gained as a result of his marriage to Gustafson, which will be focal points in the Action, are sufficient minimum contacts to give the Community personal jurisdiction over him for purposes of the Action. But there were additional contacts found by the Tribal Court.

"[Nguyen] testified that [during the marriage] he relied on an on-reservation address for certain tax advantages." J. Miller Decl., Ex. F at 31. One of his trucks was registered to the address "to avoid sales tax." *Id.* (quoting California Court Transcript at 71-72 (Jul. 27, 2017)). Nguyen also visited the Reservation throughout the marriage to see Gustafson or their mutual friend Bryant. *Id.* Although he averred to the Tribal Court that he did not maintain a residence on the Reservation, Nguyen did list a Reservation address as his home address in a February 2014 plea agreement that he signed. *Id.*

Nguyen also actively participated in proceedings in Tribal Court. He first participated in Gustafson's conservatorship proceedings in early 2014. *Id.* at 30. He then

participated in the 2014 marriage dissolution proceedings. *Id.* at 3. And in late November 2014, he participated in a child welfare case involving A.N. *Id.* at 4. He only objected to the Tribal Court's jurisdiction once, in his answer and counter-petition in the 2014 dissolution case. He did not pursue that argument before the parties stipulated to dismissal the following summer after he received a favorable decision about the validity of the parties' marriage.

Gustafson showed, and the Tribal Court found, sufficient minimum contacts from Nguyen to the Community to establish specific personal jurisdiction. This Court should defer to those findings, which are not clearly erroneous. *Cf. City of Timber Lake*, 10 F.3d at 559 ("We defer to the tribal court's interpretation [of tribal law], even though non-Indians are involved.") And, if the Court elects to consider the merits, decide that Nguyen had sufficient minimum contacts to the Community to establish specific personal jurisdiction.

2. The Tribal Court's Assertion Of Jurisdiction Comports With The Notion Of Fair Play And Substantial Justice

Because the Tribal Court found sufficient minimum contacts, the burden shifted to Nguyen to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Other considerations can include the burden on the defendant, the Community's interest in adjudicating the dispute, Gustafson's interest in obtaining convenient and effective relief, and the forums' interest in obtaining an efficient resolution of the Action. *Id.*

Nguyen did not argue that litigating the Action in Tribal Court would be unreasonable or that it offended the notion of fair play and substantial justice before the Tribal Court. J. Miller Decl., Ex. F at 33. He does not make that argument to this Court either. Pl.'s Mem. at 11-12. He conceded to the Tribal Court that the distance "between the Hennepin County Courthouse and the Tribal Court of the SMSC is minimal." J. Miller Decl., Ex. F at 33. And he actively participated in the 2014 dissolution proceedings and the child welfare proceedings before the Tribal Court. *Id.* Nguyen fails to present the compelling case necessary to overcome his contacts to the Community and avoid jurisdiction.

Meanwhile, the Community has a strong interest in adjudicating a marriage dissolution and child-custody proceeding involving two members, a mother and her child. Gustafson, Nguyen, and their child have an interest in obtaining convenient, effective, and efficient relief from the Tribal Court as opposed to hopping from forum to forum. To date, all other forums have directed the parties to the Tribal Court. That is where the Action should remain.

IV. DENYING THE REQUESTED PRELIMINARY INJUNCTION WILL ADVANCE THE PUBLIC INTEREST

Federal Indian policy favors the fostering of tribal sovereignty and the development and operation of tribal courts. "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.*, 480 U.S. at 14-15 (internal citation omitted). "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-

government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers*, 471 U.S. at 856. The Hennepin County District Court explicitly found, in its decision to stay the action there in favor of the Tribal Court Action, that, "There is no evidence that the Tribal Court Order [under review here] contravenes public policy of this state." J. Miller Decl., Ex. E at 8. The public interest favors denying Nguyen's motion.

CONCLUSION

The Court should deny Nguyen's motion for preliminary injunction.

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