IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KALYN FREE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-CV-181 CVE JFJ
	)	
KEVIN W. DELLINGER &,	)	
JUDGE GREGORY H. BIGLER,	)	
	)	
Defendants,	)	

DEFENDANT GREGORY H. BIGLER'S OPPOSITION MOTION TO THE PLAINTIFF KALYN FREE'S MOTION FOR PRELIMINARY INJUCTION AND BRIEF IN SUPPORT

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Defendant, the Honorable Judge Gregory H. Bigler ("Judge Bigler") in his official capacity on the Muscogee (Creek) Nation District Court ("MCN Court"), presents his Opposition to Plaintiff Kalyn Free's ("Free") Motion for Preliminary Injunction ("Motion") filed on April 4, 2018 (ECF No. 3).

I. INTRODUCTION

The imposition of injunctive relief constitutes an extraordinary remedy that federal courts are reluctant to impose. In this instance, Plaintiff Free requests injunctive relief to enjoin the MCN Court from exercising jurisdiction over her on the basis that she should not be required to exhaust her tribal court remedies. Free, however, has failed to make a "substantial showing" that she is entitled to an exception to the Supreme Court's tribal court exhaustion doctrine, and as a result, she cannot establish the requisite likelihood of success on the merits to warrant the imposition of injunctive relief.

Free premises her assertion that she should not have to exhaust tribal court remedies on an erroneous interpretation of *Montana*, claiming that the Supreme Court's decision in *Montana* precludes tribal courts from exercising civil jurisdiction over Indians enrolled in other Tribes. Free mischaracterizes the guiding precedent on this point, and her Complaint makes no mention of a Supreme Court—or Tenth Circuit—precedent declaring Tribal Nations to be without jurisdiction over citizens of separate Tribal Nations. She is not likely to succeed on this claim.

Free further predicates her claim that she should not be required to exhaust on a factual dispute she has raised regarding the proper legal identity of the company the Attorney General alleges she co-owns with her husband, Bim Stephen Bruner ("Bruner"). She argues that she cannot be connected to the development of the Red Creek Casino on her husband's restricted allotment land (the "Bruner Parcel") because the entity the MCN Attorney General alleges

funded the development of the casino was misidentified in that it did not have "LLC" after "Bruner Investments." Compl. ¶ 4. Free also makes a vague, general statement to imply that the companies she currently owns have nothing to do with the development of Red Creek Casino.

These factual disputes, however, are precisely the sort of factual issues the Supreme Court has concluded a tribal court must be permitted to determine in the first instance when examining its own jurisdiction. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (concluding that "the existence and extent of a tribal court's jurisdiction" requires "a careful examination" that "should be conducted in the first instance in the Tribal Court itself . . . by allowing a full record to be developed in the Tribal Court."); *see also id.* (acknowledging that the tribal exhaustion doctrine "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"). Free, therefore, is unlikely to succeed in her assertion that the veracity of the Attorney General's allegations should not be examined first in the MCN Court, with the benefit of a record concerning the factual disputes she raises now before this Court.

And as discussed in greater detail below, Free has failed to demonstrate that irreparable harm will result from the MCN Court's adjudication of its jurisdiction over her, nor has she established that an injunction will align with the public interest, or that the benefits from injunctive relief will outweigh the harm to the MCN Court's sovereign interest and right to first adjudicate questions related to its own jurisdiction. Accordingly, for these reasons, this Court should deny Free's request for injunctive relief.[1]

[1] Neither Judge Bigler, nor the MCN Court, have waived their sovereign immunity. It is well-settled that Indian Tribes constitute sovereign governments that enjoy immunity from suit. *See Michigan v. Bay Mills Indian Cmty.,*134 S. Ct. 2024 (2014) ("Among the core aspects of sovereignty that tribes possess. . .is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'"). In filing his Opposition to Plaintiff Free's Motion for Preliminary

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Statement of Facts

For a complete statement of facts relevant to the Plaintiff's Motion and underlying Complaint in this Court, Defendant refers this Court to Defendant's Motion to Dismiss, filed concurrently with Defendant's Opposition to Plaintiff's Motion for injunctive relief. *See* Def.'s Mot. to Dismiss 5-9.

B. Procedural Background

a. The Attorney General files the Complaint in the underlying Tribal Court proceeding.

On August 16, 2017, the Attorney General of the Muscogee (Creek) Nation filed a civil complaint against Plaintiff's husband, Bruner and other defendants, including the Kialegee Tribal Town, Jeremiah Hobia, Red Creek Holdings LLC, and Luis Figueredo, alleging violations of MCN law under "NCA 12-184" (now NCA 17-081), as well as the Indian Gaming Regulatory Act ("IGRA"), and the State of Oklahoma Gaming Compact. MCN AG Compl. 8, ¶ T (ECF No. 09-02). Additionally, the MCN Prosecutor, Shelly Harrison, filed a criminal felony complaint[2] against Bruner on the same day, asserting violations of MCNCA Title 21, § 11-103 (now § 7-103), § 11-104 (now § 7-104).[3] Both the civil and criminal complaints were assigned to Judge Bigler.

Injunction, Judge Bigler and the MCN Court do not waive any available defenses, such as (but not limited to) sovereign immunity. The fact that Plaintiff Free's claims are barred by sovereign immunity constitutes yet another reason to deny her Motion, as she is not likely to succeed on the merits of her underlying claims against the MCN Court. All arguments from Defendant's Motion to Dismiss are incorporated by reference herein. Def.'s Mot. to Dismiss 13-15.

[2] *Muscogee (Creek) Nation v. Bruner*, CRF-2017-42, Criminal Complaint and Information ("MCN Crim. Compl.") (MCN Dist. Ct. filed Aug. 16, 2017).

[3] Title 21, § 11-103 (now § 7-103) of the Muscogee (Creek) Nation Code makes it unlawful to "knowingly own, manufacture, possess, buy, sell, rent, lease, store, repair or transport any unlicensed gambling device, or offer or solicit any interest therein; whether through an agent,

On October 26, 2017, the Attorney General filed an amended complaint in its civil case against Bruner to add additional defendants, including the Plaintiff in this case, Kalyn Free, along with Bruner Investments, alleging they "enabled and/or participated in the development of Red Creek Casino." *See* Am. MCN AG Compl. ¶¶ 1-2 (ECF No. 2 Ex. 1). As of October 26, 2017, Plaintiff Free, allegedly co-owned a business entity, along with her husband, with a name that included the words "Bruner Investments" in the title; Plaintiff Free and her husband terminated this company in January 2018.[4]

b. The MCN Court considers several Motions to Stay.

In her Motion for Preliminary Injunction before this Court, Plaintiff states that "Defendant Judge Gregory H. Bigler entered an indefinite stay of the *Muscogee Creek Action*[,] . . . denying Plaintiff an opportunity to challenge the District Court of the Muscogee (Creek) Nation's jurisdiction over her." Mot. Prelim. Inj. 4. Judge Bigler's considered judgment of the motion practice before him, however, reveals that his rulings on the various motions to stay have not been as nefarious, or as simple, as Plaintiff Free presents. Instead, the procedural background discloses the respectable work of a seasoned Judge who must give careful review and consideration to all arguments and motions the attorneys present. And, like all Judges, Judge Bigler cannot consider arguments that *were not* presented to him.

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employee or otherwise." Title 21, § 11-104 (now § 7-104) of the Muscogee (Creek) Nation Code makes it unlawful to "own, lease, employ, operate, occupy, or otherwise knowingly maintain, aid, or permit an unlicensed gambling premise." *See Muscogee (Creek) Nation v. Bruner*, CRF-2017-42, MCN Amended Criminal Complaint and Information ("MCN Am. Crim. Compl.") (filed Aug. 18, 2017).

[4] *See* Oklahoma Secretary of State, Entity Summary Information, Filing Number 3512292913 (Information available through the Oklahoma Secretary of State indicates that Bruner Investments, LLC a/k/a Free-Bruner Investments, LLC, was terminated on January 17, 2018.).

In filing the initial complaint in the underlying action, the Attorney General filed a motion requesting injunctive relief. *Muscogee (Creek) Nation v. Bruner*, CV-2017-129, MCN AG Compl. (MCN Dist. Ct. filed Aug. 16, 2017). On August 25, 2017, the MCN Court held a hearing on the motion, and the Assistant Attorney General requested a stay on the scheduling of any trial in the civil action on the basis that the Kialegee Tribal Town had filed a separate action against the Department of the Interior in the District Court for the District of Columbia, challenging the MCN's exclusive authority over the Bruner Parcel. *Bruner*, CV-2017-129, Temp. Inj. Relief Hr'g Tr. 11-12, Aug. 25, 2017.

In response to the Nation's request for a stay, Counsel for Bruner—who also serves as Counsel for the Plaintiff in the present case—conditioned his agreement to the stay on the request that he could "ask for a hearing at any time on application. . . . for additional discovery . . . . on the issues remaining to be heard by [the MCN Court]." *Id.* at 115-16. The parties then negotiated and reached agreement on a stay that Judge Bigler imposed in an Order stating that "[b]y agreement of the parties, this order shall stay in effect until further hearing" following the outcome of the "challenges to the Nation's sole tribal authority of the concerned parcel of property." *Bruner*, CV-2017-129, TRO 3-4 (MCN Dist. Ct. Aug. 30, 2017). Thus, the initial stay the MCN Court issued in August 2017 dealt only with the timing of a final trial in the civil case, but otherwise permitted discovery to continue. *Bruner*, CV-2017-129, TRO, (MCN Dist. Ct. Aug. 30, 2017); *see also* TRO Hr'g Tr. 121 (Counsel for Bruner stated that he "wants to make sure that I heard correctly[,] [d]iscovery in this matter is not stayed[,]" to which Judge Bigler replied "correct.").

On November 9, 2017, two weeks after the Attorney General filed the amended civil complaint adding Free as a Defendant, the Attorney General filed a *Motion to Stay Deposition*

Discovery Request for Emergency Hearing ("Motion to Stay Discovery"). *See Bruner*, CV-2017-129, Mot. to Stay Dep. Disc. Req. for Emergency Hr'g and Resp. to Def. Bim Stephen Bruner's Mot. to Dismiss Compl. ("Mot. to Stay Disc."), Nov. 9, 2017. At a hearing on November 13, 2017, Judge Bigler considered the Attorney General's November 9 motion to stay and explained that "the problem I have in staying it is that this was filed by the nation in both instances and the Court is inclined . . . to give broad, generally broad allowance to discover information in a civil matter." Mot. to Stay Disc. Hr'g Tr. 22-23. Accordingly, Judge Bigler denied the MCN's November 9 *Motion to Stay Discovery*. *See Bruner*, CV-2017-129, Mot. to Stay Disc. Hr'g Tr. 23, Nov. 13, 2017 (Judge Bigler stating: "I am going to deny the request to stay discovery.").

The Attorney General again filed another motion to stay on November 15, 2017, but this time presented the motion as a *Motion to Stay Proceedings and Request for Expedited Hearing*, asking the "Court to stay these proceedings in their entirety until either the accompanying criminal matter [against Steve Bruner] . . . is resolved, or alternatively," until the challenges to the MCN's "sole tribal authority over the concerned parcel of property" are resolved. *See Bruner*, CV-2017-129, Mot. to Stay Proceedings and Req. for Expedited Hr'g ("Mot. to Stay Proceedings") 1, Nov. 15, 2017 (ECF No. 09-4). In the November 15 hearing, the Attorney General pushed for a hard stop to all civil proceedings, while Bruner's Counsel requested that parties entitled to responsive pleadings can file those.

At the subsequent November 28 hearing, counsel for Plaintiff Free in the current case, while representing her husband at the November 28 hearing, asked how a stay would impact a cross-claimant's ability to challenge jurisdiction, to which Judge Bigler replied, "If it's subject to jurisdiction, they may make that at any point in time regardless. If it's personal jurisdiction, then we'll see what arguments are made by both sides and worry about that at some point. . . . we will

try to address each of those variables to the best of the Court's ability." *Id.* at 16. Ultimately, Judge Bigler issued an *Order Granting Plaintiff's Motion to Stay Proceedings* on December 11, 2017, stating that "[a]ll proceedings in this matter between the parties . . .including but not limited to discovery, responsive pleadings, reports, and conferences—are stayed until further notice." *See Bruner*, CV-2017-129, Order Granting Pl.'s Mot. to Stay Proceedings (MCN Dist. Ct. Dec. 11, 2017) (ECF No. 09-7).

Free never filed a motion to lift the stay, nor has she filed a request for a hearing on the stay as it applies to her. Instead, on November 28, 2017—the same date the MCN Court held a hearing on the Attorney General's *Motion to Stay Proceedings*—Bruner's counsel filed a *Motion to Dismiss and Brief in Support* on behalf of Free and Free-Bruner Investments, LLC, challenging the jurisdiction of the MCN Court. (ECF No. 09-6). Despite filing his special appearance on behalf of Free the same day as he appeared on behalf of Bruner in the hearing on *the Motion to Stay Proceedings*, Bruner's counsel, Mr. James E. Frasier, made no reference to his representation of Free in the hearing, nor did he present any arguments against the stay on her behalf.

On February 22, 2018, Plaintiff filed an *Application to Assume Original Jurisdiction and Petition for Writs of Prohibition and Mandamus ("Application")* in the Supreme Court of the Muscogee (Creek) Nation ("MCN Supreme Court"), stating that the Nation's highest court should assume original jurisdiction over her case, in part, because the civil case was stayed "before hearing Petitioner Free's Motion to Dismiss, denying Petitioner an opportunity to challenge the District Court of the Muscogee (Creek) Nation's jurisdiction over her, whether through the District Court or through appeal to this Court." *See Free v. Bigler et al.*, Appl. to Assume Original Jurisdiction and Pet. for Writs of Prohibition and Mandamus 4 (MCN S. Ct.

filed Feb. 22, 2018) (ECF No. 09-8). Free's February 22 *Application* provided no explanation as to why her counsel remained silent at the hearing on November 28, 2017, or why he failed to present any argument or statement as to how the granting of the requested stay might prejudice Free.

On March 1, 2018, the MCN Supreme Court denied Plaintiff's *Application*, holding that she "must exhaust all legal avenues before the Muscogee (Creek) Nation District Court prior to utilizing the Nation's appellate court system." *See* MCN S. Ct. Order Den. Pet'r's Appl. 2 (Mar. 1, 2018) (ECF No. 3 Ex. 4). Instead of returning to the District Court to seek relief, as instructed by the MCN Supreme Court, Plaintiff filed the present action in the Northern District on April 4, 2018. The present action is brought solely on Plaintiff Free's behalf, and does not include Free-Bruner Investments, LLC, which Plaintiff included in her *Motion to Dismiss* before the MCN Court.

III. STANDARD OF REVIEW

Preliminary injunctions are "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (citation omitted). As the Tenth Circuit has concluded, a preliminary injunction "constitutes drastic relief to be provided with caution," and as a result, "should be granted only in cases where the necessity for it is clearly established." *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888–89 (10th Cir. 1989).

IV. ARGUMENT

The provision of injunctive relief is an extreme remedy, the imposition of which is not warranted under the circumstances Plaintiff has alleged in her Complaint or included in her Motion. Plaintiff is not entitled to injunctive relief because she has failed to establish the four requisite elements. "In order to receive a preliminary injunction, the plaintiff must establish the following factors: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1281.

Plaintiff's failure to establish each of the four elements is fatal to her Motion, and as a result, her motion should be denied.

a. Plaintiff is not likely to succeed on the merits.

First and foremost, Plaintiff's Motion must be denied because she has failed to demonstrate a sufficient likelihood that she will prevail on the merits. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (affirming the denial of a motion for preliminary injunction where plaintiff "has failed to meet his burden of demonstrating a substantial likelihood of success" on his claims); *see also Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (affirming the district court's denial of a preliminary injunction where party seeking the injunctive relief has failed "to demonstrate its likelihood of success on the merits, the first factor required for preliminary injunctive relief.") (citation omitted).

i. Free mischaracterizes the Supreme Court's holding in *Montana* as it applies to the claims brought against her.

Plaintiff is unlikely to succeed on the merits because her argument that the jurisdiction of the MCN Court is "plainly lacking" rests on a flawed interpretation of the Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). Neither the Supreme Court's decision in *Montana*, nor the Court's conclusion in *Plains Commerce*, command the conclusion that the MCN Court is expressly prohibited from exercising jurisdiction over Free concerning the allegations made regarding her conduct and the conduct of the corporate entities she owns, as outlined in the Attorney General's Amended Complaint.

First, Free predicates most of her argument on the assertion that *Montana* applies to limit the exercise of tribal jurisdiction over *any nonmember* of a Tribal Nation, regardless of whether the nonmember is Indian or non-Indian. *See, e.g.,* Mot. Prelim. Inj. 4 (urging the grant of her Motion on the basis "that she is not a citizen of" the MCN Nation); *cf. with* Feb 22, 2018 Appl., Aff. ¶ 1 (acknowledging that Free is a citizen of the Choctaw Nation).

The Supreme Court's precedent on this point is not as settled as Free would have it. As the Tenth Circuit Court of Appeals recently concluded, "the Supreme Court has not been clear about whether *Montana*'s rules regarding tribal civil jurisdiction apply to *all nonmembers* or to *only non-Indians* (i.e., whether *Montana* limits a tribal court's civil jurisdiction over Indians who are members of a different tribe)." *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1244 n.2 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1001 (2018) (emphasis added) (internal citations omitted); *see also McDonald v. Means*, 309 F.3d 530, 540 n.10 (9th Cir. 2002) (stating that because tribes can exercise criminal jurisdiction over all Indians regardless of membership, they can also exercise civil jurisdiction over nonmember Indians). In

this instance, the Attorney General could argue that *Montana* does not diminish tribal jurisdiction over Free because the MCN Court "is merely exercising civil jurisdiction over a defendant whom it could prosecute criminally." *McDonald*, 309 F.3d at 540 n.10. In any event, the uncertainty on this point within the Tenth Circuit makes clear that the MCN Court's jurisdiction over Free, a citizen of a separate Tribal Nation, is not "plainly lacking."

Second, Free's arguments overlook the status of the land at issue in this case. Free erroneously relies on *Plains Commerce* to assert that tribal jurisdiction over her for claims arising '"on non-Indian fee land, are presumptively invalid."' Mot. Prelim. Inj. 6 (quoting *Plains Commerce Bank*, 554 U.S. at 330). The claims against her, however, arose on restricted land, *not* non-Indian fee land. Am. MCN AG Compl. 3. The fact that the land at issue constitutes restricted reservation land, therefore, "may be a dispositive factor" disposing of the need to undergo a *Montana* analysis altogether. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Free is wrong to overlook it.[5]

Plaintiff further mistakenly relies on *Strate v. A-1 Contractors* to support her argument against tribal jurisdiction. *See* Mot. Prelim. Inj. 6 (citing *Strate v. A-1 Contractors*, 520 U.S. 438,

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[5] The Tenth Circuit's interpretation of *Plains Commerce* diverges significantly from Plaintiff's with regard to the relevance of the status of the land in this Court's analysis. In contrast to Plaintiff's characterizations, the Tenth Circuit has explained that:

> In *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), the Court emphasized that "[t]he status of the land is relevant insofar as it bears on the application of *Montana*'s exceptions." It stressed the "critical importance of land status" to its jurisdictional analysis, stating that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," The Court also reiterated that tribes may "exclude outsiders from entering tribal land."

Norton, 862 F.3d at 1244 (quoting *Plains Commerce Bank*, 554 U.S. at 331, 327, 328, 338) (internal citations omitted).

445 (1997)). In *Strate*, the Supreme Court noted that although tribal jurisdiction over non-Indian fee land is diminished, "tribes retain considerable control over nonmember conduct *on tribal land.*" *Strate*, 520 U.S. at 454 (emphasis added). To be sure, the *Strate* Court concluded that the Three Affiliated Tribes of the Fort Berthold Reservation (Mandan, Hidatsa, and Arikara) could not exercise civil jurisdiction over the non-Indian defendant because the dispute arose on "alienated, non-Indian reservation land." *Id.* Unlike the land at issue in *Strate*, the land here is not alienated, but constitutes restricted-fee property lands.[6] *See* Am. MCN AG Compl. 3 ("The land upon which the Red Creek Casino was being developed . . . is upon the restricted historical reservation land of the MCN and subject to federal restraints against federal alienation.").

Free glosses over this distinction, but federal courts do not. Instead, courts routinely look to the status of the land in applying *Montana* and its progeny, and frequently conclude that when the land at issue is under tribal ownership, the civil jurisdiction of the Tribal Nation is at its pinnacle. *See, e.g., Brendale v. Confederated Yakima Nation,* 492 U.S. 408, 433 (1989) (concluding that a Tribe's power to exclude "necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community"); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011) (holding that a Tribal Nation's "inherent authority to exclude" non-Indians from tribal lands confirms the Tribe's jurisdiction and thus there is no need to undertake a *Montana* analysis with regards to the exercise of civil jurisdiction over disputes that arise on tribal trust lands); *see also Merrion v.*

[6] Restricted-fee maintains the same legal significance as land held in trust. *See Enlow v. Moore*, 134 F.3d 993, 995 n.2 (10th Cir. 1998) (noting "[r]estricted allotments of Indian land constitute Indian country").

Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.").

Thus, Free's repeated assertions that *Montana* renders the MCN Court's jurisdiction over her "plainly lacking" or "patently violative" do not survive the application of the Tenth Circuit's guiding precedent.

ii. *Montana*'s affirmance of tribal self-government precludes a finding that the MCN Court's jurisdiction, in the present case, is "plainly lacking."

Free's arguments that *Montana* renders the jurisdiction of the MCN Court "plainly lacking" must be considered in the context of the fundamental precepts the Supreme Court declared in deciding *Montana*. Although the Supreme Court's decision in *Montana* imposes limitations on the exercise of tribal civil jurisdiction, the decision's fundamental precept recognizes that Tribal Nations retain civil jurisdiction over non-Indians (or as Free would have it, non-members) where such jurisdiction "is necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564; *see also Hicks*, 533 U.S. at 359-62 (affirming *Montana*'s holding and acknowledging the continued "federal interest in encouraging tribal self-government"). The Supreme Court's subsequent decisions are in accord: *Montana* should not be construed to preclude the preservation of tribal self-government.

And, as the Supreme Court has repeatedly recognized, a critical component of a Tribal Nation's ability to self-govern is its tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("Tribal courts play a vital role in tribal self-government."); *see also Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir. 2006) ("[T]ribal courts [are] critical to Indian self-governance") (citations omitted). As a result, a tribal court's jurisdiction "over the activities of non-Indians [and members of other Nations] on reservation lands is an important part of tribal

sovereignty." *Iowa Mut. Ins. Co*., 480 U.S. at 18 (citing *Montana*, 450 U.S. at 565–66); *see also Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on tribal lands.).

Since deciding *Montana*, the Supreme Court has repeatedly recognized Tribes' civil jurisdiction "over the activities of non-Indians on reservation lands" (*Iowa Mut. Ins. Co*., 480 U.S. at 18), and has only restricted Tribes' civil jurisdiction in a few limited circumstances—circumstances that differ dramatically from the claims brought against Free, a Choctaw citizen, regarding allegations of unlawful conduct on restricted reservation lands. *See, e.g., Strate*, 520 U.S. at 459 (no tribal court jurisdiction over civil lawsuit where both plaintiff and defendant are non-Indians and the conduct from which the lawsuit arose took place on non-Indian owned fee land); *Plains Commerce Bank*, 554 U.S. at 330 (concluding "the Tribe lacks the civil authority to regulate the [non-Indian] Bank's sale of its [non- Indian owned] fee land"). Notably, the Supreme Court has never eliminated a Tribal Nation's civil jurisdiction over citizens of a separate Nation who engage in unlawful gaming activities on a Tribal Nation's lands.

Thus, tribal self-government sits at the core of the Supreme Court's preservation of tribal civil jurisdiction. Despite having been presented with several opportunities to eliminate the exercise of tribal jurisdiction over non-Indians (or as Free suggests, non-members) altogether, the Court has continually affirmed civil jurisdiction over non-Indians as an "inherent [tribal] power necessary to [sustain] tribal self-government and territorial management." *Merrion*, 455 U.S. at 141; *see also Montana*, 450 U.S. at 565; *see also Montana*, 450 U.S. at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.").

Arguably, there are few other instances where the preservation of tribal self-government carries more weight than in the regulation of gaming. *See California v Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987) (noting that gaming on tribal lands "generates funds for essential tribal services" and gaming "generat[es] value on the reservation[] through activities in which they [Tribes] have a substantial interest."); *see also Cabazon Band of Mission Indians v. Riverside Cty., State of Cal.*, 783 F.2d 900, 906 (9th Cir. 1986) (tribal gaming constitutes an "exercise[e of Tribes'] inherent sovereign governmental authority."), *aff'd and remanded sub nom. Cabazon*, 480 U.S. 202; *Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (explaining that tribal gaming is not a "mere profit-making venture[]" that exists "wholly separate from the Tribes' core governmental functions," and thus a key goal of the Federal Government's recognition of a Tribe's right to regulate gaming on its own lands "is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding"); *see also* 25 U.S.C. § 2702(1) (stating the purpose of the IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

To be sure, the MCN relies on its casinos "for a wide variety of programs, including education, housing, and health care."[7] Nothing would undermine this purpose more than the

[7] *See* BNP Media Custom Media Group*, River Spirit Casino Opens To Success*, SovereignSpirit Magazine (Fall 2009), available at http://digital.bnpmedia.com/publication/?i=25757&article_id=257017&view=articleBrowser&ver=html5#{%22issue_id%22:25757,%22view%22:%22articleBrowser%22,%22article_id%22:%2257017%22} ("The Muscogee's (Creek) Principal Chief A.D. Ellis told members of the press on opening day [of the River Spirit Casino] that the revenues from the casino would provide funds for a wide variety of programs, including education, housing, and health care for his Tribal citizens.").

conclusion that tribal jurisdiction is "plainly lacking" or "patently violative" over a tribal citizen who is alleged to have enabled and/or participated in the development of unlawful gaming, or whose business entity is alleged to be the developer of unlawful gaming on that Tribal Nation's land.[8]

iii. Consideration of the *Montana* exceptions do not render the MCN Court's jurisdiction "plainly lacking."

Furthermore, Free's assertion that "both [*Montana*] exceptions are inapplicable here" is easily refuted. *See* Mot. Prelim. Inj. 3. In furtherance of tribal self-government, *Montana* outlined two categories of non-Indian conduct over which Tribes retain the authority to exercise their inherent civil jurisdiction (also referred to as the "*Montana* exceptions"). The allegations in the Attorney General's Amended Complaint provide both a "colorable" and a "plausible" basis for finding tribal jurisdiction, and consequently, tribal jurisdiction is not "plainly lacking."

In articulating its first exception, the *Montana* Court confirmed that Tribal Nations "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Free avers that she "has not entered into any relationship with the MCN, much less a relationship which would trigger this exception." Mot. Prelim. Inj. 7. This statement, like many others made in her Motion and

[8] Free baldly asserts that "[n]one of the alleged conduct relates to the Tribe's interest in regulating self-government or internal relations," Mot. Prelim. Inj. 3, but provides no authority or citation to support this assertion. There are none. As the Supreme Court and Congress have repeatedly reiterated, a Tribal Nation's right to regulate gaming activity on its own lands goes to the heart of tribal self-government and internal relations. *See Cabazon*, 480 U.S. 202 at 203, 219-20; 25 U.S.C. § 2702(1); MCNCA 21 § 1-106 (formerly § 12-102) (Gaming revenues "shall be used only. . . (1) To fund tribal government operations or programs; (2) To provide for the general welfare of the Nation and its members; (3) To promote tribal economic development; (4) To donate to charitable organizations; or (5) To help fund operations of local government agencies.").

Complaint, is not entirely true. Free is currently an active member of the MCN Bar Association.[9] By consenting to, and now maintaining, her admission to the MCN Bar, Plaintiff voluntarily agreed to comply with the Rules Governing the MCN Bar and Attorney Professional Conduct, including Rule 8.5(a), which states: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." Whether this fact gives rise to jurisdiction under the first *Montana* exception remains to be seen and adjudicated; but at a minimum, the discrepancy between Free's allegations in her Complaint and the public record of her contacts with the MCN highlight the need for the factual inquiry that the Supreme Court commands the Tribal Court be permitted to undertake. *See Nat'l Farmers*, 471 U.S. 845, 856 (1985) (concluding that "the existence and extent of a tribal court's jurisdiction" requires "a careful examination" that "should be conducted in the first instance in the Tribal Court itself . . . by allowing a full record to be developed in the Tribal Court.").

In articulating the second exception, the *Montana* Court expanded on the first, holding that a Tribal Nation retains its "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana*, 450 U.S. at 566. The Tenth Circuit has concluded the second *Montana* exception is met where the non-Indian's conduct "directly threatened the tribal community and its institutions," or where the non-Indian's conduct "threatened the political integrity, the economic security, and the health and welfare of the Tribe." *Norton*, 862 F.3d at 1245.

[9] Muscogee (Creek) Nation Bar Association, Current Members as of May 4, 2018, http://www.creeksupremecourt.com/wp-content/uploads/Current-Members-May-4-2018.pdf.

In the underlying case in the MCN Court, the Attorney General's allegations against Free present colorable threats to "the tribal community and its institutions" sufficient to defeat Free's claim that the MCN Court's jurisdiction must be "plainly lacking." Indeed, the Attorney General brought the underlying suit against Free to preserve the MCN's right to regulate any and all "gaming upon the historical reservation lands of the MCN," and further, to "protect[] such lands from illegal activities." Am. MCN AG Compl. 5. As both Congress and the federal courts have acknowledged, the right of a Tribal Nation to regulate gaming on tribal lands implicates issues directly related to the Tribe's "political integrity" and right to "engage in self-government and territorial management." *Norton*, 862 F.3d at 1245; *see, e.g.,* 25 U.S.C. § 2702(1) (noting that the purpose of the IGRA is to promote "tribal economic development, self-sufficiency, and strong tribal governments"); *Cabazon*, 480 U.S. at 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.").

The Attorney General has further alleged that Free's conduct threatens the MCN's largest source of revenue for its government, courts, schools, police force, emergency services, as well as health and welfare programs.[10] If proven to be true, and if allowed to continue unregulated or unprosecuted in the MCN Court, Free's alleged conduct would constitute a catastrophic threat to

[10] *See* River Spirit Casino Tulsa, About Us Section, available at www.riverspirittulsa.com/about-us/muscogee-creek-nation/ (stating "[p]roceeds from gaming operations help [] fund a variety of Muscogee (Creek) Nation service programs such as housing, education, elderly assistance and health care."); *See also* Rhett Morgan, *Creek Nation chief seeking way to fill $18 million gaming budget shortfall*, Tulsa World, August 21, 2015, available at http://www.tulsaworld.com/communities/okmulgee/creek-nation-chief-seeking-way-to-fill-million-gaming-budget/article_730cd638-7d43-52a1-b7dd-8a6ef852641b.html (Chief George Tiger stating that the majority of the Tribe's services are paid for through its gaming revenue budget.).

the MCN's ability to engage in self-government and territorial management. Application of the second *Montana* exception, therefore, does not render the MCN Court's jurisdiction "plainly lacking."

Judge Bigler may find that Free's alleged conduct threatens all the above, in which case the MCN Court would have jurisdiction, or he may find that her alleged conduct does not present these threats, in which case he could dismiss the case against Plaintiff for lack of jurisdiction. The Supreme Court's tribal exhaustion doctrine, however, commands that the MCN Court be permitted to undertake this analysis in the first instance. Above all, the *Montana* Court did not articulate a standard that can be picked apart word by word and applied in isolation. Instead, *Montana* provides a carefully crafted judicial framework that ensures the rights of non-Indians are properly balanced with the inherent rights of Tribal Nations to self-govern and protect their citizens. *See Montana*, 450 U.S. at 564-66. Here, under *Montana*, the rights of a Choctaw Nation citizen to allegedly own and operate corporate entities that are alleged to be engaged in unlawful gaming on restricted allotment lands do not outweigh the MCN's rights to self-govern and protect the welfare of MCN citizens. A proper application of *Montana* confirms that the jurisdiction of the MCN Court is, at a minimum, sufficiently "colorable" to negate Free's request for injunctive relief in federal court.

iv. Free has failed to exhaust tribal court remedies.

Plaintiff, as a result, is unlikely to succeed on the merits because, as discussed above, the MCN Court's claim to jurisdiction is more than "colorable," and thus under guiding Tenth Circuit precedent, Free is required to exhaust all tribal court remedies before filing in federal court. *See Norton*, 862 F.3d at 1251-52 (Where "Tribal Court jurisdiction over the . . . claim is colorable," the defendant in tribal court "may not seek to enjoin that claim prior to exhausting

Tribal Court remedies."). The question before this Court is not whether the MCN definitively has jurisdiction over Plaintiff Free. The question is whether, under the principles of comity, the MCN has even "colorable" jurisdiction over the claims and should be given the opportunity to determine its own jurisdiction within its own territory. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1240 (10th Cir. 2014) ("Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is colorable") (quoting *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008) (internal quotation marks omitted); *Nat'l Farmers*, 471 U.S. at 857 (finding that the federal court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction"); *Elliot v White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009) ("[W]e need not make a definitive determination of whether tribal court jurisdiction exists; we must decide only whether jurisdiction is plausible."). The exceptions to the tribal exhaustion rule are narrowly constructed, requiring Plaintiff to "make a substantial showing of eligibility," *Thlopthlocco*, 762 F.3d at 1238, that the tribal court so clearly and obviously lacks jurisdiction "that the exhaustion requirement would serve no purpose but delay." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006). Plaintiff has failed to do so.

As discussed in Defendant's Motion to Dismiss, Plaintiff has failed to allege sufficient facts, authority, and/or circumstances to warrant the application of an exception to the tribal exhaustion doctrine. *See* Def.'s Mot. to Dismiss 13-25. Accordingly, Plaintiff Free is unable to establish the requisite likelihood of success on the merits, and as a result, her Motion for injunctive relief should be denied.

b. Litigation expenses, alone, do not rise to the level of harm required for irreparable injury.

Plaintiff's Motion should further be denied because she has failed to demonstrate

irreparable injury sufficient to warrant the imposition of injunctive relief. Establishing irreparable harm "is 'not an easy burden to fulfill.'" *Hunter v. Hirsig*, 614 F. App'x 960, 962 (10th Cir. 2015) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). A showing of irreparable harm requires that the injury "be both certain and great, … and that it must not be merely serious or substantial." *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). In this instance, Plaintiff simply asserts that injunctive relief is necessary because without it, she "will be forced to expend unnecessary time, money, and effort litigating . . .in a court which likely does not have jurisdiction." Mot. Prelim. Inj. 13 (quotation omitted).

The Supreme Court, however, has made clear that litigation expenses do not constitute irreparable injury. *See Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *see also Lifespan Home Health, LLC v. Burwell*, No. 14-CV-489-GKF-PJC, 2015 WL 12683666, at *4 n.2 (N.D. Okla. July 20, 2015) (citing *Renegotiation Board* to conclude that the irreparable harm requirement is not established where plaintiff merely alleges the harm of litigation expenses). Plaintiff's assertion of litigation expenses, alone, does not warrant the imposition of injunctive relief.

Plaintiff further attempts to circumvent the Supreme Court's guiding precedent by citing an outlier decision, the Tenth Circuit's decision in *Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011), for support, *see, e.g.,* Mot. Pelim. Inj. 13, but Plaintiff makes no effort to explain or analogize how the facts of that case, or its outcome, apply here. They do not. The case in *Crowe* "stems from Crowe's representation of the Thlopthlocco [Tribal Town] in the

Muscogee (Creek) Nation District Court ('Muscogee District Court')," *Crowe*, 640 F.3d at 1144. Following Crowe's representation of Thlopthlocco—a Tribal Town that constitutes a federally recognized Tribe entitled to sovereign immunity, *id.* at 1143—the MCN Supreme Court ordered Crowe to return all attorney's fees he had been paid during his representation of Thlopthlocco. *Id.* at 1157.

The Court of Appeals ultimately enjoined the MCN Court's order that Crowe return the attorneys' fees he had been paid, but the injunction was not based on a finding that the payment of ordinary litigation expenses alone constitutes "irreparable injury." *See id.* Instead, the *Crowe* Court recognized that "the *unique* circumstances of this case [] create[] an irreparable harm" because even if Crowe did ultimately triumph in the MCN Court, the MCN Court would be without the jurisdiction necessary to order Thlopthlocco to return the attorney's fees to Crowe since Thlopthlocco, as a federally recognized Indian tribe, "would be immune from suit." *Id.* at 1157 (emphasis added); *see also id.* (affirming the imposition of injunctive relief because without an injunction, "Crowe would be required to return its fees to the Thlopthlocco Treasury, leaving the firm without recourse to recoup the fees because, as a sovereign entity, the Thlopthlocco is immune from suit").

The Tenth Circuit thus distinguished the harm that stems from the payment of ordinary litigation expenses (the burden Plaintiff cites in her Motion) from the harm that results when an attorney is required to return his attorney fees in "unique" circumstances where, if he were to ultimately prevail, the tribal court would be without the jurisdiction necessary to effectuate a reverse of the previous order. *See Crowe*, 640 F.3d at 1157. In reaching this conclusion, the Tenth Circuit rejected the notion that the *Crowe* Court's holding would render the "expenditure of time, money, and effort in litigating" a case a sufficient "basis for finding irreparable harm."

Crowe, 640 F.3d at 1158 n.10 (noting the Court's holding "is limited to the economic injury related to Crowe's likely irrecoverable attorneys' fees," and not "Crowe's expenditure of time, money, and effort in litigating before the tribal court" as that does not "provide[] an additional basis for finding irreparable harm")

Free's failure to demonstrate an irreparable injury is yet another reason her Motion for injunctive relief should be denied.

c. The harm of ordinary litigation expenses does not outweigh the harm that will result from the imposition of injunctive relief.

Free must also demonstrate "that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party." *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016). She has failed to do so, and as a result, her Motion should be denied.

In addressing the third element of the Tenth Circuit's four-part test for injunctive relief, Free merely states that denying the MCN Court's jurisdiction over her would bring about nothing more than a "potential inconvenience," Mot. Prelim. Inj. 14, because the Attorney General has "the ability to file the MCN's claims in federal or state court." *Id.* at 15. The Tenth Circuit, however, has concluded that "interfering with [a] Tribe's ability to engage in self-government" triggers much more than a "potential inconvenience" and instead constitutes irreparable harm *to the Tribe*, as "the Tribe should not be compelled to expend time and effort on litigation in a court that does not have jurisdiction over them." *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (internal citations and quotation marks omitted).

Here, if this Court were to grant Plaintiff's requested injunctive relief, the MCN Court would be prohibited from engaging in one of the most crucial forms of self-government, the "full enforcement of tribal laws[]." *Id*. In this instance, the MCN seeks to enforce its own gaming laws

(*see, e.g.,* Am. MCN AG Compl. 3), an area of law that Congress has recognized Tribal Nations must be permitted to regulate. *See* 25 U.S.C. § 2701 ("The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands."). Accordingly, prohibiting the MCN Court from exercising jurisdiction over this case would significantly undermine the Nation's right, as a sovereign Nation, to self-government and would ultimately create a harm much greater than the time and expense Free must undertake to respond to the Attorney General's Complaint. Plaintiff's inability to satisfy this element is yet another reason to deny her request for injunctive relief.

d. Enjoining the MCN Court would be adverse to the public interest.

Plaintiff's Motion should further be denied since the requested injunction would be adverse to the public interest. Plaintiff's cursory statement that "the public interest is served by preventing tribal courts from proceeding where they lack jurisdiction," Mot. Prelim. Inj. 15, in no way supports her Motion since, as discussed above, the MCN Court's jurisdiction is not "plainly lacking," and thus the Court has the authority to determine in the first instance whether it has jurisdiction over the lawsuit Plaintiff now attempts to circumvent, a determination that has not yet been made. Plaintiff's perfunctory paragraph on public interest contains no other argument or authority to support her assertion that the requested injunction would serve the public interest. *See* Mot. Prelim. Inj. 15-16. There are none.

Instead, in this case, the denial of Plaintiff's Motion would best serve the public interest. Here, allowing the MCN Court to determine its own jurisdiction in the first instance will serve the public interest because it effectuates Congress's policy of supporting tribal self-government and self-determination. *See, e.g., Nat'l Farmers*, 471 U.S. at 856 (stating that the tribal exhaustion doctrine is borne out of a commitment "to a policy of supporting tribal self-government and self-determination"). The public interest is particularly strong here since the

Attorney General's Amended Complaint constitutes an effort to regulate gaming on tribal lands. *See* 25 U.S.C. § 2702 (Congress intended "for the operation of gaming by Indian tribes [to serve] as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."); *see also Cabazon*, 480 U.S. at 219 ("The Tribes' interests obviously parallel the federal interests."); *AGAMENV, LLC v. Laverdure*, 866 F. Supp. 2d 1091, 1100 (D.N.D. 2012) ("The operation of the [tribal] [c]asino and the employment and revenue it may generate are matters in the public interest. Compliance with the tribal constitution and tribal gaming code are also in the public interest."); *see also Fox Drywall & Plastering, Inc. v. Sioux Falls Const. Co.*, No. 12-4026-KES, 2012 WL 1457183 at *15 (D.S.D. 2012) ("[T]here is a significant public interest in recognizing a tribe's sovereign right to regulate activities by nonmembers on tribal trust land and a tribal court's right to enforce those regulations . . . .").

The public interest commands the denial of Free's Motion.

V. CONCLUSION

For the aforementioned reasons, Plaintiff has failed to establish the four elements necessary to the provision of injunctive relief, and as a result, this Court should deny her Motion.

Respectfully submitted this 10th day of May, 2018.

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CERTIFICATE OF SERVICE

I, Mary Kathryn Nagle, hereby certify that on this 10th day of May, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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