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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

TAMMY WILHITE, Plaintiff, v. AWE KUALAWAACHE CARE CENTER, PAUL LITTLELIGHT, LANA THREE IRONS, HENRY PRETTY ON TOP, SHANNON BRADLEY, and CARLA CATOLSTER, Defendants.	)	Case No. 18-CV-80-BIL-SPW **DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FAILURE TO EXHAUST TRIBAL REMEDIES, AND INAPPLICABILITY OF THE FEDERAL CIVIL RICO STATUTE**

Defendants, through their counsel of record, Michael Rausch and Evan Thompson of the firm of Browning, Kaleczyc, Berry & Hoven, P.C., hereby submit this brief in support of their motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(h)(3), F.R.Civ.P., for lack of subject matter jurisdiction. Defendants

further request dismissal based on Plaintiff's failure to exhaust tribal remedies. Finally, dismissal should be granted because the civil RICO statute on which the Plaintiff asserts relief is not applicable to Indian tribes. Therefore, this Court has no subject matter jurisdiction and must, as required by law, dismiss this case.

BACKGROUND

On May 9, 2018, the Plaintiff Tammy Wilhite filed a Complaint in this Court based on the following alleged facts. The Plaintiff worked for the Crow Tribe's Care Center (a/k/a the Awe Kaualawaache Care Center), an entity created by the CrowTribe. Doc. #1, ¶ 4.[1] The named Defendants (with the exception of Carla Catolster) are members of the Board of Directors of the Care Center. Id., at ¶¶ 5-8. Defendants are enrolled members of the Crow Tribe. See Exhibit A, attached hereto, the Affidavit of Paul Littlelight in support of Defendants' Motions to Dismiss. Ms. Catolster is the "administrator and managing employee of the Care Center. Doc. #1, ¶ 10.[2] The Plaintiff claims she was employed as a registered nurse receiving a salary and various benefits. Id., at ¶ 10. She alleges a patient at the care center reported having been molested during a transport. Id., at ¶ 11. Plaintiff in turn notified her supervisor, Defendant Catolster. Id., at ¶12.

[1] The Care Center is located on trust property within the exterior boundaries of the Crow reservation. All alleged actions by the Defendants occurred within the reservation boundaries.

[2] ¶ 10 was misnumbered and should be ¶ 9.

She then reported it to the Montana DPPHS. Id., at ¶13. She alleges the Care Center retaliated against her by directing her landlord to lock her out of her apartment and by terminating her employment. Id., at ¶¶ 16, 20. She alleges Defendants Littlelight, Pretty on Top, Three Irons, and Bradley conspired to terminate her employment. Id., at ¶ 19. She further alleges various damages. Id., at ¶¶ 25-27.

Plaintiff asserts federal question jurisdiction over this tribal employment and housing dispute under 28 U.S.C. § 1331 (federal question jurisdiction). She also claims jurisdiction based on 18 U.S.C. § 1964(c) (the federal civil RICO statute). Id., at ¶ 2. She asserts the actions of the Defendants constitute a civil RICO violation. Id., at ¶¶ 28-33.

Thereafter, after serving some of the defendants in this case, the Plaintiff filed an Amended Complaint, Docket #11. This amendment modifies only some of the factual assertions but not the substance of allegations identified above. The jurisdictional allegations and the civil RICO theory of relief remain unchanged.

Additionally, as set forth in the attached Exhibit A, the affidavit of Paul Littlelight, the Care Center is a tribally owned and operated nursing home facility located on trust property within the exterior boundaries of the Crow Reservation. Its residents are Indians. Pursuant to Tribal law, its workforce has an Indian hiring preference. The Board members include all the other named Defendants except for

Carla Catolster who is the Care Center's administrator and managing employee. All actions allegedly taken by the Board of Directors as set forth in the Plaintiff's Amended Complaint were taken in their official capacities as board members. All of the individually named Defendants are Crow tribal members. Further, although the Plaintiff filed a grievance and although that grievance was heard by the Board of Directors, she failed to file this claim in the Crow Tribal Court system and failed to avail herself of the remedies provided by the Crow Tribal Court and Crow Tribal laws.

Defendants assert this case should be dismissed because: (1) this Court lacks subject matter jurisdiction over this tribal employment dispute; (2) the Plaintiff has failed to exhaust tribal remedies; and (3) the civil RICO statute does not apply to Indian tribes.[3]

STANDARD OF REVIEW

In Arbaugh v. Y&H Corp., 546 U.S. 500, 513-514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006), the United States Supreme Court reiterated:

[3] Defendants reserve the right to file a separate motion to dismiss based on the defense of sovereign immunity. That motion will be filed soon and will assert that the Care Center, as an arm of the Tribe and as an entity of the Tribe enjoys the Tribe's sovereign immunity. Additionally, the actions alleged to have occurred by the individually named Defendants were done in their official capacities and, as such, likewise enjoy the Tribe's sovereign immunity. As such, motion to dismiss based on sovereign immunity should be heard after the Court determines whether it has subject matter jurisdiction in this case as set forth in the present motion.

> A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim "arising under" the Constitution or laws of the United States. See *Bell v. Hood*, 327 U.S. 678, 681–685, 66 S.Ct. 773, 90 L.Ed. 939 (1946). … "**subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.**" *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Moreover, **courts,** including this Court, **have an independent obligation to determine whether subject-matter jurisdiction exists,** even in the absence of a challenge from any party…. When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety. (Emphasis added).

The Plaintiff bears the burden of establishing jurisdiction by evidence of competent proof. Thomson v. Gaskill, 315 U.S. 442, 446, 62 S. Ct. 673, 86 L. Ed. 951 (1942). She must carry this burden by a preponderance of the evidence. Superior MRI Services, Inc. v. Alliance Healthcare Services, Inc., 778 F.3d 502, 504 (5th Cir. 2015).

A dismissal for lack of subject matter jurisdiction is a question of law which is reviewed de novo. Hyatt v. Yee, 871 F.3d 1067, 1073 (9th Cir. 2017). Objections to a court's subject matter jurisdiction may be raised by any party or by the court on its own initiative at any stage in the litigation, even after trial and entry of judgment. Arbaugh v. Y&H Corp., 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (February 22, 2006). This defense cannot be waived. Augustine v. U.S., 704 F.2d 1074 (9th Cir., April 26, 1983).

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MEMORANDUM

F.R.Civ.P. 12(b)(1) states, "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction...." F.R.Civ.P. 12(h)(3) further states, "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

I. THE FEDERAL COURT LACKS SUBJECT MATTER JURISDICTION, BECAUSE THE PLAINTIFF VOLUNTARILY ENTERED INTO A CONTRACTUAL RELATIONSHIP WITH THE TRIBE AS AN EMPLOYEE THEREBY GIVING THE TRIBAL COURT JURISDICTION OVER THIS TRIBAL EMPLOYMENT MATTER.

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 1675 (1978). Tribes have power to make their own substantive law in internal matters, and to enforce that law in their own forums. *Id.* (internal citations omitted). "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." Burrell v. Armijo, 456 F.3d 1159, 1167 (10th Cir. 2006) (*citing* Santa Clara Pueblo, 436 U.S. at 65–66) (emphasis added); see also Montana v. United States, 450 U.S. 544, 566, 101 S.Ct. 1245 (1981) (Determining Indian tribes possess inherent authority to exercise civil jurisdiction, even over nonmembers).

The United States Supreme Court in the case of Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), held that tribes do not have power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. In doing so, however, the Court recognized two scenarios in which a Tribal Court may exercise jurisdiction over non-members. The Court said:

> To be sure, 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. **A tribe may regulate**, through taxation, licensing, or other means, **the activities of nonmembers who enter consensual relationships with the tribe or its members, through** commercial dealing, contracts, leases, or **other arrangements**....
> A tribe may also retain 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 or welfare of the tribe**.

Id., at 565-566, 1258, 493 (emphasis added). By entering an employment relationship with the Crow Tribe, the Plaintiff voluntarily entered a consensual relationship with the Tribe, to work for the Tribe, to be paid by the Tribe, and to receive benefits of that employment. As such, and under the first Montana exception, the Crow Tribe has exclusive civil jurisdiction to hear Plaintiff's wrongful discharge claim, housing claim, and other claims associated with and arising out of her employment.

Indeed, the Crow Law and Order Code (CLOC) § 3-2-201 states: "Jurisdiction. The Crow Tribal Court shall be a court of general jurisdiction." The

CLOC also provides for personal jurisdiction over persons who transact business on the reservation. CLOC § 3-2-203.[4] It further provides that the Court has subject matter jurisdiction over "**all causes of action** arising within the exterior boundaries of the Crow Indian Reservation" CLOC § 3-2-205 (emphasis added).[5]

The Crow Tribe has a fully functional tribal court system with Rules of Civil Procedure and an appellate Court. See CLOC Title 5 and CLOC § 3-1-103, respectively. In addition to the Court system, the Crow Tribe also has an administrative appeal process in its Personnel Policies and Procedures for handling employee grievances including termination. The Crow Tribe also has a Workforce Protection Act, Title 17 of CLOC, effective April 1, 2009, which protects all employees from discrimination in the workplace. The Plaintiff failed to avail herself of the Tribal Court process and the remedies it provides. The Crow Tribe's established statutory, judicial, and administrative framework allows Plaintiff to pursue her claims against the tribal Defendants within the jurisdiction of their Tribe.

[4] CLOC § 3-2-203 states, "Jurisdiction–Personal. (1) The Crow Tribal Court shall have jurisdiction over all persons who reside, enter, and/or transact business within the exterior boundaries of the Crow Indian reservation…."

[5] CLOC § 3-2-205 states, "Jurisdiction–Subject Matter. The Crow Tribal Court shall have jurisdiction over all causes of action arising within the exterior boundaries of the Crow Indian Reservation …."

In the case of Smith v. Salish Kootenai College, 434 F.3d 1127 (2006), the plaintiff sued the College for personal injuries resulting from a motor vehicle accident. The Court noted that the claim for negligence, among other claims, arose out of the College's actions on its campus. Since the plaintiff voluntarily filed his claim in Tribal Court, the plaintiff was held to have entered into a consensual relationship with the tribe within the meaning of Montana. The Court stated:

> So long as the Indians "remain a 'separate people, with the power of regulating their internal and social relations,' ... [making] their own substantive law in internal matters, and ... enforce[ing] that law in their own forums, " tribal courts will be critical to Indian self-governance.
> ...
> The Tribes have a strong interest in regulating the conduct of their members; it is part of what it means to be a tribal member. The Tribes plainly have an interest in compensating persons injured by their own....

Smith, p. 1140-1141.

Similarly, when the Plaintiff Tammy Wilhite entered into an employment relationship with the Tribe, she entered into a consensual relationship with the Tribe. Employment with the Tribe is certainly one of the "other arrangements" contemplated by the Montana decision which justifies Tribal Court jurisdiction. Indeed, if the Tribe cannot adjudicate employment-related issues, especially with regard to employment with a tribal agency, then the Montana case and its established policy is meaningless and Tribal sovereignty is likewise threatened. Tribes must have a basic, inherent power to hire, discipline, and fire employees

who work for it. Since the Plaintiff was indisputably an employee of the Tribe, the Crow Tribal Courts unquestionably have jurisdiction to hear her wrongful discharge and related claims. Under Montana, Plaintiff has consented to the exclusive jurisdiction of the Crow Tribal Court by her employment. As such, the Federal District Court lacks subject matter jurisdiction in this case. Dismissal is appropriate and warranted on this basis alone.

Moreover, because the Crow Tribe has an established legal code, functioning Tribal Court and Tribal Appellate Court, exercise of jurisdiction by this Court would infringe on the Tribe's right to make its own laws and be ruled by them. The Tribal Defendants should not be forced to defend themselves in this foreign jurisdiction where their Tribe has established law under which Plaintiff may pursue her claims against them. As such, this matter should be dismissed for lack of subject matter jurisdiction. Any other result would contradict established federal law and policy promoting tribal self-government.

II. THE FEDERAL COURT SHOULD DISMISS THIS MATTER BECAUSE THE PLAINTIFF FAILED TO EXHAUST HER AVAILABLE TRIBAL REMEDIES.

The Plaintiff has completely avoided the Crow Tribal Court and has instead filed her action directly in the Federal District Court. Such a filing is not only premature, it violates the U.S. Supreme Court's common law requirement that she exhaust all tribal remedies first, including appeal before the Tribal Appellate Court.

Exhaustion of **all** tribal remedies is required before a federal court may entertain a claim that an Indian tribal court exceeded the lawful limits of its jurisdiction. Boozer v. Wilder, 381 F.3d 931, 935 (9th Cir. 2004) (emphasis added). The rule requiring exhaustion of tribal remedies is imposed to preserve and strengthen Native American cultures by ensuring tribal institutions are not denied the opportunity to resolve tribal disputes or make tribal policy. St. Marks v. Chippewa–Cree Tribe of Rocky Boy Reservation, Mont., 545 F.2d 1188, 1189 (9th Cir.1976). Furthermore, federal courts' exercise of jurisdiction over reservation affairs impairs the authority of tribal courts. Alvarez v. Tracy, 773 F.3d 1011, 1014-15 (9th Cir. 2014) (citation omitted). "As such, [t]he Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." Id. Thus, "the court is required to 'stay its hand' until [a] party has exhausted **all** available tribal remedies." Id. (emphasis added).

In the case of National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), a school district and its insurer sought an injunction preventing an injured school boy from executing on a default judgment obtained in the Crow Tribal Court against the school district. Federal District Judge Battin granted the injunctive relief holding

the Tribe had no jurisdiction over a non-Indian. The 9th circuit reversed and the Supreme Court granted certiorari.

The Supreme Court noted that when a non-Indian Plaintiff files a claim against a Tribe in Federal District Court by invoking § 1331 federal question jurisdiction, the plaintiff must necessarily contend that "federal law has curtailed the powers of the Tribe and thus afforded them the basis for the relief they seek in the federal forum." Id., at p. 852, 2452, 818. The Court held, "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331." Id. As such, the Court upheld the District Court's conclusion that it may determine whether the tribal court has exceeded its lawful limits of jurisdiction. Id. Applying that rationale to this case, this Court has authority to determine that the Crow Tribal Court has exclusive jurisdiction to hear this tribal employment dispute.

However, the Court in National Farmers Union went on to hold that the Tribal Court is the appropriate forum to decide whether to exercise its jurisdiction in a civil matter over a non-Indian. The Court stated:

> **We believe that examination [whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians] should be conducted in the first instance in the Tribal Court itself.** 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. Moreover the orderly administration of justice in 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 appropriate relief is addressed. **The risks** of the kind of "procedural nightmare" that has allegedly developed in this case **will be minimized if the federal court stays its hand until after the Tribal Court** has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. **Exhaustion of tribal court remedies, moreover, will encourage tribal courts** to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review. (Emphasis added).

Id., at 856-857, 2454, 818. The Court sent on to state:

> **exhaustion is required before such a claim may be entertained by a federal court**.... Until petitioners have exhausted the remedies available to them in the Tribal Court system, n. 4, *supra*, **it would be premature for a federal court to consider any relief**. Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court. (Emphasis added).

Id.

Two years after National Farmers Union was decided, the Supreme Court expanded the exhaustion requirement in the case of Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). In that case, the Court stated:

> [In Montana,] we refused to foreclose tribal court jurisdiction over a civil dispute involving a non-Indian. We concluded that ... **considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court**.... (Emphasis added).

Id., at p. 15, 976, 10. The Court further stated:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.... **Civil jurisdiction over such activities presumptively lies in the tribal courts** unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, **the proper inference from silence ... is that the sovereign power ... remains intact**." *Merrion v. Jicarilla Apache Tribe*, 455 U.S., at 149, n. 14, 102 S.Ct., at 908, n. 14. (Emphasis added).

Iowa Mut. Ins. Co., at 18, 977–78, 10. Indeed, Iowa Mut. Ins. Co. went even further and held:

> 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.

Id., at 16-17, 977, 10.

Here, the Plaintiff has effectively challenged the jurisdiction of the Crow Tribal Court by refusing to file this claim in that Court and by instead filing it directly in Federal Court. The Plaintiff not only failed to exhaust tribal court remedies, the Plaintiff has wholly circumvented the Tribe's jurisdiction over its own employment-related matters. Since federal courts are required to stay their hands and allow tribal courts to determine their jurisdiction first, as a matter of comity, this Court should dismiss this action for failure to exhaust tribal court remedies. As in National Farmers Union where injunctive relief was inappropriate,

the relief sought by Plaintiff here in this federal forum is likewise inappropriate and flies in the face of the clear federal policy which requires courts to promote Indian self-determination and self-government. Failure to do so eviscerates the Tribe's sovereignty in this tribal employment dispute.

Similar to the Court's observation of the plaintiff in Alvarez, *supra*, had Plaintiff pursued the full extent of her tribal remedies, "it is possible that a tribal court would have granted relief, and we would not be here today." See Alvarez, 773 F.3d at 1022. Simply, Plaintiff's action in this forum is premature and the Court may not reach her claims until Plaintiff exhausts all available tribal remedies.

Therefore, this Court should dismiss this case as a matter of comity with the Crow Tribal Court due to the Plaintiff not only failing to seek Tribal Court relief, but also failing to obtain Tribal Court appellate review through the Crow Tribal Courts as well. The Supreme Court predicted that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." Id., at 16, 976, 10. That is exactly what is happening here. This Court should "stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction"". Id. This case should be dismissed due to the Plaintiff's failure to exhaust all tribal remedies.

III. THE CIVIL RICO STATUTE DOES NOT APPLY TO INDIAN TRIBES AND AS SUCH, THIS COURT LACKS SUBJECT MATTER JURISDICTION.

The Court in Santa Clara Pueblo, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106, provides this Court a road map for determining whether to apply the civil RICO statute to the Crow Tribe (which the Plaintiff clearly wishes to do). In Santa Clara Pueblo, the Court noted that Congress statutorily provided for a private right of action for habeas corpus relief in the Indian Civil Rights Act while at the same time remaining silent as to granting a private right of action for the enforcement of civil rights. The Court stated:

> Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.... Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government.

Santa Clara Pueblo, at p. 60 and 64, 1678 and 1680, 106 (1978). In other words, the Court should not read into a federal statute that which is plainly not there. This cautionary instruction is applicable here. This Court should "tread lightly" in determining whether it should exercise its jurisdiction in this case, because in doing so, it places itself at odds with the clearly expressed intent of Congress to promote tribal self-government.

The foundation for the Plaintiff's claim in this case arises from an employment related dispute involving Tribal employment. The civil RICO statute, 18 U.S.C. § 1964, provides no language and is absolutely silent as to its application to Indians and Indian tribes. As such, Congress' silence on the issue (as shown by the statute itself) is presumptive evidence of its intent that this section does NOT apply to Indian Tribes. This is particularly true in light of the fact that Congress has made specific provisions for applicability or non-applicability to tribes in other congressional acts. See e.g. the Indian Civil Rights Act (ICRA) wherein habeas relief was self-actionable under the act; Title VII of the Civil Rights Act of 1964 which specifically excludes Indian tribes at 42 U.S.C. § 2000e(b) (tribes are excluded from the definition of employer); ADA Title I does not apply to tribal employers (tribes are excluded from the definition of employer); and ADA Title II (which only applies to state and local governments without mention of Indian tribes). As noted earlier, "**the proper inference from silence ... is that the sovereign power ... remains intact.**" Merrion v. Jicarilla Apache Tribe, 455 U.S., at 149, n. 14, 102 S.Ct., at 908, n. 14.

Clearly, Congress could have specifically stated that the civil RICO statute applies to Indian tribes. It did not do so. As a matter of statutory construction, this Court should not insert language which is not in the statute. Instead, the Court

should recognize Congress' silence and should defer this employment related matter to Tribal Court.

Further, as stated by the 9th Circuit in Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985):

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ...." Farris, 624 F.2d at 893-94. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

Id., at p. 1116. Thus, if the civil RICO statute is determined to be a statute of general applicability, it cannot be applied to the Crow Tribe in this case based on two of the exceptions stated above.

First, if the civil RICO statute were to apply to the Crow Tribe in this case, it would touch the Tribe's exclusive rights of self-governance because it would significantly alter the manner in which the Tribe governs its employees. The exercise of federal court jurisdiction in this case would harm tribal self-government by making the Crow Tribe's TERO law, its Workforce Protection Act, and its Personnel Policies and Procedures useless. In effect, such an application would preempt application of the Crow Tribe's internal policies and procedures relating

to human resources. Such federal interference would constitute an impermissible impact on purely intramural affairs.

The second exception likely does not apply and is not analyzed here. The third exception, Congress' intend that the civil RICO law does not apply to Indians on their reservations, applies here. According to the U.S. Department of Justice Criminal Division on Organized Crime and Racketeering Section's publication, *Civil RICO: A Manual for Federal Attorneys*, https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/civrico.pdf, the civil RICO statute's legislative history makes absolutely no mention of Indian tribes or any intent on Congress' part to have this statute apply to Indian tribes. The publication summarizes that Congressional history as follows:

> Congress found that organized crime, particularly La Cosa Nostra ("LCN"), had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States, and hence posed "a new threat to the American economic system." See S. REP. NO. 617, 91st Cong., 1st Sess. at 76-78 (1969) ("S. REP. NO. 91-617"); see also Organized Crime Control Act of 1970, Congressional Statement of Findings and Purpose, Section 904(a) of PUB. L. NO. 91-452, 84 Stat. 922, 947.
>
> The Senate Report regarding RICO further found that existing remedies "are inadequate to remove criminal influences from legitimate endeavor organizations." S. REP. NO. 91-617 at 78. In that respect, the Senate Report stated:
>
> > The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.
>
> S. REP. NO. 91-617 at 78 (quoting H.R. Doc. No. 91-105, at 6; the President's message on "Organized Crime" (1969)).

> Accordingly, the Senate Report concluded that:
> What is needed here. . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.
> . . .
> What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adopting the civil remedies developed in the antitrust field to the problem of organized crime.
> S. REP. NO. 91-617 at 79, 80-81.

Clearly, the Plaintiff's attempt to make the Crow Tribe into a criminal enterprise subject to the civil RICO statute is more than just hyperbole. It is a wholescale attempt to eviscerate the sovereignty of the Tribe over the jurisdiction it clearly has over its own employees involving purely internal tribal employment matters. The Plaintiff is literally making a federal case out of what is in reality, and what is jurisdictionally, a purely tribal matter (even one which involves a non-Indian whose has consented to that jurisdiction by entering into that consensual employment relationship with the Tribe). Since the federal civil RICO statute plainly does not apply to Indian tribes, the Court has no § 1331 federal question jurisdiction and no subject matter jurisdiction in this case. Therefore, the Plaintiff's Amended Complaint must be dismissed.

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CONCLUSION

The Plaintiff's Complaint fails to invoke the subject matter jurisdiction of this Court. The Plaintiff, as a former employee of the Tribe, has voluntarily submitted herself to the exclusive jurisdiction of the Tribal Court pursuant to Montana. She has wholly failed to exhaust tribal remedies by failing to assert her claims at all in Crow Tribal Court. As such, this Court should "stay its hand" and must dismiss this action as a matter of comity. Further, the federal civil RICO statute was never meant to apply to Indian tribes. Indian tribes are not gangsters nor do they represent organized crime. The Plaintiff's Complaint and Amended Complaint, regardless of how artfully drafted, cannot invoke this Court's subject matter jurisdiction where Congressional intent fails to apply the statute to any tribe whatsoever. Dismissal without prejudice is the only appropriate option in this case so the Plaintiff may be allowed to pursue her employment and other related claims in the Crow Tribal Court.

DATED THIS 6th day of July, 2018.

/s/ Michael L. Rausch

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the above Brief in Support is double spaced, is a proportionately spaced 14 point typeface, and contains 4908 words exclusive of the caption, this certificate of compliance and the certificate of service.

By /s/ Michael L. Rausch
Michael L. Rausch, Esq.
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Attorneys for Ed Boland Construction, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2018, a true copy of the foregoing was served via CM/ECF and e-mail:

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