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

| | | |
|---|---|---|
| **TAMMY WILHITE,** | ) | |
| | ) | |
| **Plaintiff,** | ) | **Case No. 18 CV-080-BIL-SPW** |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **AWE KUALAWAACHE CARE CENTER, PAUL LITTLELIGHT, LANA THREE IRONS, HENRY PRETTY ON TOP, SHANNON BRADLEY, and CARLA CATOLSTER,** | ) | |
| **Defendants.** | ) | |
| _____ | ) | |

**PLAINTIFF'S RESPONSE BRIEF TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS**

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## INTRODUCTION

Plaintiff, Tammy Wilhite, filed this action seeking remedies under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 et seq. Defendants have moved the Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), lack of subject matter jurisdiction. However, the brief in support of the motion, in essence, admits there is subject matter jurisdiction but seeks to have this Court use its discretion not to exercise jurisdiction because of concerns that this case would interfere with the Crow Tribe's right to govern affairs arising on the Crow Reservation. The Rule 12 motion should be denied.

### I. Standard of Review

On a motion to dismiss, the trial court takes as true the well-pled allegations of the complaint. *Lenhardt v. Sysco Corp*., CV16-153-BLG-SPW-TJC, 2017 WL 9324519, at *1 (D. Mont. Feb. 9, 2017), report and recommendation adopted as modified, CV16-153-BLG-SPW, 2017 WL 1162168 (D. Mont. Mar. 28, 2017) [When considering motions to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pled allegations of material fact and construe them in the light most favorable to the nonmoving party.] *See also, Daniels–Hall v. National Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010). This well-established principle is equally applicable to a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The well pled allegations of fact that establish jurisdiction are taken as true for the purposes of the motion to dismiss. As the Supreme Court has noted,

"[u]nder our longstanding interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.'" *Merrell Dow Pharm. Inc. v. Thompson,* 478 U.S. 804, 808 (1986), citing *Franchise Tax Board,* 463 U.S. 1 at pp. 9–10 (1983). See also, *Rivet v. Regions Bank of Louisiana,* 522 U.S. 470, 475 (1998); *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987).

In her Complaint, Plaintiff pled that the Awe Kualawaache Care Center (Care Center) retaliated against her in her employment because she reported a potential felony to law enforcement. The Care Center did so by both locking her out of her apartment and subsequently firing her. She also pled that employees of the Care Center also threatened other persons with harm if reports were made to law enforcement. Those facts must be taken as true for the purpose of the motion to dismiss.

**II. This Court Has Jurisdiction.**

There are five elements to a RICO claim. *Eclectic Properties East, LLC v. Marcus & Millichap Co.,* 751 F.3d 990, 997 (9th Cir. 2014). The facts pled in the Complaint allege the necessary elements. The Complaint alleges a cause of action arising under federal law. The Court has federal question subject matter jurisdiction.

In another case arising out of the Crow Reservation, the Ninth Circuit held there was federal court jurisdiction when the plaintiff was seeking to enforce the penalty provision of a federal statute. The tribal member defendants had argued that

federal courts lacked jurisdiction since the matter was purely an internal tribal dispute. The Ninth Circuit stated:

> Since the Government is attempting to enforce the penalty provisions incident to 25 U.S.C. § 179 (1988), a federal law, the district court had jurisdiction to hear this case. In fact, the district court had jurisdiction to hear this case under 28 U.S.C. § 1331 (1988), which confers federal question jurisdiction; 28 U.S.C. § 1345 (1988), which confers jurisdiction when the United States is a plaintiff; and 28 U.S.C. § 1355 (1988), under which the Government filed this suit.

*United States v. Plainbull*, 957 F.2d 724, 726 (9th Cir. 1992) [Emphasis supplied.]

Applying that same analysis to this case, the Court can see that Plaintiff is attempting to enforce the civil penalty provisions of a federal law, 18 U.S.C. § 1964. This Court has jurisdiction under 28 U.S.C. § 1331which confers federal question jurisdiction. It also has jurisdiction under a specific grant of jurisdiction in the RICO statute, 18 U.S.C. § 1964(e). In this case, the Complaint alleges a cause of action arising under federal law. As in *Plainbull*, this Court has subject matter jurisdiction.

**III. Abstention is Not Required**

Defendants do not argue that the Complaint fails to state a claim or that there is not a federal question. The essence of the Defendants' motion is not that this Court lacks jurisdiction, but rather that this Court should exercise its discretion and abstain from proceeding on the action as a matter of comity. This Court should note that abstention can only apply when the Court does have jurisdiction but chooses not to exercise it.

Federal courts normally exercise jurisdiction when there is federal jurisdiction. ". . . [W]hen a federal court has jurisdiction, it also has a 'virtually unflagging obligation ... to exercise' that authority." *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015). At other times, the Supreme Court has described it as the "the duty to take such jurisdiction" when Congress has conferred jurisdiction on the federal court. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415 (1964).

Most of the cases applying the Indian abstention doctrine have done so in the context of a challenge to tribal jurisdiction after an action was initiated in tribal court. Defendants in the tribal actions have sought declaratory or injunctive relief to declare that a tribe lacks jurisdiction or enjoin the tribal court proceeding. That is not the case here. Plaintiff Wilhite has not sought to invoke this Court's equitable power to enjoin a tribal court. Her case is an action at law seeking money damages. Abstention principles apply only to cases in equity, not cases in law. As the Court noted:

> Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine.

*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996).

Abstention requires weighing the various interests. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017) ["Moreover, we must carefully balance the important factors, **with the balance heavily weighted in favor of the exercise of jurisdiction.**" (emphasis supplied.)] In this case that requires weighing the competing interests of the federal government and the tribal government. By enacting RICO, Congress has indicated that the federal interest is very substantial. The federal government has a significant interest in making sure federal felonies are reported to law enforcement. This outweighs any interference in tribal personnel policies. This Court is well aware of the interference the federal government has imposed on the tribes in the area of enforcement of criminal law. The Major Crimes Act, 18 U.S.C. § 1153 expressly gives federal courts jurisdiction over major crimes committed by one tribal member against another. The crimes enumerated in the Major Crimes Act include assault defined in 18 U.S.C. § 113. That section incorporates sexual assault defined at 18 U.S.C. § 2242. The federal government has chosen to step in even when the crime is strictly internal to a tribe. Defendants' theory would make the Major Crimes Act meaningless.

**IV. Exhaustion of Tribal Remedies Is Not Required for RICO Claims.**

RICO gives federal courts exclusive jurisdiction over actions arising under that Act. The statute provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor **in any appropriate United States district court** . . ." 18 U.S.C. § 1964(c). [Emphasis supplied.] That section limits RICO cases to federal district courts. It does not permit RICO actions to be heard in other courts, state or tribal. When Congress intends for other courts to have concurrent jurisdiction with federal courts, the legislation expressly says so. *See, e.g.* Truth in Lending Act, 15 U.S.C. § 1640(e). [. . .any action under this section may be brought in any United States district court, **or in any other court of competent jurisdiction** . . ." (Emphasis supplied.)]

In the one Indian law case to reach the high court on the issue held that when Congress expresses a preference for a federal forum, exhaustion of tribal remedies is not necessary. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999). Since Congress has expressed a preference for federal courts in RICO actions, it is not necessary to exhaust tribal remedies in this case before filing a RICO action in federal court.

The exhaustion of tribal remedies is only required when there is a question of tribal jurisdiction. If the law is well settled that a tribe does not have jurisdiction, exhaustion is not required. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, at n. 21 (1985); *See also Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Boxx*

*v. Long Warrior*, 265 F.3d 771, 777 (9th Cir. 2001). Because federal courts have exclusive RICO jurisdiction, tribal courts do not have jurisdiction. Exhaustion is not required. In addition to RICO providing only federal court jurisdiction, tribal courts would not have jurisdiction to hear a RICO case even if the statute were silent on the question of jurisdiction. In *Nevada v. Hicks*, *supra*, Hicks sued in tribal court under 42 U.S.C. § 1983. The Supreme Court held that without express statutory language granting tribes jurisdiction, tribes do not have jurisdiction over federal causes of action. *Id.* at 366-368. The Crow Tribe would not have jurisdiction to hear Plaintiff's RICO claim.

When Congress has created a federal cause of action, federal courts do not require exhaustion of state remedies prior to bringing the federal action. *Patsy v. Bd. of Regents of State of Fla*., 457 U.S. 496, 512 (1982). To allow a state or tribe to place burdens and delays before maintaining a federal action would allow such state or tribe to thwart federal law.

Also applicable is the general principle that a plaintiff may select a federal forum if federal jurisdiction exists. W*illcox v. Consolidated Gas Co., supra*; *England v. Louisiana State Bd. of Med. Examiners, supra.* If Congress has enacted a statute offering a federal forum to Plaintiff, she has a right to opt for that forum.

**V. Defendants Misstate the Law.**

Defendants misstate the status of the law in a number of ways in their brief. First, Defendants do not understand the difference between concurrent jurisdiction and exclusive jurisdiction. Defendants argue that the *Montana* tests, *Montana v. United States*, 450 U.S. 544 at 565 (1981), determines when a tribe has **exclusive** jurisdiction over a cause of action. (Defendants' Brief at p. 10). Nothing in the *Montana* tests indicate that tribal jurisdiction is exclusive. The test only indicates that the tribe will retain its inherent jurisdiction. That jurisdiction may be exclusive but most often it will be concurrent with state and/or federal courts. Attorneys who practice in tribal courts routinely discuss forum selection with clients. When there is concurrent jurisdiction, even tribal member Plaintiffs may elect a non-tribal forum to avoid extensive battles over jurisdiction and get a faster resolution on the merits. For example, a tribal member may wish to bring an action against an electric cooperative in state court rather than face a protracted jurisdictional battle in tribal and federal courts. *Compare, Granbois v. Big Horn County Electric Cooperative*, 296 Mont. 45, 986 P.2d 1097 (1999) with *Big Horn County Electric Cooperative v. Big Man*,17-CV-65 BIL-SPW-TJC, (D. Mont.). Granbois chose to invoke the concurrent jurisdiction of the state court. Her case resolved fairly quickly. Big Man chose to file in tribal court. After several years in trial and appeal in tribal court, he has now faced a collateral attack on tribal jurisdiction in federal court for nearly two years and is likely to face more time on appeal.

Plaintiff does not dispute the tribal court would have jurisdiction over some claims she might have. And some of those claims might well be within the exclusive jurisdiction of the Tribe. However, over the one claim she filed in this Court, there is federal jurisdiction. As noted, federal jurisdiction over RICO claims is exclusive. Even if there were concurrent jurisdiction with the tribal court, Plaintiff has a right to select the federal forum when it is available.

The second major flaw in Defendants' analysis is the statement that the tribal court is a court of general jurisdiction. Tribal courts are not courts of general jurisdiction. As noted above, tribal courts cannot hear federal causes of action absent express congressional authorization. In so holding, the Court noted, "[r]espondents' contention that tribal courts are courts of 'general jurisdiction' is also quite wrong." *Nevada v. Hicks*, *supra* at 367. Thus, the analysis about exhausting tribal remedies, is flawed.

Defendants also argue that allowing a RICO action to proceed would make tribal personnel policies useless. Falderal! The Tribe could still have its hiring preference under TERO, the Tribal Employment Rights Ordinance. It could still have the same job protections for its employees. The one instance where a RICO action could interfere with tribal personnel policies would be where the tribe or tribal employee tries to prevent reports of federal felonies to federal law enforcement. That is likely to be less than a fraction of 1% of the tribe's personnel actions. And, it is in that tiny fraction of cases that the federal government has a compelling federal

interest, enforcing federal criminal laws. In applying the weighing test mentioned above, the scales weigh heavily in favor of allowing a federal action when the action has almost no impact on the tribe's right to adopt its own laws and there is an important federal law enforcement concern.

The Defendants also misstate the law concerning application of federal law to reservations. Defendants argue that if a federal law is silent concerning tribes, it should be presumed not to apply to tribes. Defendants' brief at pp. 17-18. The law is just the opposite. Federal laws of general applicability apply on Indian reservations. *Fed. Power Commission. v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) [. . . a general statute in terms applying to all persons includes Indians and their property interests.] The Supreme Court noted that the failure to mention tribes is not an indication that a federal law will not apply, but that Congress was concerned the substance of the particular statute and overlooked tribes. *El Paso Nat. Gas Co. v. Neztsosie*, *supra*, at 487.

The Defendants cite the appropriate exceptions from the general rule. There are three exceptions to the general rule that federal statutes apply on reservations.

> (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

*Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)

Plaintiff's case does not touch upon the exclusive right of tribal self-governance. It involves the federal government's right to enforce federal law and protect those reporting federal felonies to law enforcement officials. Because there is a federal interest, it not strictly an intramural matter.

RICO does not abrogate treaty rights. Defendants cited no provision of the Crow Treaty of 1867 or even the treaty of 1825 that would be abrogated. RICO is consistent with the federal government's enforcement of federal felony laws on reservation.

Defendants cite no legislative history to show intent to exclude tribes from coverage of the RICO statutes. In fact, Defendants admit that the legislative history makes no mention of Indian tribes. Silence is not proof that there was intent to exclude tribes. Just the opposite is true. As noted, the general rule is that federal law applies on reservations. To exclude application, Defendants must show legislative intent to exclude tribes. Having absolutely no mention of tribes in the legislative history means the third exception is not met. This general federal law applies on the Crow Reservation.

## CONCLUSION

This Court has subject matter jurisdiction over an action for damages arising under a federal statute. The action should not be dismissed for lack of subject matter jurisdiction.

The Indian abstention doctrine does not require this Court to decline to exercise its jurisdiction since there is a substantial federal interest. Also, abstention principles do not apply to damage actions such as this one.

The RICO statutes are laws of general applicability and apply on Indian reservations.

For these reasons, the motion to dismiss for lack of subject matter jurisdiction should be denied.

Dated this 12th day of July, 2018.

EAKIN, BERRY & GRYGIEL, PLLC

/s/ D. Michael Eakin
D. MICHAEL EAKIN
Attorneys for Plaintiff

## CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that the foregoing RESPONSE BRIEF TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS contains 2798 words excluding the caption, table of contents, table of authorities, certificate of compliance and certificate of service.

/s/ D. Michael Eakin
D. MICHAEL EAKIN
Eakin Berry & Grygiel, PLLC.

## CERTIFICATE OF SERVICE

I certify that on the 12th day of July, 2018, the foregoing document, Plaintiff's RESPONSE BRIEF TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS, was served by:

1, 2 CM/ECF

_____ U.S. Mail

_____ Fax

_____ Email

Upon:

1. Clerk of Court

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