UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

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| HALCÓN OPERATING CO., INC.,<br><br>Plaintiff,<br><br>vs.<br><br>REZ ROCK N WATER, LLC; FRANK WHITE CALFE; Honorable MARY SEAWORTH, in her official capacity as Associate Judge of the Fort Berthold District Court; and FORT BERTHOLD DISTRICT COURT of the Three Affiliated Tribes of the Fort Berthold Indian Reservation,<br><br>Defendants. | ) | Civil No. 1:17-cv-00202-CSM |

**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Halcón Operating Co., Inc. ("Halcón") respectfully files this brief in support of its motion for a preliminary injunction against the Fort Berthold District Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the Honorable Mary Seaworth, in her official capacity as an Associate Judge of the Fort Berthold District Court (collectively, the "Tribal Court"), as well as against Rez Rock N Water, LLC, and its chief executive officer, Frank White Calfe (collectively "Rez Rock"). Halcón respectfully requests that the Court enjoin the Tribal Court from asserting jurisdiction in Civil Case No. 2017-0148, pending before the Tribal Court, and from interfering with the arbitration proceedings pending before the American Arbitration Association ("AAA") as Case No. 02-16-0001-7844. Halcón likewise requests that the Court enjoin Rez Rock from further requesting the Tribal Court to take such action.

## INTRODUCTION

This request for a preliminary injunction concerns two related questions of tribal jurisdiction: first, whether the Tribal Court may exercise jurisdiction over a contract dispute when arbitration and forum selection clauses in the contract negate tribal authority; and, second, whether the Tribal Court has authority to exercise control over arbitration proceedings in Texas. The answer to both questions is "no."

In this case, the Tribal Court has attempted to stay arbitration proceedings in order to exercise jurisdiction over a contract dispute involving Rez Rock and Halcón. To accomplish this purpose, the Tribal Court ordered an arbitration panel in Texas to stay its proceedings until the Tribal Court has had an opportunity to fully decide the matter. In issuing the order, the Tribal Court exceeded its jurisdiction.

This motion does not seek to litigate contractual claims between Halcón and Rez Rock, nor does it request a declaration on the arbitrability of Rez Rock's claims, as that dispute is already the subject of ongoing arbitration in Texas and the parties' contract has delegated the issue of arbitrability to the arbitrators. Rather, this lawsuit and motion for injunctive relief are limited to federal issues of tribal jurisdiction and the Tribal Court's recent efforts to interfere with arbitration proceedings. This Court has jurisdiction over the Tribal Court, which conducts business within this district, and therefore is the proper forum for this action. Clear federal precedent restricts tribal jurisdiction over nonmembers and recognizes that a party need not exhaust tribal remedies if an arbitration clause or forum selection clause calls for a non-tribal forum. Halcón therefore requests that this Court enjoin the Tribal Court from exercising jurisdiction over the case brought by Rez Rock or interfering with ongoing arbitration proceedings.

## FACTS

Effective April 2, 2013, Rez Rock entered into a Master Service Contract ("MSC") with Halcón to provide certain oilfield services, including the provision of equipment rentals. (MSC, Ex. 2 to Forster Aff.) The contract provided, "this Contract shall control and govern all Work ordered by Halcón and accepted by Contractor during the term hereof." (*Id.* ¶ 2.) In addition, its terms were to apply equally to Work provided to Halcón or Halcón Affiliates.[1] Frank White Calfe executed the contract as "CEO / Owner" of Rez Rock. (*Id.* p. 12.)

Among other provisions, the MSC contained an "Arbitration" provision that extended to "any dispute, controversy, or claim (a 'Dispute') arising out of or in connection with this Contract." (*Id.* ¶ 21.) Under this arbitration clause, the parties agreed to submit any such disputes to mediation followed by binding arbitration: "If the parties are not able to resolve the dispute by means of mediation, the parties hereby agree the Dispute shall be referred to and determined by binding arbitration, as the sole and exclusive remedy of the parties as to the Dispute, conducted in accordance with the AAA arbitration rules for commercial disputes." (*Id.* ¶ 21 (emphasis added).) The arbitration clause stated in full:

> The parties agree to cooperate with each other in an attempt to resolve any dispute, controversy, or claim (a "Dispute") arising out of or in connection with this Contract. If the parties are not able to resolve the Dispute, they agree to submit the Dispute to mediation to be conducted in accordance with the American Arbitration Association ("AAA") mediation rules for commercial disputes. If the parties are not able to resolve the dispute by means of mediation, the parties hereby agree the Dispute shall be referred to and determined by binding arbitration, as the sole and exclusive remedy of the parties as to the Dispute, conducted in accordance with the AAA arbitration rules for commercial disputes. The arbitrator (the "Arbitrator") shall use the substantive laws of Texas, excluding conflicts laws and choice of law principles, in construing and interpreting this Contract. The Arbitrator shall be selected by agreement of the parties. In the event the parties cannot agree each party

[1] Aside from Halcón Operating Co., Inc. itself, each of the Halcón entities named as a defendant in the tribal proceedings is listed as a Halcón Affiliate in Exhibit "D" to the contract. (*Compare* Ex. 2, MSC p. 20 *with* Ex. 13, Summons.).

> shall select one arbitrator, and the two arbitrators so selected shall select a third arbitrator who shall act as Arbitrator. The arbitration shall be in Houston, Texas, and the proceedings shall be conducted and concluded as soon as reasonably practicable, based upon the schedule established by the Arbitrator. The Arbitrator shall issue a written award, signed by the Arbitrator and setting forth the findings of fact and conclusions of law. No award shall be made for punitive, special, exemplary, or consequential damages, including loss of profits or loss of business opportunity. The decision of the Arbitrator pursuant hereto shall be final and binding upon parties. Judgment upon the award rendered by the Arbitrator pursuant hereto may be entered in, and enforced by, any court within the jurisdiction where the party against whom enforcement is sought has property. Each party shall share the expense of the Arbitrator and other expenses incurred by the Arbitrator, unless the Arbitrator shall determine that fairness requires that such fees and expenses be allocated among the parties in a different manner, including without limitation, requiring the losing party to pay all such expenses. Each party shall bear its own expenses, including expenses of its counsel. It is the desire of the parties that any Dispute is resolved quickly and at the lowest possible cost, and the Arbitrator shall act in a manner consistent with these intensions, including limiting discovery to only that which is absolutely necessary to enable the Arbitrator to render a fair decision which reflects the parties' intent set forth in this Contract. The parties hereby agree that this Paragraph 21 shall not preclude, limit or otherwise restrict a party from seeking immediate equitable relief against the other party in connection with this Contract, including without limitation, a restraining order or injunction, when the facts, circumstances and/or possible damages warrant such action.

(*Id.* ¶ 21 (emphasis added).)

Thus, any dispute, controversy, or claim arising out of or in connection with the MSC that cannot be resolved through mediation must be submitted to arbitration through the AAA pursuant to AAA rules.

The MSC also provided a choice of law clause and, subject to the arbitration clause, a forum selection clause:

> This Contract shall be governed, construed and enforced in accordance with the General Maritime Law of the United States ("Maritime Law") whenever any performance is contemplated in or above navigable waters, whether onshore or offshore. In the event that Maritime Law is held inapplicable, the internal laws of the State of Texas which shall apply without regard to principles of conflicts of law except to the extent otherwise expressly provided herein. Subject to the terms of Paragraph 21 below [i.e., the arbitration clause], the parties agree that any cause of action brought to enforce the terms of this Contract shall be brought in either a federal or state court located in Harris County, Texas. The parties consent to the

> jurisdiction and venue of any such federal or state court located in Harris County, Texas.[2]

(*Id.* ¶ 15 (emphasis added).)

After entering into the MSC, a dispute arose between the parties regarding payments owed on equipment rentals. The contract defines such rentals as part of the "Work" governed by the contract. (*Id.* ¶ 2.) Accordingly, Halcón commenced proceedings to resolve the dispute by mediation or arbitration as required by the MSC. Consistent with the contract's arbitration clause, Halcón filed an Original Statement of Claim and Demand for Mediation and Arbitration with the AAA on May 13, 2016. (Arbitration Demand, Ex. 1 to Forster Aff.) The Arbitration Demand recounted that the parties had previously submitted to a mediation in North Dakota on April 6, 2016, and requested that the matter be submitted to mediation in the event that Rez Rock were to contend that the previous mediation did not satisfy the mediation requirement under the MSC. (Arbitration Demand ¶ 17.) In response to the Demand for Arbitration, the AAA opened a mediation file.

On June 29, 2016, the AAA closed its mediation file, preparing the way for binding arbitration. (Mediation Closing Letter, Ex. 4 to Forster Aff.) Although arbitration proceedings were set to go forward, they were subsequently held in abeyance during Halcón's Chapter 11 Bankruptcy in 2016.

After Halcón emerged from bankruptcy, Frank White Calfe and Rez Rock N Water, LLC, filed a competing lawsuit in the Tribal Court, claiming false representations, fraud, breach of contract (implied), *quatum valebant*, unjust enrichment, and tortious interference. (Rez Rock

[2] Again, it should be noted that this action does not seek to litigate contractual claims between Halcón and Rez Rock, nor does it request a declaration on the arbitrability of Rez Rock's claims, as that dispute is already the subject of ongoing arbitration in Texas and the parties' contract has delegated the issue of arbitrability to the arbitrators.

Summons and Complaint, Exs. 13–14 of Forster Aff.) All of the claims are asserted jointly by the company and White Calfe as its Chief Executive Officer. Halcón specially appeared before the Tribal Court for purposes of objecting to jurisdiction. (Special Appearance, Ex. 15 to Forster Aff.)

Meanwhile, Halcón advised the AAA that bankruptcy proceedings were concluded and requested that the arbitration matter proceed. (Letter from Eugene Nettles, April 14, 2017, Ex. 5 to Forster Aff.) In response to this letter, the AAA proceeded with administration of the arbitration and directed the parties to designate their party-appointed arbitrators on or before May 1, 2017. By letter dated April 24, 2017, Rez Rock's counsel opposed reinstatement of the arbitration proceedings until the Tribal Court rendered a decision in this matter. (Letter from Steven Sandven, April 24, 2017, Ex. 6 to Forster Aff.) Halcón responded on May 16 and Rez Rock replied on May 17. (Letter from Eugene Nettles, May 16, 2017 and Letter from Steven Sandven, May 17, 2017, Exs. 7–8 to Forster Aff.)

On May 22, 2017, the AAA advised that it would proceed with the administration of the arbitration unless there was an agreement by the parties or a court order staying the arbitration. (E-mail from Tiffany McDermott, May 22, 2017, Ex. 9 to Forster Aff.) Halcón appropriately designated an arbitrator. The AAA requested that Rez Rock designate a party-appointed arbitrator, and advised that if Rez Rock failed to do so, the AAA would administratively appoint an arbitrator and proceed. (*Id.*) Rez Rock never designated an arbitrator, and so the AAA administratively appointed one, and ultimately confirmed an arbitration Panel on August 23, 2017. (E-mail from Courtney Karasek, August 23, 2017, Ex. 10 to Forster Aff.)

As the above was transpiring before the AAA, Rez Rock moved the Tribal Court on May 3, 2017 to stay the AAA arbitration proceedings, claiming that the arbitration clause was invalid

and did not provide for arbitration of contract validity, enforceability, or scope. (Motion to Stay Arbitration and Memorandum of Law in Support, Ex. 16 to Forster Aff.)

On May 24, 2017, Halcón moved for dismissal of the case based on a lack of tribal jurisdiction. (Halcón's Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, Ex. 19 to Forster Aff.) That same day, Halcón filed its opposition to the motion to stay arbitration proceedings, arguing, among other things, that the dispute is subject to arbitration and that the Tribal Court does not have jurisdiction to stay the arbitration proceedings. (Halcón's Brief in Opposition to Motion to Stay Arbitration, Ex. 20 to Forster Aff.)

In addition, the Tribal Business Council of the Three Affiliated Tribes filed an amicus curiae brief urging the Tribal Court to exercise jurisdiction and stay the arbitration proceedings, and arguing that the arbitration clause in the parties' contract is invalid by virtue of a tribal law purporting to void any provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in court. (Proposed Amicus Curiae Brief of the Three Affiliated Tribes' Tribal Business Counsel, at p. 6, Ex. 22 to Forster Aff.) Halcón responded to the amicus brief, explaining that the Federal Arbitration Act ("FAA") requires enforcement of an arbitration clause in any contract affecting commerce, and that any tribal law purporting to void arbitration clauses is preempted by the federal statute. (Response to Amicus Curiae Brief of the Three Affiliated Tribes' Tribal Business Counsel, Ex. 25 to Forster Aff.) On May 30, 2017, counsel for the parties argued their respective motions at a hearing before the Tribal Court.

On September 11, 2017, the Tribal Court issued an order purporting to stay the AAA arbitration proceedings. (Order Staying Arbitration, Ex. 28 to Forster Aff.) The order granted Rez Rock's motion to stay arbitration and provided "that the Stay of American Arbitration Association Case NO. 02-16-0001-7844 shall remain in place until all Tribal Court remedies, including

appellate review, have been exhausted." (*Id.*) The order does not recite what facts or law support the order, or explain how the Tribal Court acquired jurisdiction over the dispute or over arbitration proceedings in Texas. (*Id.*) Instead, the Tribal Court simply signed a proposed order filed by Rez Rock in conjunction with its motion. (*Compare id. with* (Proposed) Order Staying Arbitration, Ex. 24 to Forster Aff.)

After receiving a copy of the Tribal Court's order to stay arbitration, the AAA requested a response from Halcón, which Halcón submitted on September 14, 2017. (Letter from Eugene Nettles, September 14, 2017, Ex. 11 to Forster Aff.) Upon reviewing the filings to date regarding its jurisdiction, the Panel indicated that it would schedule a telephonic hearing in October 2017. (E-mail from Courtney Karasek, September 20, 2017, Ex. 12 to Forster Aff.)

## LEGAL STANDARD

A party seeking a preliminary injunction must establish: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)); *Gould v. Williams Cty.*, 2015 WL 94672, at *4 (D.N.D. 2015). The District Court has broad discretion in ruling upon a request for preliminary injunction. *Novus Franchising*, 725 F.3d at 893.

## ARGUMENT

A preliminary injunction is appropriate whenever the necessary standards are met. As the Eighth Circuit has recognized, however, the "most significant" preliminary injunction standard is "likelihood of success on the merits." *See DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 881–82 (8th Cir. 2013). In this case, Halcón will likely succeed in challenging tribal jurisdiction,

because there is clear federal law recognizing that issues of arbitrability may be delegated to an arbitrator and that exhaustion of tribal remedies is not required where parties have contracted to resolve their dispute in a non-tribal forum. Halcón faces the irreparable harm of being forced to litigate in a tribal forum that clearly has no jurisdiction, thereby losing the benefit of the bargain embodied in the arbitration and forum selection clauses of the MSC. The balance of harm and injury favors an injunction against the Tribal Court because it is unfairly subjecting Halcón and the Texas arbitration panel to a forum that lacks jurisdiction, in a lawsuit commenced after arbitration was demanded, and the arbitration procedures and remedies available to Halcón and Rez Rock are more than adequate. It is in the public's interest to ensure that tribal courts act within their jurisdiction and that agreements to resolve commercial disputes in a non-tribal forum be honored. For these reasons, the Court should enjoin the present exercise of jurisdiction by the Tribal Court.

**A. Halcón will likely succeed on the merits.**

It is a well-settled principle of law that tribal courts do not have jurisdiction to consider contractual disputes that are subject to mandatory arbitration or forum selection clauses. Justice Ginsburg recited this principle in her dissent in *Plains Commerce Bank v. Long Family Land & Cattle Co.* even while advocating for tribal jurisdiction, where she argued that such contractual provisions should be the normal method by which parties to commercial agreements may avoid tribal jurisdiction: "Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted." 554 U.S. 316, 346 (2008) (dissenting). In fact, the Eighth Circuit recently affirmed a preliminary injunction by this Court against tribal proceedings, on the basis that "[t]he tribal exhaustion doctrine does not

apply when the contracting parties have included a forum selection clause in their agreement." *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017) (citing *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995)).

Here, the MSC between Halcón and Rez Rock has both an arbitration clause and, subject to the arbitration clause, a forum selection clause that mandates a forum different from the Tribal Court. (*See* Ex. 2, MSC ¶¶ 15, 21.) As such, the Tribal Court does not have jurisdiction over the dispute.

***i. The question of arbitrability has been delegated to the AAA, and is therefore beyond tribal jurisdiction.***

Tribal court remedies are inappropriate whenever a valid arbitration clause exists within the disputed contract. *See Alltel Commc'ns, LLC v. Oglala Sioux Tribe*, 2010 WL 1999315, at *11 (D.S.D. 2010) (comparing *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996) with *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230 (8th Cir. 1995)). Even in cases where the tribal government itself is the contracting party, courts have consistently interpreted arbitration clauses as waivers of sovereign immunity and waivers of tribal court jurisdiction. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-20 (2001); *Rosebud Sioux Tribe v. Val-U Const. Co. of S. Dakota*, 50 F.3d 560, 562 (8th Cir. 1995); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 230 (8th Cir. 2008); *see also Val-U Const. Co. of S. D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 582 (8th Cir. 1998) (finding that an arbitration award is enforceable against the tribe because it agreed to an arbitration clause). This same concept holds true for individual tribal members. *See Plains Commerce Bank*, 554 U.S. at 346. Agreement upon an arbitration clause precludes contracting parties from seeking remedies elsewhere. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Here, Rez Rock agreed

to the arbitration provisions in the MSC, and therefore the Tribal Court has no right to interfere with this dispute or the arbitration panel's resolution of it.

Although Rez Rock will undoubtedly argue that the Tribal Court has jurisdiction to determine the scope and enforceability of the arbitration clause, this is not so if the arbitration clause delegates issues of arbitrability to the arbitrator. The United States Supreme Court has instructed, "The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability,*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis added) (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

In reviewing whether arbitration clauses delegate questions of arbitrability, courts have widely agreed that any contract containing an arbitration clause that references or incorporates the AAA rules "constitutes clear and unmistakable evidence the parties agreed to arbitrate arbitrability." *26th St. Hosp., LLP v. Real Builders, Inc.*, 2016 ND 95, ¶ 24, 879 N.W.2d 437, 446 (relying upon the following federal cases: *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005)). In other words, if an arbitration clause incorporates the AAA rules, the arbitrators are to decide questions regarding the enforceability of the arbitration clause and whether it applies to all claims.

For example, in *Fallo v. High–Tech Institute*, the Eighth Circuit reviewed the impact of the following arbitration language:

> Any controversy or claim arising out of or relating to this Agreement, or breach thereof, no matter how pleaded or styled, shall be settled by arbitration in accordance with the Commercial Rules of the American Arbitration Association at Kansas City, Missouri, and judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction.

559 F.3d at 876 (emphasis added). Considering the above, the court concluded "that the arbitration provision's incorporation of the AAA Rules … constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." *Id.* at 878. This principle holds true in disputes involving tribes. *See e.g.*, *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 227 (8th Cir. 2008) (holding tribal government bound by arbitration clause and noting that the AAA Rules confer "upon the arbitrator the power to decide issues of jurisdiction and arbitrability").

The arbitration clause in this case incorporates the AAA rules for commercial disputes. (Ex. 2, MSC ¶ 21.) These rules provide unequivocally that the arbitrator shall have the power to determine questions of jurisdiction, "including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *AAA Commercial Arbitration Rules and Mediation Procedures*, R-7, https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (last visited September 19, 2017). Based on the applicable language within the MSC, and rules of the AAA, the Tribal Court has no jurisdiction over the dispute between Halcón and Rez Rock, and no jurisdiction to decide issues of arbitrability. Halcón does not ask this Court to decide issues of arbitrability, or to otherwise adjudicate the parties' rights under the contract, but it does ask the Court to rule that such issues are beyond the jurisdiction of the Tribal Court to decide. Consequently, this Court

should issue a preliminary injunction barring the Tribal Court from exercising jurisdiction or interfering with the ongoing arbitration proceedings, and barring Rez Rock from requesting that the Tribal Court do so.

***ii. Disputes subject to a binding forum selection clause are beyond tribal jurisdiction.***

Even assuming for the sake of argument that Rez Rock were entitled to attack its arbitration clause in court, the Tribal Court is not the proper forum to do so. In addition to the reasons stated above, the Tribal Court lacks jurisdiction over this dispute because the MSC contains a forum selection clause. Subject to the arbitration clause, the forum selection clause limits jurisdiction and venue to federal and state courts located in Harris County, Texas. (*See* Ex. 2, MSC ¶ 15.)

"Forum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid for reasons such as fraud or overreaching." *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 (8th Cir. 1999) (citing *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972)). "A forum selection clause is enforceable unless it 'would actually deprive the opposing party of his fair day in court.'" *Enerplus Res. (USA) Corp. v. Wilkinson*, 2016 WL 8737869, at *4 (D.N.D. 2016), *aff'd*, 865 F.3d 1094 (8th Cir. 2017) (quoting *M.B. Rests., Inc.*, 183 F.3d at 752).

The existence of a forum selection clause mandating jurisdiction outside of tribal court negates tribal jurisdiction, and "[t]he tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement." *Enerplus*, 865 F.3d at 1097 (citing *FGS Constructors*, 64 F.3d at 1233). *See also Fox Drywall & Plastering, Inc. v. Sioux Falls Const. Co.*, 2012 WL 1457183, at *10–11 (D.S.D. 2012); *Alltel Commc'ns*, 2010 WL 1999315, at *11; *Larson v. Martin*, 386 F. Supp. 2d 1083, 1087–88 (D.N.D. 2005). This reasoning was recently reaffirmed by the Eighth Circuit in its *Enerplus* opinion, which affirmed this Court's grant of a preliminary injunction much like that requested here. *See* 865 F.3d at 1097.

Here, the MSC, and the parties' rights under the arbitration provisions discussed above, cannot be litigated anywhere other than a state or federal court in Harris County, Texas. (*See* Ex. 2, MSC ¶ 15.) Thus, the Tribal Court has no authority regarding these issues, and if Rez Rock believed it was entitled to litigate any issues of arbitrability before a court, the proper forum to do so was a state or federal court in Harris County, Texas. Halcón therefore does not ask this Court to adjudicate any arbitrability issues that may arise under the contract, but it does ask the Court to rule that such issues are beyond the jurisdiction of the Tribal Court.

***iii. The Tribal Court does not have authority to stay AAA proceedings.***

It is well-settled as to nonmembers that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 440 (1997); *Plains Commerce Bank*, 554 U.S. at 330. Thus, it goes without saying that the Three Affiliated Tribes do not have legislative jurisdiction to enact laws over an AAA arbitration panel in Texas. Conduct outside the reservation "does not fall within the Tribe's inherent sovereign authority." *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998). As a general rule, tribal courts lack jurisdiction over the activities of non-Indians. *Plains Commerce Bank*, 554 U.S. at 330.

As an example, *Tamiami Partners ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.* presented a similar situation, in which a tribal court ordered arbitration proceedings stayed pending the resolution of the tribal court's decisions. 177 F.3d 1212, 1218 (11th Cir. 1999). Reviewing the issue of jurisdiction and whether arbitration should be stayed, the arbitration panel in that case concluded that it derived its authority from the contract at issue and that the Miccosukee Tribal Court had no jurisdiction. *Id.* The courts upheld the arbitration panel's decision, and the tribal court was not allowed to interfere with the proceedings. *Id.*

In addition to the above federal limitations, tribal law itself limits the Tribal Court's jurisdiction to land and persons within the exterior boundaries of the reservation. *See Constitution of the Three Affiliate Tribes of the Fort Berthold Indian Reservation*, Art. I. (stating that the jurisdiction of the tribe "shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold"); *Fort Berthold Tribal Code*, Tit. I, Ch. III, § 3.2-3.3 (stating that the court has jurisdiction over all the land within "the reservation boundaries" and land "held in trust" outside reservation boundaries and "over all persons who reside, enter or transact business within the territorial boundaries of the reservation"). Arbitration proceedings in Texas obviously do not fall within the exterior boundaries of the Fort Berthold Indian Reservation, and therefore the Tribal Court's order staying such proceedings was improper.

All of the points above demonstrate the likelihood that Halcón will succeed on its claim that the Tribal Court lacks jurisdiction. Therefore, the Tribal Court should be enjoined from interfering with the ongoing arbitration proceedings involving Halcón and Rez Rock.

**B. Halcón faces irreparable harm.**

Because the Tribal Court plainly lacks jurisdiction, subjecting the arbitration panel and Halcón to its authority would result in irreparable harm to Halcón. Being required to litigate in a forum without jurisdiction may constitute irreparable harm especially where, as here, parallel litigation is pending in a different forum. *See, e.g. Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768, at *2 (D.N.M., 2002) (finding that parties would suffer irreparable harm if forced to litigate in a tribal forum without jurisdiction and face the possibility of inconsistent judgments). Moreover, if forced to litigate the dispute before the Tribal Court, Halcón will irreparably lose the benefit of the bargain set forth in the arbitration and forum selection clauses, even if tribal jurisdiction is defeated after litigation of the case. *See Wisdom Imp. Sales Co. v.*

*Labatt Brewing Co.*, 339 F.3d 101, 113–15 (2d Cir. 2003) (finding that a party suffers irreparable harm if contract terms, that have "intrinsic value" apart from the monetary value of the contract, are not enforced).

In addition, the Eighth Circuit has explained that irreparable harm can be presumed when the party seeking the injunction demonstrates "probable success" on the merits. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987).

Here, Halcón would be irreparably harmed if it is forced to litigate in a forum that lacks jurisdiction, despite arbitration and forum selection clauses that guarantee otherwise. In addition, Halcón faces the possibility that the AAA panel and the Tribal Court will make inconsistent rulings. Halcón will also be deprived the benefit of the forum selection and arbitration clauses by being forced into time-consuming litigation in a forum that is contrary to the agreement of the parties. Finally, the likelihood of success on the merits explained above is enough for the Court to presume irreparable harm. *See Calvin Klein Cosmetics Corp.*, 815 F.2d at 505.

**C. The balance of the harms favors an injunction.**

In issuing an injunction, the district court must "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotations omitted). It goes without saying that Halcón would suffer greater harm from having to litigate in a tribal forum than Rez Rock would suffer from being required to arbitrate. Simply put, Rez Rock agreed to the arbitration and forum selection clauses when it signed the contract at issue. As such, Rez Rock's interest in avoiding its own contract should be given little or no weight. *See Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 582, (2013) (holding in a transfer of venue case that a forum selection clause means a court "must deem the private-interest factors to weigh entirely in favor of the preselected forum"). There is no

indication that the arbitration panel has any bias against Rez Rock or that the outcome of the arbitration proceedings would adversely affect the sovereignty of the Three Affiliated Tribes. To the contrary, arbitration is a legitimate forum whereby Rez Rock can properly raise its grievances and can even dispute the arbitrability of its claims if it wishes. *See AAA Commercial Arbitration Rules and Mediation Procedures*, *supra*.

Tribal Court, on the other hand, is not the contractually proper forum for this dispute. Without injunctive relief, Halcón would waste valuable resources defending against a Tribal Court action that lacks jurisdiction. *See, e.g.*, *Chiwewe*, 2002 WL 31924768, at *2. Thus, the balance of harms favors an injunction.

**D. A preliminary injunction is in the public's interest.**

Public policy demands that courts exercise jurisdiction when appropriate and refrain from exercising jurisdiction when it is not. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011) (stating that it is not in the public's interest to allow the exertion of tribal authority over a non-consenting, nonmember). As tribal jurisdiction is an issue of federal law, public policy favors a determination from this Court regarding the limitations of Tribal Court authority. A determination against injunctive relief in this case could negatively affect contracts with tribal members and economic opportunities enjoyed by many individuals on the Fort Berthold Indian Reservation. If the arbitration and forum selection provisions agreed to between Halcón and Rez Rock can be overridden, and Halcón can simply be hailed into Tribal Court because the opposing party changed its mind, it would materially increase the uncertainty for businesses operating on Indian reservations.

It is appropriate to grant a preliminary injunction when doing so promotes "the public interest by protecting freedom to contract through enforcement of contractual rights and

obligations." *PCTV Gold, Inc. v. SpeedNet, LLC.*, 508 F.3d 1137, 1145 (8th Cir. 2007). The public interest "does not favor forcing parties to a[n] agreement to conduct themselves in a manner directly contrary to the express terms of the agreement . . . and to refuse to grant the preliminary injunction in this case would have precisely that effect." *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1274 (N.D. Iowa 1995) (quoting *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir. 1992)).

Indeed, the language of the Federal Arbitration Act clearly demonstrates it is the public policy of the United States for arbitration clauses to be enforced. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015); *see also Fallo*, 559 F.3d at 879. The FAA provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. The FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). The statute is a "congressional declaration of a liberal policy favoring arbitration agreements," such that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). The statute applies not only in federal court but to any contract "involving commerce," because "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control

over interstate commerce and over admiralty.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

To the extent there is any tribal public policy against arbitration, the U.S. Supreme Court has repeatedly made clear that local laws are preempted if they discriminate on their face against arbitration. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001). In addition, the FAA "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426; *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Similarly, the Supreme Court has recognized a policy that "in the light of present-day commercial realities … the forum clause should control absent a strong showing that it should be set aside." *M/S Bremen*, 407 U.S. at 15. In short, the public policy of this country is that freedom of contract should be upheld and that arbitration clauses and forum selection clauses generally should be enforced as written. Public policy strongly favors a preliminary injunction.

**CONCLUSION**

For the foregoing reasons, Halcón respectfully requests that this Court grant Halcón's motion for a preliminary injunction halting the Tribal Court's exercise of jurisdiction over the dispute between Halcón and Rez Rock and its attempt to stay of the pending arbitration between them. The Court should enjoin the Tribal Court from asserting jurisdiction in Civil Case No. 2017-0148 pending before the Tribal Court, and from interfering with the arbitration proceedings pending before the American Arbitration Association ("AAA") as Case No. 02-16-0001-7844.

Halcón likewise requests that the Court enjoin Rez Rock from further requesting the Tribal Court to take such action.

Dated this 27th day of September, 2017.

*/s/ Paul J. Forster*

Joshua B. Cook (ND #07067)
Paul J. Forster (ND # 07398)
CROWLEY FLECK PLLP
Attorneys for Plaintiff
100 West Broadway, Suite 250
PO Box 2798
Bismarck, ND 58502-2798
Phone: (701) 223-6585
Fax: (701) 222-4853
jcook@crowleyfleck.com
pforster@crowleyfleck.com