UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

LESLIE ROMERO, Plaintiff, v. WOUNDED KNEE, LLC d/b/a SIOUX-PREME WOOD PRODUCTS, a South Dakota limited liability company, and WOUNDED KNEE COMMUNITY DEVELOPMENT CORPORATION, a South Dakota corporation, Defendants.	)	Case No. 5:16-cv-05024-JLV **PLAINTIFF'S BRIEF ON TRIBAL COURT EXHAUSTION**

COMES NOW Plaintiff, Leslie Romero, by and through her attorney of record, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, and respectfully submits this Brief on Tribal Court Exhaustion pursuant to this Court's instruction at the May 24, 2018 Show Cause Hearing wherein this Court requested that simultaneous briefs be filed by close of business June 18, 2018. *See* May 24, 2018 Hearing Transcript ("HT") at 23:16-27:5.

INTRODUCTION

Defendant Wounded Knee Community Development Corporation ("WKCDC") has filed a motion to dismiss, arguing that the Plaintiff failed to exhaust her tribal remedies. This Court has ordered simultaneous briefing on this issue, in pertinent part, whether the Tribal Court has the right to determine its own jurisdiction prior to a party filing in federal court. *See* HT at 23:16-27:5. As is set forth more fully herein, Plaintiff was not required to obtain such a finding from the Tribal Court, and instead, sufficiently exhausted all other remedies prior to filing suit in this Court and obtaining a default judgment.

FACTUAL BACKGROUND

The Plaintiff is an Indian and member of the Oglala Sioux Tribe. WKCDC alleges that it is a "federally recognized Oglala Sioux Tribe business entity."[1] (Doc. 42 at p. 7). WKDCD is not tribally chartered, and has never produced a tribal charter or claimed it has one. The incidents giving rise to the Plaintiff's claims occurred on the Pine Ridge Indian Reservation. (*See generally* Doc. 1). The underlying facts giving rise to the Plaintiff's claims are set forth fully in the Complaint. *Id.* However, because this brief deals with the issue of tribal exhaustion, the facts pertinent to that issue will be reinstated herein for the ease of the Court.

When the Plaintiff was beginning to pursue her claims against the Defendants in 2013, she met with the then president of the Oglala Sioux Tribe, Brian Brewer about her complaint. (Doc. No. 66, ¶ 5). President Brewer determined that the WKCDC was not a part of the Tribe, and encouraged Plaintiff Romero to sue the WKCDC to hold them accountable. *Id.*

At this time, Plaintiff Romero also pursued her claim with the OST Tribal Employment Rights Office ("TERO"), working with Cordelia White Elk and Buffy Red Fish. *Id.* at ¶ 6. Plaintiff Romero appropriately came to TERO to report her claim of discrimination. After receiving a complaint, TERO determines whether the complainant's employer is an arm of the Tribe. If the complainant's employer is an arm of the Tribe, TERO would investigate the complaint. Then, the TERO commissioners would determine the issue in an administrative hearing before the TERO commission board. TERO does not handle complaints against any OST district's CDCs, as they are not a part of the Tribe.

TERO determined the WKCDC was not a part of the Tribe and instructed Plaintiff Romero to file a charge of discrimination with the EEOC. (Doc. 66 at ¶ 7). TERO also

[1] WKCDC also argues that it is an "arm of the tribe" and is entitled to the same sovereign immunity, which is highly contested by Plaintiff but is not at issue in this brief.

determined Plaintiff Romero exhausted her tribal remedies and her only next option was to file a charge with the EEOC. TERO determined this charge could not be handled within the Tribe because CDCs are not arms of the Tribe. TERO does not direct sexual harassment victims to tribal court, but rather the EEOC.

In further efforts to take all necessary steps, Plaintiff Romero also pursued her claim with Tatewin Means, the then OST Attorney General. (Doc. 66 at ¶ 8). Attorney Means instructed Plaintiff Romero to file a charge of discrimination with the EEOC, and that there was no need to file in tribal court as it would end up in federal court anyway. *Id.*

Following the direction of both TERO and the OST Attorney General, Plaintiff then filed her Charge of Discrimination with the EEOC on April 26, 2013. (Doc. 1-2.) The Notice of Charge of Discrimination was sent and mailed to "Sioux Preme Wood Products / Wounded Knee CDC at P.O. Box 200, Manderson, SD 57756" on April 30, 2013. (Doc. 1, Exhibit 2, Notice of Charge of Discrimination.) The Notice advised a position statement was due June 10, 2013. The EEOC Intake Case Log indicates on July 19, 2013, "very overdue PS [position statement]". On July 25, 2013, the EEOC investigator spoke with Lori Mesteth on behalf of Wounded Knee CDC and faxed her the Charge of Discrimination. (Doc. 52-3, EEOC Intake Case Log,) (Doc. 52-4, Fax Cover Sheet and Charge of Discrimination) The EEOC Intake Case Log documents numerous telephone calls with various agents of Wounded Knee CDC. *Id.*

On August 7, 2013, Mark St. Pierre, on behalf of Wounded Knee CDC and using the email address, "WKCDC <woundedkneecdc@gmail.com>", sent the EEOC investigator a position statement. (Doc. 52-5, Position Statement.) The position statement was written on "Wounded Knee Community Development Corporation" letterhead that identifies Mark St.

Pierre as the CEO. Notably, there is no mention of tribal involvement or sovereign immunity in the position statement.

On March 20, 2014, the EEOC investigator sent a letter to Mark St. Pierre requesting additional information. (Doc. 52-6, March 20, 2014 RFI.) One question specifically inquired:

> 4. In regards to Wounded Knee Community Development Corporation, provide the following information:
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> ***
>
> e. Is Wounded Knee Community Development Corporation tribally owned? If yes, provide names/titles of the individuals who own Wounded Knee Community Development Corporation. Provide the name of the tribe.

(Doc. 52-6, March 20, 2014 RFI.) The EEOC Investigator called Lori Mesteth on April 3, 2014 and the investigator's notes reflect, "there was a board meeting on [Roby?] and they gave the document to their attorney to respond to RFI. R needs an extension. I granted an extension until April 10th. She will relay this to the attorney that the RFI is due April 10th. She will let the attorney know that I need his/her contact info. As well." (Doc. 52-3, EEOC Intake Call Log.) Wounded Knee CDC responded to the request for information on April 7, 2014 by way of letter on "Wounded Knee Community Development Corporation" letterhead and signed by Charlotte Black Elk, "Consultant to the Board of Directors". (Doc. 52-7, April 7, 2014 Letter.) There is no response to the question of whether Wounded Knee CDC is tribally owned and no mention of tribal involvement or sovereign immunity. *Id.*

On August 21, 2014 and September 17, 2014, the EEOC investigator wrote to Charlotte Black Elk advising her response was insufficient and that that each and every question in the request for information needs to be fully answered. (Doc. 52-8, August 21, 2014.) (Doc. 52-9, September 17, 2014 Letter.) The EEOC investigator also spoke with Charlotte Black Elk on October 7, 2014, reiterated each question needed a response and granted an extension of time.

(Doc. 52-3, EEOC Intake Call Log.) On October 29, 2014, John Hussman contacted the EEOC investigator, advised he was the executive director and would answer the request for information. *Id.* John Hussman requested the EEOC investigator email him so he could respond via email. *Id.* The EEOC investigator emailed John Hussman on October 29, 2014 per his request and they exchanged emails through November 21, 2014. (Doc. 52-10, October 29, 2014-November 21, 2014 email string.) Attached to one of those emails is "Responses to Correspondence dated September 17, 2014". (Doc. 52-11, Responses.) **The response to the question of whether Wounded Knee CDC is tribally owned is "no"**. *Id.* (Emphasis added).

On October 5, 2015, Wounded Knee CDC copied the EEOC on a letter to Plaintiff's attorney. (Doc. 52-12, October 5, 2015 Letter.) Wounded Knee CDC alleged Plaintiff was not a Wounded Knee CDC employee but instead an employee of Wounded Knee, LLC. *Id.* The letter fails to mention any tribal involvement or sovereign immunity. *Id.* Mr. Ecoffey signed this letter. *Id.*

On October 16, 2015, the Equal Employment Opportunity Commission returned a final determination finding reasonable cause to believe that Plaintiff was "discriminated against based on her sex/female, when she was subject to severe and pervasive sexual harassment which created a hostile work environment [and] . . . was retaliated against when she opposed Respondent's discriminatory practices and was constructively discharged in violation of the Title VII." (Doc. 1-3). This determination from the Equal Employment Opportunity Commission found that both Wounded Knee CDC and Wounded Knee, LLC were responsible for the discrimination and harassment alleged in the charge of discrimination. *Id.*

On November 30, 2015, Wounded Knee CDC sent another letter to the EEOC and this letter was signed by all the board members. (Doc. 52-13, November 30, 2015 Letter.)

Finally, on January 28, 2016, following correspondence between Wounded Knee CDC and Plaintiff regarding Plaintiff's claims, and its failure to take action, the Equal Opportunity Commission issued to Plaintiff a notice of Right to Sue with respect to such charge of discrimination. (Doc. No. 1-4). Plaintiff subsequently filed suit against Defendants in federal court on April 21, 2016.

ARGUMENT

A. Romero was not required to exhaust any remedies in Tribal Court before bringing this action in federal court.

i. Tribal Court is not a "United States court" and no tribal court is contemplated to have jurisdiction of this case under Title VII.

Title VII of the Civil Rights Act reads as follows:

> (f) **Civil action by** Commission, Attorney General, or **person aggrieved**; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; **jurisdiction** and venue **of United States courts**; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.
>
> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation

> agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and **within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved** or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. **Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance**

See 42 USCS § 2000e-5(f) (emphasis added). As indicated above, Title VII has one exhaustion requirement – that the plaintiff file a claim with the Equal Employment Opportunity Commission (the "Commission" or "EEOC") before filing suit. Once a plaintiff receives notice from the EEOC, typically referred to as a "right-to-sue" letter, the plaintiff has only 90 days to file suit in federal court or is time barred in pursuing her Title VII rights.

Moreover, the content quoted above allows a court to only stay the federal proceedings for no more than 60 days pending is a complaint under federal, county or municipal law and still needs to be resolved. The last sentence of the block quote above does not apply, as no state or subdivision-of-the-state law applies here. Nonetheless, the quote above is bolded to indicate that even should a complaint be pending in another forum, the district court can only stay proceedings for 60 days for those forums to resolve such complaints. There is no mention of tribal court (which is inherently not a state forum or subdivision-of-a-state forum), and Title VII in no way anticipates tribal courts handling such matters or federal courts staying or dismissing cases for tribal courts to handle such matters.

Whenever a court handles a Title VII case, it must use the Federal Rules of Civil Procedure:

> (2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief **shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure**. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

Id. at (f)(2) (emphasis added). *See also Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435 (9th Cir. 1984)(". . . we do not believe that Congress attempted in Title VII to regulate the procedures and priorities off the state courts. Therefore, section 706(f)(2) also unmistakably implies that Congress intended exclusive federal jurisdiction.").

Title VII itself indicates only United States district courts and "United States courts" shall have jurisdiction of Title VII cases. Title VII's language repeatedly references a "district" or "circuit," suggesting federal district or federal circuit courts (such as federal three-judge courts) have jurisdiction of such cases:

> (3) **Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.** Such an action may be brought in any judicial **district** in the State in which the unlawful employment practice is alleged to have been committed, in the judicial **district** in which the employment records relevant to such practice are maintained and administered, or in the judicial **district** in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such **district,** such an action may be brought within the judicial **district** in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 *[United States Code]*, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Id. at (f)(3) (emphasis added). As indicated above, the judicial district in which the respondent has his principal office shall be determined by federal law. Moreover, Title VII indicates that if the chief judge of the district is not able to find an available district judge, the chief judge "shall certify this fact to the chief judge of the circuit" who then shall designate a district or circuit judge of the circuit to hear the case:

> (4) It shall be the duty of the chief judge of the **district** (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, **shall certify this fact to the chief judge of the circuit** (or in his absence, the acting chief judge) who shall then designate a **district or circuit judge of the circuit** to hear and determine the case.

Id. at (f)(4) (emphasis added). This Title VII language clearly connotes that a federal district judge must find an available judge to hear the case, and if there is no such available district judge, the Eighth Circuit must designate a circuit judge of the circuit to hear the case. All such language applies neatly to the federal court system. All such language is incongruous with the idea that tribal courts can or should determine Title VII cases. Upon information and belief, the Oglala Sioux Tribal court system does not have districts or circuits from which a circuit judge can hear the case in the absence of an available district court judge, which is further indication that Title VII cases are appropriately heard in federal court.

> (5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Id. at (f)(5).

Moreover, Title VII requires any appeals brought in a Title VII case to be brought under federal law, specifically §§ 1291 and 1292 of Title 28.

> (j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28, United States Code.

Id. at (j). These provisions very clearly indicate that the underlying case being appealed comes from the federal district court. As stated in 28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Id. Further, 28 U.S.C. § 1292 provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders **of the district courts of the United States**, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
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> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
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> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C. § 1292(a)(1-3) (emphasis added). That section goes on further to provide:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay

> proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id. at (b). "Congress could not have intended that actions brought in state court be appealed to the federal circuit courts. Thus section 706(i) unmistakably implies that Congress intended to vest exclusive jurisdiction in the federal courts." *Valenzuela* at 435.

Finally, Title VII makes clear that federal courts have exclusive jurisdiction:

> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
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> (1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and
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> (2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.
>
> (d)
>
> (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.
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> (2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

> (3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.
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> (4) (A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.
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> B. When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.
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> (e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Thus, the entire structure of Title VII itself suggests that only federal district courts should determine Title VII cases. This case is a federal question and was properly brought in federal district court, within 60 days of the issuance of the right-to-sue letter, as required by the text of Title VII itself.

In addition, whenever the Attorney General brings a Title VII case against "any person or group," he or she must bring that action in "the appropriate district court of the United States." *See* 42 U.S.C. § 2000e-6 [Section 707](a). Section (b) states, "[t]he **district courts of the**

United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case." *Id.* at (b) (emphasis added). This case is brought pursuant to § 42 U.S.C. § 2000e-et seq., which is Title VII of the Civil Rights Act. Any case an Attorney General brings is also brought under that same section. Therefore, when the Attorney General brings a Title VII case, even against a tribal entity, it must be brought in the appropriate U.S. district court.

ii. Case law supports the argument that this Court has jurisdiction of this matter.

Based upon the language of Title VII, it is no wonder that the Ninth Circuit Court of Appeals has found that Title VII claims are within the federal court's exclusive jurisdiction. *See Valenzuela v. Kraft,* 739 F.2d 434 (9th Cir. 1984) (Federal courts possess exclusive jurisdiction over Title VII cases). The Seventh Circuit has found Title VII cases are within the concurrent jurisdiction of the state and federal courts. *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402 (7th Cir. 1989). Notably, such cases have not found that tribal courts have jurisdiction over Title VII claims.

The *Vance v. Boyd Mississippi, Inc.,* case is akin to this case. 923 F. Supp. 905 (S.D. Miss. 1996). In *Vance,* the plaintiff brought a Title VII complaint against a casino owned by a tribe and located on a reservation. The defendant argued that Vance should be required to exhaust her remedies in tribal court. *Id.* at 908. The *Vance* court analyzed *National Farmers,* noting that the question before the Supreme Court in the *National Farmers* case was "whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court," and that the existence of the jurisdiction of the tribal court should first be determined by the tribal court itself. *Id.* at 909; (citing *Nat'l Farmers Union Ins. Cos. v.*

Crow Tribe of Indians, 471 U.S. 845, 855-56, 105 S. Ct. 2447, 2449 (1985)). The *Vance* court emphasized the Supreme Court's three exceptions to tribal exhaustion, which are discussed more fully later in this brief. *Id.*

For ease of this Court's review, the *Vance* court's analysis of the *National Farmers* case is included below:

> Boyd asserts that Vance should be required to exhaust her remedies in the Choctaw Tribal Court before bringing an action in federal court. According to Boyd, the tribal exhaustion rule is an "inflexible bar to consideration of the merits of the petition by the federal courts." Defendant's Brief in Support at 8 (quoting *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir.1991)). Boyd relies on the holdings of two United States Supreme Court cases to support its position. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). Boyd also cites various Tenth Circuit and district court cases, which interpret *Iowa Mutual* and/or *National Farmers*, and all of which require exhaustion in the tribal courts of any dispute arising on an Indian reservation. *See, e.g., Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir.1993); *Smith*, 947 F.2d at 444; *Brown v. Washoe Housing Auth.*, 835 F.2d 1327 (10th Cir.1988); *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 517 (D.Kan.1993); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096, 112 S. Ct. 1174, 117 L. Ed. 2d 419 (1992). Boyd also relies on at least two Ninth Circuit cases which support this requirement of tribal exhaustion of any dispute arising on an Indian reservation. *See Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir.1987); *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 983 (9th Cir.1983), *cert. denied*, 472 U.S. 1016, 105 S. Ct. 3476, 87 L. Ed. 2d 612 (1985).
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> Vance interprets the tribal exhaustion doctrine as a "belief that a federal court should abstain from exercising jurisdiction over civil cases if those cases are also subject to tribal jurisdiction." Plaintiff's Brief in Opposition at 2 (citing *Iowa Mutual*, 480 U.S. at 15, 107 S. Ct. at 975; *National Farmers*, 471 U.S. at 857, 105 S.Ct. at 2454). According to Vance, the tribal exhaustion doctrine is not applicable in this case for three reasons: (1) the doctrine may not be applied to circumstances outside the narrow holdings of *Iowa Mutual* and *National Farmers;* (2) the tribal exhaustion rule is not an inflexible bar to the exercise of federal court jurisdiction; and (3) in considering the relevant factors concerning abstention, this Court should exercise federal jurisdiction in this case. Vance relies on *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 621, 126 L. Ed. 2d 585 (1993), and various district court cases and law review articles to support its contention that a bright line rule of tribal exhaustion was not contemplated by the Supreme Court in either *Iowa Mutual* or *National Farmers*. Vance also asserts that the leading case concerning federal court abstention,

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), counsels in favor of exercising jurisdiction in this case.

The United States Court of Appeals for the Fifth Circuit has not yet ruled on the issue of tribal exhaustion of remedies in a case such as this. This Court must therefore look to existing Supreme Court precedent as well as the law of other circuits to determine the correct result in this case.

In *National Farmers*, an Indian child was struck by a motorcycle in the parking lot of an elementary school located on land owned by the State of Montana, but within the boundaries of the Crow Indian Reservation. 471 U.S. at 847, 105 S. Ct. at 2449. Through his guardian, the Indian child filed a lawsuit in the Crow Tribal Court against the school district which was a political subdivision of the State, not of the Crow Tribe. Process was served on the Chairman of the School Board, but he failed to notify anyone that a suit had been filed against the school board. *Id.* Thereafter, a default judgment was entered in the Tribal Court against the school district in the amount of $153,000.00. *Id.* at 848, 105 S. Ct. at 2449. Upon receiving a copy of the judgment, the school district filed a complaint and motion for temporary restraining order in the District Court for the District of Montana. The complaint against the Crow Tribe and the Tribal Court, among others, stated that the execution of the default judgment would result in a seizure of school property which would cause irreparable injury to the school district. *Id.* Subsequently, the district court entered a permanent injunction finding that the Tribal Court lacked subject matter jurisdiction over the tort which was the basis for the default judgment. *Id.* at 848-49, 105 S. Ct. at 2449-50. The Ninth Circuit reversed concluding that federal jurisdiction could not be supported on any constitutional, statutory or common law ground. *Id.* at 849, 105 S. Ct. at 2450.

The Supreme Court held that "[t]he 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."[4] *Id.* at 852, 105 S. Ct. at 2452. The Supreme Court then concluded, however, that the existence of the jurisdiction of a tribal court should first be determined by the tribal court itself:

[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

We believe that examination should be conducted in the first instance in the Tribal Court itself. 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.
>
> *Id.* at 855-56, 105 S. Ct. at 2453-54. In a footnote, the Court stated that exhaustion would not be required under three circumstances: (1) where an assertion of tribal jurisdiction is made in bad faith or for the purpose of harassment; (2) where the action is "patently violative of express jurisdictional prohibitions;" or (3) where exhaustion would be futile because of no adequate opportunity to challenge the court's jurisdiction. *Id.* at 856 n. 21, 105 S. Ct. at 2454 n. 21. The Supreme Court then remanded the case for the district court to determine whether the action should be dismissed or merely held in abeyance until the plaintiffs had exhausted their tribal remedies. *Id.* at 857, 105 S. Ct. at 2454.

Vance, 923 F. Supp. at 908-909.

Additionally, the *Vance* court also analyzed *Iowa Mutual*, noting the question before the Supreme Court in the *Iowa Mutual* was "whether a federal court could exercise diversity jurisdiction before the tribal court had an opportunity to determine its own jurisdiction." *Id.* (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19-20, 107 S. Ct. 971, 978 (1987)).

For ease of the Court's review, the pertinent portion of the *Vance* opinion which analyzes the *Iowa Mutual* case is set forth below:

> In the next major case addressing the issue of tribal exhaustion, the Supreme Court again held that tribal exhaustion of remedies was required. *Iowa Mutual*, 480 U.S. at 19-20, 107 S. Ct. at 978-979. The question in *Iowa Mutual* was whether a federal court could exercise diversity jurisdiction before the tribal court had an opportunity to determine its own jurisdiction. *Id.* at 11, 107 S. Ct. at 973. The plaintiff,[5] Edward LaPlante, was a member of the Blackfeet Indian Tribe and employed by the Wellman Ranch Company, which is located on the Blackfeet Indian Reservation. The Wellman Ranch Company is owned by members of the Wellman family who are also Blackfeet Indians. While driving a cattle truck on the Reservation, LaPlante lost control of the truck and was injured when it jack-knifed. LaPlante filed suit in the tribal court seeking compensatory damages against the owners of the Wellman Ranch and compensatory and punitive damages against Iowa Mutual and its claims adjuster for bad faith refusal to settle his claim. *Id.* Iowa Mutual sought dismissal for lack of subject matter jurisdiction and for LaPlante's failure to properly allege tribal court jurisdiction. *Id.* at 12, 107 S. Ct. at 974. The tribal court dismissed but allowed the plaintiff to amend his complaint to properly allege jurisdiction. The tribal court concluded that it would have jurisdiction over the action holding that "the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation." *Id.*

Iowa Mutual then filed suit in federal district court, based upon diversity of citizenship, naming LaPlante, the Wellmans and the Wellman Ranch Company as defendants. Iowa Mutual sought a declaration that it owed no duty to the Wellmans or the Ranch to defend or indemnify the suit brought by LaPlante in tribal court because the injuries sustained by LaPlante were not within the scope of the coverage provided by the applicable policies. *Id.* at 12-13, 107 S. Ct. at 974-975. On a motion to dismiss filed by LaPlante, the district court dismissed the case for lack of subject matter jurisdiction holding that the tribal court must first be given an opportunity to determine its own jurisdiction. *Id.* at 13, 107 S. Ct. at 974-975. The Ninth Circuit affirmed the district court concluding that "[w]e merely permit the tribal court to initially determine its own jurisdiction. The tribal court's determination can be reviewed later `with the benefit of [tribal court] expertise in such matters.'" *Id.* at 14, 107 S. Ct. at 975.[6]

Relying on *National Farmers,* the Supreme Court held that although the federal district court had diversity jurisdiction, the plaintiff was required to exhaust his remedies in the tribal court before proceeding to federal court. *Id.* at 19, 107 S. Ct. at 978.

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." ... In diversity cases, as well as federal-question cases, 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.... Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

Id. at 16, 107 S. Ct. at 976 (citations omitted). In a footnote which has been largely ignored by the various courts of appeal, the Supreme Court made the following observation:

> As the Court's directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River,* as here, strong federal policy concerns favored resolution in the nonfederal forum.

Id. at 16 n. 8, 107 S. Ct. at 976 n. 8. In concluding that Iowa Mutual had not yet exhausted all tribal remedies, the Court held:

> In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene. *Id.* at 17, 107 S. Ct. at 977.

Because this is a matter of first impression in this Circuit, the Court must decide how broadly to apply the holdings of *National Farmers* and *Iowa Mutual.* In making this determination, the Court is not convinced that the bright-line rule of requiring tribal exhaustion, as espoused by the Tenth Circuit, is the appropriate avenue for deciding cases with vastly different factual scenarios. Unlike the cases cited by Boyd and the Tribe, this case does not involve a dispute between Indians or even between an Indian and a non-Indian. The Plaintiff here is not challenging a tribal ordinance or its applicability to her situation. Nor is there any pending tribal court proceeding or an attack upon the jurisdiction of the Tribal Court. Rather, this is a case involving a dispute between two non-Indians, concerning only issues of federal law, which happened to arise on the Reservation in a business owned by the Tribe but which is managed by a non-Indian corporation. Furthermore, the factual situations in the two Supreme Court cases involve challenges brought in federal court to tribal court jurisdiction during ongoing tribal litigation. Some courts have interpreted the holdings in these two Supreme Court cases as not requiring tribal exhaustion in every case. *See Altheimer*, 983 F.2d at 814 (concluding that tribal exhaustion was not required because "there has been no attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law"); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n. 2 (9th Cir.1991) (concluding that in this federal question case involving the challenge to the taxation by the tribe of a railroad right of way, "[t]he complaint presents issues of federal, not tribal law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues"), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3013, 120 L. Ed. 2d 887 (1992); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754-55 (D.N.D.1989) (concluding that tribal exhaustion of plaintiff's Title VII claims was not required because there was no challenge to tribal court jurisdiction, the tribal was not a party and the case presented issues of predominately federal law). Given the facts in this case, the Court finds that tribal exhaustion of remedies is not required.

As noted by the Plaintiff, the decisions in *Iowa Mutual* and *National Farmers* were based upon the concern of treading on the jurisdiction of tribal courts (1) by not allowing the tribal courts to determine their jurisdiction in the first instance; (2) by avoiding competition between federal courts and tribal courts; and (3) based upon

> the belief that tribal courts are the best qualified to assess tribal law. Plaintiff's Brief in Opposition at 8 (citing *Iowa Mutual*, 480 U.S. at 15-16, 107 S.Ct. at 975-976; Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual and the Abstention Doctrine in the Federal Courts*, 71 N.D.L.Rev. 519, 523-24 (1995)). All of these factors weigh heavily in favor of this Court retaining jurisdiction over this action. There is no pending proceeding in the Tribal Court such that the jurisdiction of that court is being challenged. Because there is no pending proceeding, there will be no competition between this Court and the Tribal Court in this matter. Finally, as stated previously, the issues in this case do not involve any interpretation of tribal law. The issues presented are purely questions of federal law which should be decided in this Court.

Vance, 923 F. Supp. at 909-911.

Other courts have found the same. In *Myrick v. Devils Lake Sioux Mfg. Corp*., 718 F.Supp. 753 (D.N.D. 1989), an American Indian plaintiff brought a Title VII case against a corporation which argued it was an Indian Tribe. In that case, the court noted the *Valenzuela* and *Donnelly* cases and noted that the claims in the case at issue predominately presented issues of federal law. *Id.* The court also noted that neither the tribe nor an arm of the tribe was a party. *Id.* The court held, "the federal claims which form the basis of this lawsuit are properly heard in the federal court. Neither existing case law nor sound reasoning necessitates dismissal." *Id.*

As in *Myrick*, WKCDC is not a tribe nor an arm of the tribe, as it is not tribally chartered and does not meet the other required criteria as briefed in the motion to dismiss briefing pending before the Court. As in *Myrick*, there is no attack or challenge to any case pending in tribal court. There is no case pending in tribal court on this matter, as there was in *National Farmers* or *Iowa Mutual*. As in *Myrick*, this case presents predominately issues of federal law. There are no tribal ordinances or other tribal laws at issue here, and tribal courts have no expertise in Title VII or determining the arm-of-the-tribe factors that the federal district court frequently determine in these cases.

Moreover, the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) enumerated the forums available to a victim of discrimination under Title VII. The Supreme Court only named the EEOC, state and local agencies, and the federal courts.

iii. Even if this Court finds tribal exhaustion to be applicable, the exceptions set forth in *National Farmers* apply.

Because the case at issue arises under federal law, this court has jurisdiction over this matter; thus, any issues as to tribal court exhaustion are simply inapplicable, as argued above. However, should this Court determine that the tribal court has jurisdiction over the federal claims asserted herein, tribal exhaustion still would not be required because the exceptions set forth in *National Farmers* apply. Per that case, there are three exceptions to tribal exhaustion:

1. Where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;

2. Where the action is patently violative of express jurisdictional prohibitions; or

3. Where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

See National Farmers, 471 U.S. at 856 n. 21. These exceptions apply to the case at hand.

First, WKCDC's assertion of tribal jurisdiction is conducted in bad faith. As has been extensively briefed to this Court in previous filings, and as is set forth in the Factual Background section about, WKCDC never asserted any jurisdictional deficiency, either to the United States Equal Employment Opportunity Commission or to this Court until such point that a default judgment was entered against it. Only when the Plaintiff received a default judgment, nearly five years after the events giving rise to the Complaint occurred did WKCDC finally assert tribal jurisdiction. This failure to timely assert this matter constitutes bad faith on the part of WKCDC, as well as an intent to further harass the Plaintiff by delaying adjudication of this matter for another period of years. Forcing the Plaintiff to file in tribal court (despite the fact she was told

multiple times by officers of and the lawyer for the OST government that it was not the proper venue for her claim) would be a great disservice to her and would further allow WKCDC to avoid liability for the actions of its employees.

Second, as argued fully above, tribal court jurisdiction over this federal Title VII claim would be patently violative of express jurisdictional provisions. Per its own language, Title VII was drafted specifically for federal court adjudication. This case is not a negligence case like the *National Farmers* case; it is a case that involves predominantly federal law. Further, the considerations undertaken by the *National Farmers* case are inapplicable here. There is no tribal law or ordinance in any form that is at issue in this case; it solely deals with federal law. There is no proceeding pending in any tribal court that would create competition between the federal court and the tribal court; the tribal court possesses no special expertise in Title VII, and exhaustion in tribal court would do nothing to assist this court in deciding federal law issues. *See Burlington N. R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (discussing factors pertaining to tribal exhaustion with regard to the Railroad Revitalization and Regulatory Reform Act) (citing *National Farmers*, 471 U.S. at 857). Further, contrary to the *National Farmers* case, there is no opportunity for the tribal court to develop of "full record" as to jurisdiction because there are no court reporters in the OST's tribal court.

Because the exceptions to tribal court exhaustion set forth above apply to the Plaintiff, this Court should continue to hear this case to its end.

B. In Title VII cases, federal courts repeatedly decide the issue of their own jurisdiction without any discussion or consideration of whether a tribal court should first do so.

Federal courts in this jurisdiction commonly determine whether the defendant is an arm of a tribe without any discussion or consideration of what a tribal court might say on the topic. In *Wright v. Melbert Prairie Chicken*, 1998 SD 46; 579 N.W.2d 7, 9, the South Dakota Supreme

Court recognized that Indian tribes generally enjoy a common-law immunity from suit. Such tribal sovereignty has been extended to tribal officers acting in their representative capacities and within their scope of authority. *Id.* In *Wright*, the defendants serving on the Rapid City Indian Health Board, a private nonprofit corporation chartered by the State of South Dakota, argued sovereign immunity should be extended to them. *Id.* This Board was authorized to operate health care programs by three local tribes. *Id.* The Board's main purpose was to promote the health care and operation of quality health care programs for Indian people. *Id.*

The *Wright* court recognized that if an entity is a tribal organization, it does not necessarily follow that it enjoys the same sovereign immunity as the tribes it serves. *Id.*

> Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: the entity is organized under the tribe's laws or constitution rather than Federal law; the organization's purposes are similar to or serve those of the tribal government; the organization's governing body is comprised mainly of tribal officials; the tribe has legal title or ownership of property used by the organization; tribal officials exercise control over the administration or accounting activities of the organization; and the tribe's governing body has power to dismiss members of the organization's governing body. More importantly, courts will consider whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the sub entity has the 'power to bind or obligate the funds of the [tribe].' The vulnerability of the tribe's coffers in defending a suit against the sub entity indicates that the real party in interest is the tribe.

Id. at 9-10, *citing Ransom v. St. Regis Mohawk Educ. & Comm. Fund., Inc.,* 86 N.Y.2d 553, 658 N.E.2d 989, 992-93, 635 N.Y.S.2d 116 (NY 1995). There was no discussion of requiring a tribal court to make this determination, and the district court made the determination itself.

In *Seaport Loan Prods., LLC v. Lower Brule Community Dev. Enter. LLC,* 981 N.Y.S.2d 638 (Sup.Ct.N.Y. 2013), the court discussed tribal businesses and whether they have sovereign immunity of their own. "Tribal businesses 'have no inherent immunity of their own,' and enjoy immunity only to the extent the tribe's immunity is extended to them." *Id.*, (citing *Am. Prop.*

Mgmt. Corp. v. Superior Court, 206 Cal.App. 4th 491, 500, 141 Cal. Rptr. 3d 802 (Cal. Ct. App. 2012)). Determining whether a tribal business enjoys sovereign immunity "requires a comprehensive, fact-based analysis utilizing the factors set forth in *Ransom* to determine whether the company functions as an arm of the Tribe." *Id.* The *Ransom* factors were used by the South Dakota Supreme Court in *Wright* and listed above.

"[T]he burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe." *Seaport Loan Prods.*, 981 N.Y.S.2d at 638 (citing *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 109 AD3d 80, 87, 968 N.W.Sd 271 (4th Dep't 2013)(quoting *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F.Supp. 2d 442, 466 (E.D.NY 2009)). There was no discussion of requiring a tribal court to make this determination; instead, the district court made the determination itself.

In *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040 (8th Cir. 2000), the Eighth Circuit considered whether the defendant was immune from suit. The Sisseton-Wahpeton Sioux Tribe had chartered the College as a nonprofit corporation, and this fact was undisputed. *Id.* at 1042, 1043. The plaintiffs had filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and state human rights commission. *Id.* The EEOC found the defendant to be an Indian tribe. *Id.* The plaintiffs filed discrimination complaints in federal district court, and the College did not answer the complaints. *Id.* The court granted the plaintiffs' motion for default and set the matter for a jury trial on damages. *Id.* Then the College entered an appearance and filed a motion to dismiss based upon immunity. *Id.*

Significantly, the parties agreed that the facts regarding immunity were undisputed (very unlike the situation *sub judice*). "Because the facts are undisputed," the Eighth Circuit addressed the College's argument that it was immune from suit. *Id.* at 1043.

The College argued that because it was chartered[2], funded, and controlled by the Tribe, and therefore it is a tribal agency. *Id.* at 1043. These facts were undisputed. *Id.* The Eighth Circuit found the College served as an arm of the tribe "and not as a mere business." *Id.* There was no discussion of requiring a tribal court to make this determination, and the district court made the determination itself.

In *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F.Supp. 2d 1163 (D.S.D. 2012), the federal district court reviewed the decisions in *Hagen, Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998), and *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-671 (8th Cir. 1986). The court found that in those three cases, the Eighth Circuit "considered critical to the issue of entitlement to sovereign immunity that the organizations served as 'arms of the tribe' and were established by tribal councils pursuant to the councils' powers of self-government." *J.L. Ward* at 1170; *See also Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2010 U.S. Dist. LEXIS 48969, 2010 WL 1999352, at *9 (D.S.D. 2010) ("For a tribal agency to have sovereign immunity, the agency must be established by a tribal council pursuant to its powers of self-government and serve as an arm of the tribe.") The *J.L. Ward* court found that these cases provided guidance, but did not establish a specific test or list of factors for court to consider when determining whether an entity immune due to tribal sovereignty. *Id.* at 1173. The district court then went on to adopt the factors discussed in *Wright* and *Ransom* (listed above). The district court characterized these factors as the "subordinate economic entity" analysis. *Id.* The district court indicated that it analyzes a claim of sovereign immunity based upon the factors set forth in *Wright*. *Id.* at 1176. There was

[2] Plaintiff cannot emphasize enough that in the *Hagen* case, the parties agreed the College was chartered by the Tribe. There is no such stipulation in the case *sub judice*, and no evidence whatsoever that WKCDC was chartered by the Tribe.

no discussion of requiring a tribal court to make this determination, and the district court made the determination itself.

In *Giedosh v. Little Wound Sch. Bd., Inc.*, 995 F.Supp. 1052, 1057 (D.S.D. 1997), the defendant school board was authorized by, organized under the law of, and chartered by the Oglala Sioux Tribe. The school board was established by authority of a tribal resolution of the Tribal Council. *Id.* The school board's members were democratically elected. *Id.* The board was tribally chartered. *Id.* The Oglala Sioux Tribe was allowed to, for good reason, step in and assume the operation of the school. *Id.* The board was required to comply with tribal regulations and ordinances. *Id.* The EEOC in the *Giedosh* case also found the school board to be an Indian tribe. *Id.* at 1058, FN 8. There was no discussion of requiring a tribal court to make this determination, and the district court made the determination itself.

There is no requirement for a tribal court to hear this case or determine sovereign immunity. Federal district courts routinely make the sovereign immunity determination themselves and do not require the plaintiff to launch yet another case in tribal court before or while bringing its Title VII case. Indeed, Plaintiff was required by Title VII to bring her case in federal court within 90 days of receiving her right-to-sue letter. This Title VII requirement suggests there is no first-stop at tribal court required prior to bringing Plaintiff's case in this court.

C. This Court should not exercise abstention due to comity.

The *Vance v. Boyd Mississippi, Inc.* case, 923 F. Supp. 905 (S.D. Miss. 1996), case also considered whether the federal district court should grant a stay or dismissal of the Title VII case due to the matter of comity. For the ease of this Court's review, the pertinent portion of that decision pertaining to abstention is set forth below:

Plaintiff also asserts that this Court should consider the factors set forth in *Colorado River* in deciding whether to stay or dismiss this proceeding. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). The *Iowa Mutual* Court noted that the tribal exhaustion doctrine is a matter of comity, not of jurisdiction, which is analogous to the principles of abstention set forth in *Colorado River*. *Iowa Mutual*, 480 U.S. at 16 n. 8, 107 S. Ct. at 976 n. 8. Although these factors concern whether a stay is appropriate when a parallel state court proceeding is pending, the factors will be helpful in considering whether to stay or dismiss the instant case and require tribal exhaustion of remedies. The Court will therefore consider these factors in deciding whether to retain jurisdiction of this matter.

Under the *Colorado River* standard, this Court must find that "exceptional circumstances" warrant a stay or dismissal of this proceeding during the pendency of parallel litigation in another forum. *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 951 (5th Cir.1994). In *Colorado River*, the Supreme Court determined that, despite a "virtual unflagging obligation" to exercise federal jurisdiction, a district court could nonetheless abstain from the assumption of jurisdiction over a particular suit in "exceptional circumstances." 424 U.S. at 818-20, 96 S. Ct. at 1246-47. The Court announced four factors to consider when determining whether "exceptional circumstances" exist: (1) whether another court has assumed jurisdiction over the property; (2) whether the federal forum is inconvenient; (3) whether it is desirable to avoid piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums. Later, in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), the Supreme Court added two additional factors to the *Colorado River* test: (1) whether the federal law provides the rule of decision; and (2) whether the proceedings in the concurrent forum are inadequate to protect the federal court plaintiff's rights. *Id.* at 25-26, 103 S. Ct. at 941-42. The Court will address each of these factors in turn.

In this matter, there is no *res* or property over which any court has assumed control. The presence of property over which a concurrent forum has taken control would tip the scales in favor of federal abstention. However, the absence of such property is not a neutral consideration but weighs in favor of the federal court retaining jurisdiction. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 589 n. 4 (5th Cir.1994); *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191-93 (5th Cir.1988). Therefore, this factor weighs in favor of this Court retaining jurisdiction.

As to the inconvenience of the federal forum, the *Jimco* court explained that this factor "primarily involves the physical proximity of the federal forum to the evidence and witnesses." *Jimco*, 844 F.2d at 1191. In making this assessment, the ultimate issue is not whether the Tribal Court is "better" or "more convenient" but whether the inconvenience of this Court is so substantial that it weighs in favor of abstention. *Id.* at 1192. In this matter, the federal forum, while not located on the Reservation, is close enough in proximity to the evidence and witnesses that this

factor also weighs in favor of the federal court retaining jurisdiction over this matter.

The next factor is the desirability of avoiding piecemeal litigation. Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results. *American Int'l Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir.1988). The policy behind avoiding piecemeal litigation is the justification of abstention based upon duplicitous state proceedings, namely "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River,* 424 U.S. at 817-19, 96 S. Ct. at 1246-47. The question, therefore, is whether either of the concurrent forums can resolve the entire dispute between all interested parties so that litigation in different courts will be unnecessary to conclude the conflict. *Jackson Hewitt, Inc. v. J2 Financial Services, Inc.*, 901 F. Supp. 1061, 1067 (E.D.Va.1995); *see also Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1265 (5th Cir.1994) (indicating that the policy to avoid piecemeal litigation is implicit where claims will have to be litigated in separate suits). In this matter, if the Plaintiff was forced to first try her case in Tribal Court, she could still appeal to this Court the question of whether the Tribal Court had jurisdiction to entertain her case. *Iowa Mutual,* 480 U.S. at 19, 107 S. Ct. at 978. However, Plaintiff would not be able to appeal to this Court the factual issues raised and decided by the Tribal Court. *Id.*[7] As noted previously, *see supra* at n. 6, if this Court found that Tribal Court jurisdiction was lacking, neither the factual nor legal findings of the Tribal Court would be binding on this Court in a subsequent proceeding. The Court finds that this factor also weighs in favor of federal court jurisdiction. It would be duplicitous to require the Plaintiff to go to Tribal Court, then return to this Court for a determination of whether the Tribal Court had jurisdiction. Although the Supreme Court has stated that a tribal court should be given the first opportunity to determine its own jurisdiction, *see Iowa Mutual,* 480 U.S. at 16-17, 107 S.Ct. at 976-977; *National Farmers,* 471 U.S. at 856, 105 S. Ct. at 2453, because this is a dispute between non-Indians over an issue strictly governed by federal law, this factor does not weigh in favor of abstention. *See supra* at 910-911.

With regard to the order in which jurisdiction was obtained, federal district courts generally defer to the earlier-filed action. *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24,* 751 F.2d 721, 728-29 (5th Cir.1985). With respect to the priority question, this factor "is to be applied in a pragmatic, flexible manner" such that it is not "measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Signad, Inc. v. City of Sugar Land,* 753 F.2d 1338, 1340 (5th Cir.), *cert. denied,* 474 U.S. 822, 106 S. Ct. 75, 88 L. Ed. 2d 61 (1985). In this matter, there is no pending Tribal Court action. Plaintiff filed her action in this forum, and there is no counter-claim by the Defendant or any other mechanism for the Defendant to file a suit in the Tribal Court to determine whether it is liable to the Plaintiff for her Title VII claims. Therefore, if the Court decides to stay this action, it would be usurping Plaintiff's

> choice of forum and require the Plaintiff to litigate her case in a court not of her choosing. Because this case was filed first, and is the only pending case, this factor weighs heavily in favor of this Court retaining jurisdiction.[8]
>
> The next factor is whether federal law provides the rule of decision. Here, Plaintiff's claims are strictly federal Title VII claims that she was dismissed because of her pregnancy and/or in retaliation for filing a charge with the EEOC. Such claims are best decided by federal courts who have an enormous amount of expertise in such matters.[9]
>
> Finally, the Court must consider whether Plaintiff's rights would be adequately protected in the Tribal Court. Because of the relationship between the Defendant Boyd and the Tribe, the Court finds that there is a reasonable question of the appearance of the impartiality of the Tribal Court.[10] If allowed to remain in federal court, the parties will litigate before a federal tribunal with no connection to either of them. Furthermore, if the factual issues in this case are litigated in the Tribal Court, the Plaintiff may not challenge those issues in a later suit in this Court. *See supra* n. 7. For this reason, this factor weighs in favor of this Court retaining jurisdiction.
>
> Based on a careful application of the *Colorado River/Moses H. Cone* factors, the Court finds that the circumstances in this case do not rise to the level of "exceptional" such that they substantially outweigh the presumption in favor of the exercise of jurisdiction. The Court therefore finds that this Court should retain jurisdiction of this cause of action, and that Plaintiff should not be required to exhaust tribal court remedies in this matter.

Id. at 911-914.

In this matter, like the *Vance* case, this Court should retain jurisdiction of this cause of action and find that tribal exhaustion is not necessary. This Court should find no "exceptional circumstances" exist requiring tribal court exhaustion.

1. Whether another court has assumed jurisdiction over the property

As in *Vance*, there is no property at issue in this case, nor has a tribal court assumed jurisdiction over that property. This factors weighs in favor of this Court retaining this case.

2. Whether the federal forum is inconvenient

As in *Vance*, this federal court is not inconvenient to the parties. In *Vance*, the court found "[i]n making this assessment, the ultimate issue is not whether the Tribal Court is 'better' or 'more convenient' but whether the inconvenience of this Court is so substantial that it weighs in favor of abstention." *Id.* at 1192. As in *Vance*, the federal forum, while not located on the reservation, is close enough in proximity to the evidence and witnesses that this factor also weighs in favor of this Court retaining jurisdiction over this case.

3. Whether it is desirable to avoid piecemeal litigation

As the *Vance* court determined, it is not desirable to have a tribal court determine it has jurisdiction and go on to determine the facts, as this Court then re-determines its own jurisdiction thereafter. Should this Court find it had jurisdiction all along, all the fact gathering and factual findings in the tribal court are for nothing, wasting the parties' scarce resources. As *Vance* held:

> . . . if the Plaintiff was forced to first try her case in Tribal Court, she could still appeal to this Court the question of whether the Tribal Court had jurisdiction to entertain her case. *Iowa Mutual*, 480 U.S. at 19, 107 S. Ct. at 978. However, Plaintiff would not be able to appeal to this Court the factual issues raised and decided by the Tribal Court. *Id.*[7] As noted previously, *see supra* at n. 6, if this Court found that Tribal Court jurisdiction was lacking, neither the factual nor legal findings of the Tribal Court would be binding on this Court in a subsequent proceeding. The Court finds that this factor also weighs in favor of federal court jurisdiction. It would be duplicitous to require the Plaintiff to go to Tribal Court, then return to this Court for a determination of whether the Tribal Court had jurisdiction.

Id. at 912.

4. The order in which jurisdiction was obtained by the concurrent forums

Plaintiff filed this case in federal court years ago, as required by Title VII. There is no case pending in tribal court. As held in *Vance*, "if the Court decides to stay this action, it would be usurping Plaintiff's choice of forum and require the Plaintiff to litigate her case in a court not of her choosing. Because this case was filed first, and is the only pending

case, this factor weighs heavily in favor of this Court retaining jurisdiction." *Id.* at 912. Moreover, "[i]f the Court decides to stay this action, it would be usurping Plaintiff's choice of forum and require the Plaintiff to litigate her case in a court not of her choosing. Because this case was filed first, and is the only pending case, this factor weighs heavily in favor of this Court retaining jurisdiction." *Id.*

5. Whether Plaintiff's rights would be adequately protected in the Tribal Court

The *Vance* court considered the reasonable question of the appearance of the impartiality of the tribal court, considering its relationship with the defendant. "If allowed to remain in federal court, the parties will litigate before a federal tribunal with no connection to either of them. Furthermore, if the factual issues in this case are litigated in the Tribal Court, the Plaintiff may not challenge those issues in a later suit in this Court." *Id.*

Moreover, upon information and belief, the tribal court judge is John Hussman, Sr. The tribal judge's son, John Hussman, Jr., is a witness in this case, having worked for the Defendant itself. (*See* Documents 6, 7, 13, 16, 43 p.3, 43-4, 50 p.1, 52-3 pp.4-5, 52-10, 52-11, 65-1 p.18, 67 p.4.) Requiring Plaintiff to have her case determined by the father of a witness who worked for the Defendant would create a conflict of interest and be highly prejudicial to Plaintiff. At the very least, there is an appearance of bias. This Court is beholden to no one, and is not affiliated with the Plaintiff, the Defendants, nor any witnesses, and is the superior jurisdiction.

The OST courts are often without a judge, have frequent and lengthy judge suspensions, lose files, and often utilize judges who are not lawyers. The OST tribal court often fails to rule on motions, letting issues sit for years. Lawyers frequently make trips to tribal court only to be told the court has lost the file or to learn once they arrive that the court is continuing the hearing.

It is typical to make numerous repeated trips to tribal court to attempt to have a hearing on one single motion. Placing a complex federal law case into the tribal court system, particularly one which must, according to Title VII, follow federal law and the Federal Rules of Civil Procedure, is highly prejudicial to Plaintiff and will delay this matter even further, if it is resolved at all in tribal court.

CONCLUSION

Plaintiff was not required to exhaust her tribal remedies by filing in Tribal Court to ask it to determine whether it has jurisdiction. Plaintiff has more than satisfied any requirement under federal and tribal law to take all steps necessary before filing suit in federal court.

Dated: June 18, 2018.

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