IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Shingobee Builders, Inc.	)	
	)	
Plaintiff,	)	Case No. 1:18-cv-00057-DLH-CSM
	)	
-against-	)	
	)	
North Segment Alliance	)	
	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF DEFENDANT NORTH SEGMENT ALLIANCE'S MOTION TO DISMISS COMPLAINT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

As described in North Segment Alliance's ("NSA") opening brief, this case involves a contract dispute between a contractor and a tribally-owned corporation. NSA requests that the Court dismiss Shingobee Builders, Inc.'s ("Shingobee") Complaint for two independent reasons: (1) the Court lacks subject matter jurisdiction because there is no diversity of citizenship, and (2) NSA is an arm of the Tribe and did not waive its sovereign immunity. The Eighth Circuit has provided clear authority on both issues. For this reason, it is unnecessary to look to other jurisdictions for authority as Shingobee does. Eighth Circuit law is clear: Tribal corporations are not citizens of any state for purposes of diversity jurisdiction, and tribally-owned corporations like NSA that enjoy the tribe's sovereign immunity do not waive that immunity, absent an express waiver that complies with tribal law.

ARGUMENT

I. There Is No Diversity Jurisdiction and the Court Therefore Lacks Subject Matter Jurisdiction.

For this matter to proceed in federal court, the Court must have subject matter jurisdiction. Plaintiff in its response brief does not dispute that there is no federal question. Thus, Plaintiff must establish that there is diversity of citizenship. Plaintiff cannot do so, and the Court must therefore dismiss the case.

A. In the Eighth Circuit, a Tribe and Its Agencies, Authorities *and* Corporations Are Not Citizens of a State.

Plaintiff concedes, as it must, that in the Eighth Circuit, "'an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction'." (See Shingobee Memorandum of Law in Opposition to Defendant North Segment Alliance's Motion to Dismiss ("Plaintiff's Opposition Brief"), p. 5.); see *e.g., Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974).

As discussed in NSA's opening brief, the Eighth Circuit has applied this principle of diversity jurisdiction to tribal agencies, authorities *and* corporations. In *United States ex. Rel. Kishell v. Turtle Mountain Hous. Auth.*, a tribe chartered a housing authority as a "*corporation* created by the Tribe to provide low-income housing on the reservation." 816 F.2d 1273, 1274 (8th Cir. 1987) (emphasis added). The *Kishell* Court explicitly concluded "that the district court correctly refused to exercise federal jurisdiction based on diversity of citizenship. *Id.* at 1277. In *Hagen v. Sisseton-Wahpeton Cmty. College,* a tribe chartered a community college "as a nonprofit *corporation* to provide post-secondary education to tribal members." 205 F.3d 1040, 1042 (8th Cir. 1999) (emphasis added). In *Dillon v. Yankton Sioux Tribe Hous. Auth.,* a tribe chartered a housing authority which "was a *corporation* created by the Tribe." 144 F.3d 581, 583 (8th Cir. 1998) (emphasis added); *see also Auto-Owners Ins Co v. Tribal Court of Spirit Lake Indian Reservation* 495 F.3d 1017, 1021 (8th Cir. 2007) ("no diversity jurisdiction exists as a basis for subject matter jurisdiction because Tate Topa – a sub-entity of the Spirit Lake Sioux Tribe – is considered a part of the Indian tribe."). In all cases, the Eighth Circuit treated the tribal corporations as agencies, authorities and arms of the tribes and ordered dismissal of Plaintiffs' claims for lack of jurisdiction.

Similar to the tribal entities in *Hagen, Dillon,* and *Kishell*, NSA is a tribal nonprofit corporation created to serve the common welfare, social, economic, educational, health, economic self-sufficiency, self-determination of and to improve housing for the North Segment of the Mandan, Hidatsa and Arikara Nation (the "Tribe"). (Williams Aff., Ex. B, p. 1.) And like the tribal entities in those cases, NSA is not a citizen of any state and the Court should dismiss Shingobee's complaint for lack of jurisdiction.

Plaintiff relies on cases outside of the Eighth Circuit that are both factually distinct and not ultimately supportive of Plaintiff's position. Plaintiff cites *Cook v. AVI Casino Enterp., Inc.*, 548 F.3d 718 (9th Cir. 2008) and *Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993) for the proposition that a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation. (See Shingobee's Opposition Brief, p. 6.) The *Cook* court and the unanimous Tenth Circuit in *Gaines* ultimately dismissed plaintiffs' complaints for lack of jurisdiction. The *Cook* court held, "the settled law of our circuit is that tribal *corporations* acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." *Cook,* 548 F.3d 724 (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (emphasis added). The *Cook* court treated the tribal casino corporation as an arm of the tribe and dismissed the case due to sovereign immunity.

In *J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd.,* 842 F. Supp. 2d 1163, 1164 (S.D.S.D. 2012), also cited by Plaintiff, a tribe created a non-profit corporation under *state* law. Here, NSA was created under *tribal* law and is an arm of the Tribe. In sum, it is not necessary to turn to other jurisdictions' dicta, reasoning or rules. Doing so would ignore controlling Eighth circuit law and would create unnecessary conflict within the Eighth Circuit. Plaintiff's arguments and legal authorities are simply not on point and do not refute NSA's motion.

B. Federal Court Subject Matter Jurisdiction Cannot Be Waived.

In both *Hagen* and *Dillon*, arguments were raised regarding the tribal corporations' waiver of jurisdictional challenges. However, there is no dispute that subject matter jurisdiction cannot be waived. *Leroy v. Great Western United Corp.,* 443 U.S. 173, 180 (1979). Indeed, the court can raise the issue of subject matter jurisdiction sua sponte. *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation,* 495 F.3d 1017, 1020 (8th Cir. 2007). "Even if an

Indian tribe waives its sovereign immunity, such a waiver does not automatically confer jurisdiction on federal courts. ('The [Tribal] Housing Authority's waiver only nullifies the Housing Authority's use of sovereign immunity as a possible defense to [a] breach of contract action. That waiver of immunity does not determine in what forum a suit against the Housing Authority may properly be brought.')" *Id.*, (*citing Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671-72 (8th Cir. 1986).

II. Tribal Corporations Do Not Waive Sovereign Immunity Absent an Express Waiver Pursuant to Tribal Law.

NSA has not expressly and unequivocally waived sovereign immunity in accordance with tribal law. Shingobee does not, and cannot, identify any valid waiver of sovereign immunity by NSA. Instead, Shingobee attempts to rely on a purported waiver of immunity by a separate tribal entity that no longer exists—North Segment Community Development Corporation ("NSCDC")—to bring claims against NSA. Shingobee argues that NSA waived its sovereign immunity because it was "authorize[d]" to assume the "assets and liabilities" of NSCDC after dissolution. The Eighth Circuit has already rejected this exact argument, holding that a "general assumption of . . . obligations and liabilities . . . does not constitute an express waiver." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011). Indeed, it is well-established that a "sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding a corporation that is either not entitled to sovereign immunity or that has waived such immunity." *Amerind*, 633 F.3d at 686 n.7 (citing *Asociacion De Empleados Del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1315-16 (11th Cir. 2006); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49-50 (1st Cir. 2003); *Kroll v. Bd. of Trs. of the Univ. of Ill.*, 934 F.2d 904, 909 (7th Cir. 1991)). The predecessor entity's purported waiver "is irrelevant unless the sovereign successor's immunity has been expressly and unequivocally waived." *Id.*

Therefore, even if Shingobee could show that NSCDC had validly waived its immunity—that waiver would not apply to NSA.

Shingobee cannot identify any further action by NSA to *actually* assume any specific liability of NSCDC, much less the purported waiver of immunity in the Contract. Any such action would have to satisfy the following conditions under its corporate charter, which was approved by Resolution of the Tribe:[1]

> [N]o such consent to suit shall be effective against the Corporation in any manner and to any extent whatsoever unless such consent is:
> (1) explicit,
> (2) contained in a written contract or commercial document to which the Corporation is a party and under which the Corporation is involved in the suit, and
> (3) specifically approved by the Tribe's Tribal Business Council, and the Tribe's Corporations Act.

(Williams Aff., Ex. B, p. 3.) Shingobee cannot show that any of these conditions are satisfied by the Business Council's dissolution resolution or any other action. Therefore, NSA has not expressly and unequivocally waived sovereign immunity pursuant to tribal law.

Once again, the cases cited by Plaintiff from other circuits on this issue are distinct from the facts of this case. Plaintiff relies on *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 228 (8th Cir. 2008), where the tribe raised the sovereign immunity issue at the end of a lengthy

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[1]A purported waiver of tribal sovereign immunity is enforceable only if it is valid under tribal law. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004); *see also Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) (finding that there was no evidence that Board of Directors adopted a resolution waiving immunity as required by tribal law, thus there was no waiver of immunity); *Attorney's Process and Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 945-46 (8th Cir. 2010) (holding that a tribal official cannot waive a tribe's sovereign immunity unless authorized under tribal law to do so). The party asserting claims against an Indian tribe bears the burden of proving that the tribe has expressly and "unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685-86; *Hagen*, 205 F.3d 1043. Absent a clear and unequivocal waiver, tribal sovereign immunity must be strictly enforced, for "[s]overeign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . the application of which is within the discretion of the court." *U.S. v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940).

arbitration proceeding and after an award was granted. The court held the tribe waived its sovereign immunity through "full participation in" the arbitration proceedings. *Id* at 233. Here, in sharp contrast, NSA asserted sovereign immunity with its first response to Plaintiff's Complaint.

In *Bates Assoc., LLC v. 132 Associates, LLC*, 799 N.W.2d 177 (Mich. Ct. App. 2010), the court found that the tribal entity expressly waived sovereign immunity in a settlement agreement that was appropriately authorized, and that settlement agreement incorporated the waiver provisions of an earlier sales agreement, which was properly supported by a tribal resolution. Here, there is no waiver of sovereign immunity by NSA in any agreement in compliance with tribal law or a resolution authorizing such waiver.

Plaintiff's reliance on *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996), does not save its claim. In *Lien,* there was a federal question under the Indian Gaming Regulatory Act and National Indian Gaming Commission and, the court deferred to the tribal court to determine the validity of the contract. *Lien* never analyzed whether the tribe expressly waived sovereign immunity via the arbitration clause.

In *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, (1st Cir. 2000), the court found there was a waiver of sovereign immunity where the tribe passed an ordinance permitting waiver of sovereign immunity by contract and there was a contract waiving sovereign immunity to arbitration pursuant to the ordinance. Here, NSA did not expressly waive sovereign immunity by contract per tribal law. Still, the *Ninigret* court deferred to the tribal court under the tribal exhaustion doctrine.

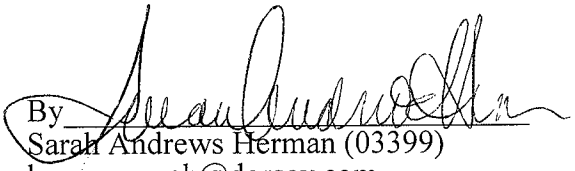
Thus, the cases relied upon by Plaintiff are very factually different and do not contradict NSA's position. NSA has not expressly and unequivocally waived its sovereign immunity pursuant to tribal law.

CONCLUSION

For all of the above reasons, NSA reiterates its request that this Court dismiss with prejudice this entire action.

DORSEY & WHITNEY LLP

Dated: May 21, 2018

By 

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