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UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA

BIG HORN COUNTY ELECTRIC COOPERATIVE, INC., Plaintiff, v. ALDEN BIG MAN, *et al.*, Defendants.	Case No. 17-cv-00065-SPW-TJC **REPLY MEMORANDUM OF DEFENDANT ALDEN BIG MAN IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Alden Big Man, by and through counsel, and submits this Reply Memorandum in support of his Motion for Summary Judgment (Doc. 84).

INTRODUCTION

Defendant Alden Big Man ("Big Man") filed his Motion for Summary Judgment with supporting materials on November 21, 2019 (Docs. 84-86). Plaintiff Big Horn County Electric Cooperative, Inc. ("BHCEC") filed a brief opposing the Motion (Doc. 99), but did not file any Statement of Disputed Facts as required by LR 56.1(b) and offered no competent evidence[1] that would otherwise support additional facts that could be recited in a Statement of Disputed Facts under LR 56.1(b)(2). Big Man's Statement of Undisputed Facts (Doc. 86) is uncontroverted.

The question before the Court is jurisdictional, and Big Man's Motion asks this Court to affirm the Apsaalooke Appeals Court conclusions regarding jurisdiction and to refrain from addressing the merits of claims that should be litigated in Crow Tribal Court. In its Complaint here, BHCEC asserts "obligatory provisions" of its so-called "membership agreement"[2] are "superior to" Crow law (Doc. 1, at 12, ¶ 30). BHCEC did not present any such claim, counterclaim, or argument to the Crow Tribal Court, which is where it should be litigated first.

[1] BHCEC attaches three hearsay documents as exhibits to its brief without making any attempt to authenticate them or lay a foundation. Big Man objects to any consideration of these exhibits under Fed.R.Civ.P. 56(c) because they are not admissible.

[2] The document is actually styled as an "Application for Membership and for Electric Service" (hereafter "membership application"). Compl., Ex. 4 (Doc. 1-6).

Big Man is simply a litigant in Crow Tribal Court seeking to enforce his rights under Crow law, not a tribal officer or tribal official. Therefore, Big Man defers to and joins Tribal Defendants' arguments regarding jurisdictional issues, and refers the Court to their Motion for Summary Judgment and opposition to Plaintiff's Motion for Summary Judgment (Docs. 87-89. 102-103), as well as any reply filed by the Tribal Defendants regarding their Motion for Summary Judgment.

Big Man asks this Court to affirm the Apsaalooke Appeals Court conclusions regarding jurisdiction and to refrain from addressing the merits as to enforceability of the BHCEC "membership application" signed by Big Man, which is a non-jurisdictional question. If the Court decides to assess the merits regarding the "membership application," this Court should find Paragraph 4 of the BHCEC "Application for Membership and for Electric Service" dated February 15, 1999 (Doc. 1-6) unenforceable.

ARGUMENT

A. BHCEC Raises Claims Here that Should be Raised and Decided in Tribal Court. BHCEC now stresses in this case that its forum selection clause is contained in all members' contracts with BHCEC to which all members (including Big Man) are "required to adhere." Plaintiff's Brief in Response to Defendants'

Motions for Summary Judgment ("BHCEC Response Br.") (Doc. 99) at 25.[3] These terms are "obligatory" according to BHCEC. Complaint (Doc. 1) at 12, ¶ 30. According to BHCEC, these terms are not negotiated -- more precisely, these terms are not even negotiable. BHCEC thus admits that, if its position on the "membership application" is correct, it is an adhesion contract. No members can negotiate terms because the terms are "obligatory" or required. Therefore, BHCEC submits, it is not subject to Crow tribal jurisdiction because all of its members, wherever they reside, must "adhere" to and abide by the BHCEC adhesion contract. BHCEC Response Br. at 25.

Significantly, BHCEC did not advance any arguments opposing tribal jurisdiction in Crow Tribal Court based upon the "membership application" choice of law or forum selection clause (the "choice" clauses), as demonstrated by its Crow Tribal Court briefing attached to the Complaint. *See* Defendant's Response to Plaintiff's Motion for Summary Judgment (Doc. 1-10); Respondent/Appellee's Brief (Doc. 1-11). However, BHCEC shifted strategy when it commenced this case. In its Complaint filed here, BHCEC expressly alleges the "obligatory provisions of the membership agreements with . . . its members are not invalid or void and are superior to, not subordinate to, subsequent assertion of authority of

[3] All citations to BHCEC Response Br. refer to pagination generated by ECF for Doc. 99, not the page number in the document footer.

the Crow Tribe to enforce Title 20." Complaint, at 12, ¶ 30. These allegations are incorporated into each claim for relief. *Id.* at 12-13, ¶¶ 32, 39.

In response to BHCEC's Complaint, as to the two "choice" clauses in the BHCEC "membership application," Big Man raised separate affirmative defenses regarding BHCEC's claims as to electrical service provided to his parcel situated on tribal trust land: (1) any forum selection clause is unconscionable or violates Crow law, and is unenforceable; and (2) any choice of law provision is also unconscionable or violates Crow law, and is unenforceable. Big Man's Answer (Doc. 58) at 12 (Affirmative Defense Nos. 8-9).

Big Man does not assert that, contrary to BHCEC's supposition, "Title 20 entitles the Tribe to legislatively entitle its members to not adhere to contractual obligations." BHCEC Response Br. at 23. Big Man instead contends that the "choice" clauses are unconscionable, violate Crow law, and are unenforceable.

Regarding the validity and enforceability of Big Man's "membership application" terms such as the "choice" clauses, Big Man has consistently submitted that the validity and enforceability of the "choice" clauses terms are non-jurisdictional, therefore separate from the threshold issue of the existence and scope of the Tribe's inherent jurisdiction. The enforceability of these clauses should therefore be decided by the Crow Tribal Courts. *See* Big Man's Memo.

Supp. Mot. S.J. (Doc. 85), at 2; Big Man's Memo. Opp. BHCEC's Mot. S.J. (Doc. 100), at 2-3.

B. If this Court Addresses Enforceability of Paragraph 4 in the Application for Membership, Which it Should Not Do in Deference to Tribal Jurisdiction, this Court Should Determine the "Choice" Clauses are Unenforceable. In response to Big Man's Motion for Summary Judgment, BHCEC states quite casually that the contract with Big Man "is not directly at issue in this matter at this time."[4] BHCEC Response Br. at 23. BHCEC then proceeds to briefly argue that its choice of forum clause is enforceable (even though BHCEC submits it is not even at issue) and makes no effort at all to justify its choice of law clause in what it asserts is its adhesion contract.

BHCEC's argument is facile and attempts to disguise its shifting tactics. Only BHCEC knows why it is backing away from the allegations in the Complaint, but most likely BHCEC recognizes that it never presented any arguments based upon the "choice" clauses in Crow Tribal Court, therefore the tribal forum had no opportunity to address claims BHCEC raises here. Thus, the Crow Tribal Court should be allowed to determine in the first instance whether Montana substantive

[4] BHCEC raised this contention in its Complaint in support of both claims for relief and it is the subject of Big Man's Motion for Summary Judgment. The Court should resolve this issue by affirming tribal jurisdiction and allowing the Crow Tribal Court to proceed.

law should displace tribal law based upon the "membership application" for electrical service to Big Man's home on tribal trust land, and then the Crow Tribal Court should be allowed to determine whether any forum selection clause is enforceable under the substantive law to be applied.

While BHCEC's misdirected concession that any contract with Big Man "is not directly at issue in this matter at this time" rings hollow, BHCEC proceeds to argue that the forum selection clause "should have negated the entire Big Man lawsuit altogether." *Id.* at 23-24. BHCEC cites solely to *Carnival Cruise Line v. Shute*, 499 U.S. 585 (1991), which involves only a choice of forum clause,[5] and BHCEC ignores the choice of law issue entirely.

Should this Court address the merits of enforceability of the "choice" clauses, it should recognize that the *Shute* case did not overrule *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972). *Shute* only interpreted *Bremen* and applied it to a specific set of facts: "In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts." *Shute*, 499 U.S. at 593. Further, "[i]t bears emphasis that forum-selection clauses contained in form passage contracts

[5] The *Shute* forum selection clause was printed on a cruise line ticket, which must be deemed a discretionary purchase under any circumstances, a far cry from the "membership application" required by BHCEC for Big Man to obtain electricity delivered to his home on tribal trust land.

are subject to judicial scrutiny for fundamental fairness." *Id.* at 595. Here, the task of any Court (preferably the Crow Tribal Court) would be to refine or consider the analysis of *Bremen* to account for the realities of tribal court jurisdiction over the purveyor of electricity to a tribal member residing on tribal trust land. The "choice" clauses remain subject to judicial scrutiny for fundamental fairness regarding a modern necessity (electricity) that must, for all purposes, be considered a vastly more significant issue than purchasing a luxury item (cruise line tickets). Based upon controlling Ninth Circuit authority applying *Bremen* after the *Shute* decision in 1991, in the event this Court decides to consider the merits, there can be no doubt that the "choice" provisions are unenforceable.

Controlling Ninth Circuit authority provides that, under federal common law, the *Bremen* test is applied to analyze the validity of choice of forum **and** choice of law clauses. *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir.1998). The clauses are not enforceable if inclusion in the contract was the "result of fraud, undue influence, or overweening bargaining power." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996); *see also Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 915-17 (9th Cir. 2019); *Portafolios v. Opengate Capital, LLC*, 769 Fed. Appx. 429 (9th Cir. 2019).

In *Richards*, the Court identified three grounds for repudiating "choice" clauses: first, if the inclusion of the clause in the agreement was the product of

fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, if enforcement would contravene a strong public policy of the forum in which the suit is brought. 135 F.3d at 1292 (citing *M/S Bremen*, 407 U.S. at 12-13). All of these grounds are present here to support rejection of both "choice" clauses. These issues should be addressed in Crow Tribal Court after this Court affirms tribal jurisdiction.

Persuasive authority supports Big Man's position. In *Ninigret Dev't Corp. v. Narragansett Indian Wetuomuck Housing Auth*., 207 F.3d 21 (1st Cir. 2000), the Court held that "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract." 207 F.3d at 33 (citing *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-57 (1985)). In a tribal remedies exhaustion case, issues regarding the validity of a forum selection clause "must be resolved in the tribal court." *Id.* (citing *Snowbird Construction, Inc. v. United States*, 666 F. Supp. 1437, 1444 (D. Idaho. 1987)). The result should be no different here: this Court should follow *Ninigret* and *Snowbird* to hold that the validity and enforcement of the membership application's "choice" clauses are issues to be decided by the Tribal Courts.

Here, BHCEC's overt arguments about the necessity of enforcing the "membership application" in its form and substance as an adhesion contract implicate Big Man's affirmative defense of unconscionability. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1148-52 (9th Cir. 2003) (discussing procedural and substantive unconscionability as grounds for avoidance of adhesion contract provisions). These issues are particularly appropriate for Crow Tribal Court consideration.

CONCLUSION

Based upon the foregoing points and authorities, as well as those set forth in Big Man's Opening Brief in Support of his Motion for Summary Judgment, and his Response Brief in Opposition to BHCEC's Summary Judgment Motion, this Court should affirm the Tribal Appeals Court's holding that the Tribe has civil regulatory and adjudicatory jurisdiction over BHCEC on tribal land by granting summary judgment to Big Man.

Respectfully submitted this 24th day of January, 2020.

SUBMITTED BY:

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CERTIFICATE OF COMPLIANCE

This brief complies with L.R. 7.1(d)(2). There are 2,086 words in this brief, excluding the caption and certificate of compliance.

DATED this 24th day of January 2020.

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