No. 25-1283

In the United States Court of Appeals

for the Sixth Circuit

ALEXANDRIA PARROTTA,

Plaintiff - Appellant,

v.

ISLAND RESORT AND CASINO,

Defendant - Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
No. 2:24-cv-00056
Hon. Robert J. Jonker

BRIEF OF APPELLEE ISLAND RESORT AND CASINO

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Disclosure of Corporate Affiliations and Financial Interest

Pursuant to Sixth Circuit Rule 26.1 **Defendant - Appellee, ISLAND RESORT AND CASINO** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

Dated: June 20, 2025 By: /s/ Jesse C. Viau

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Statement in Opposition to Plaintiff-Appellant's Request for Oral Argument

Plaintiff-Appellant Alexandria Parrotta (***Parrotta***) has filed a Request for Oral Argument (Parrotta Brief, Doc. 16) pursuant to Federal Rules of Appellate Procedure 34(a)(1) and Sixth Circuit Rules 28(b)(1) and 34(a). Defendant-Appellee the Hannahville Indian Community, d/b/a the Island Resort and Casino (the ***HIC***) does not believe that oral argument is necessary. This is a straightforward case of interpretation of the plain language of the HIC's Tribal Constitution and oral argument is not necessary to resolve this matter. Parrotta proffers that this Court will "benefit from a discussion of the interesting procedural and factual record, particularly given that the lower court denied oral argument." However, the factual record was not developed in the lower court because oral argument was not necessary for strict construction of the language in the constitution; and Parrotta's unsupported facts are extrinsic and not relevant to the core issue presented: her claims are barred by tribal sovereign immunity. This Court will not consider new facts and allegations made for the first time on appeal absent exceptional circumstances, which are not present here. *See United States v. Kennedy*, 714 F.3d 951, 959 (6th Cir. 2013); *see also United States v. Bonds*, 12 F.3d 540, 552 (6th Cir. 1993) (noting that a party may not introduce new facts into the record on appeal). However, if this Court does grant Parrotta's request for oral argument, then the HIC similarly requests to participate.

Respectfully submitted,

Dated: June 20, 2025

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Brief of Appellee Island Resort and Casino

STATEMENT OF THE CASE

Parrotta filed a complaint under the Fair Labor Standards Act ("FLSA") (Comp., RE 1, Page ID # 1). The HIC moved to dismiss on the basis of subject matter jurisdiction under tribal sovereign immunity and the Exhaustion Doctrine. The lower court held that it did not have subject matter jurisdiction on the basis of tribal sovereign immunity. This Court reviews questions of subject matter jurisdiction, including sovereign immunity, *de novo*. *DRFP, LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 515 (6th Cir. 2010). The issue of tribal sovereign immunity is dispositive. However, as alternative grounds in this de novo review, the HIC reasserts its original arguments that the matter should be dismissed on the basis of tribal sovereign immunity and the Exhaustion Doctrine.

STATEMENT OF ISSUES

I. Whether Article V, §2 of the HIC Constitution Clearly and Unequivocally Waives Tribal Sovereign Immunity?

No.

II. Whether Parrotta Should Have Filed Her Claims With the Department of Labor?

Yes.

III. Assuming Arguendo the Issue of Tribal Sovereign Immunity Is Not Dispositive - Which It Is - Would this Matter of Interpretation of Article V, §2 of the HIC Constitution Require Dismissal under the Exhaustion Doctrine?

Yes.

I. STATEMENT OF FACTS.

Defendant-Appellee the Hannahville Indian Community, d/b/a the Island Resort and Casino (the ***HIC***) is a federally recognized Indian tribe located in Wilson, Michigan. *See* 25 U.S.C. § 5131; 81 Fed. Reg. 5019, 521 (Jan. 29, 2016). The HIC owns and operates the Island Resort and Casino in Harris, Michigan. The Island Resort and Casino offers a resort experience with five restaurants, two award-winning 18-hole golf courses, a waterpark, spa, and hotel. All Island Resort and Casino employees are employees of the HIC.

As a federally recognized Indian tribe, the HIC has inherent sovereignty (the right to self-governance), along with other governmental immunities and powers, including sovereign immunity from private suit in federal, state, and tribal courts. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed.2d 1071 (2014). Sovereign

immunity protects tribal resources, including lands, water, and natural resources, and casino and economic resources that fund tribal healthcare and education. *Id.*

Sovereign immunity is paramount to the continued existence of tribal communities and the delivery of their essential services for their members. *Id.* Therefore, abrogation of sovereign immunity by Congress or a waiver by a tribe requires specific and detailed legislation that provides a *clear* and *unequivocal* waiver. *Michigan v. Bay Mills Indian Cmty*, 695 F.3d 406 (6th Cir. 2012). This imperative has been extant for over two centuries, *see, e.g., Parks v. Ross, 52 U.S. (11 How.) 362*, 13 L. Ed. 730 (1851), and the Supreme Court has consistently affirmed it, *see*, e.g., *Bay Mills Indian Cmty.*, 572 U.S. at 788–805.

On September 23, 2019, Parrotta was hired as Executive Chef, an FLSA exempt position, at the Island Resort and Casino's Horizons Steakhouse (***Horizons***). Horizons, the flagship restaurant of the Island Resort and Casino, offers elevated cuisine, a sophisticated atmosphere, and attentive service. Parrotta previously worked at the casino as a Sous Chef.

In her capacity as Executive Chef, Parrotta oversaw the kitchen operations, food selection, and menu choices. She exercised authority over personnel (including hiring and firing decisions) and management

of eight to ten staff members, including line cooks, sous chef, lead line cook and dishwashers, among others. Parrotta received an annual salary of $52,915.20, which was well over the required FLSA salary threshold.

As a dinner-only restaurant, Horizons is open to the public between the hours of 5:00 p.m. and 10:00 p.m. Parrotta worked as Executive Chef primarily from Noon to 8:00 p.m. Due to pregnancy, Parrotta requested her work schedule be adjusted to 9:00 a.m. to 5:00 p.m. Tuesday through Thursday and Noon to 8:00 p.m. on Friday and Saturday. This accommodated schedule, which allowed Parrotta to avoid dinner service and focus on administrative tasks, started February 6, 2023 and ended July 29, 2023, at which time Parrotta began maternity leave, which ended October 24, 2023.

On October 24, 2023, Parrotta requested an indefinite extension of the accommodated schedule to continue to work outside of dinner service due to increased family commitments. The HIC denied the request citing the need for an Executive Chef to be consistently present during dinner service to address issues that arise during Horizon's hours of operation. In response to the denial of her request, Parrotta quit without notice effective October 26, 2023.

Parrotta's original Complaint, as well as her First Amended Complaint, contained two claims under the FLSA: (1) that the HIC violated the FLSA by misclassifying her position, which Parrotta now likens to a line cook in her Brief (Parrotta Brief, Doc. 16, p. 9), as exempt and fail-

ing to properly compensate her for all overtime hours worked for the last ten years ; and (2) that HIC violated the PUMP ACT 29 U.S.C. section 218d(a)(1) (an amendment to the FLSA) by failing to extend her accommodated work schedule indefinitely, which is not a requirement of the Act. (Comp., RE 1, Page ID # 9; First Am. Comp., RE 7, Page ID # 47). The Act only requires employers to provide breastfeeding mothers a reasonable break time in a private room (not a bathroom). § 218d(a)(1)–(2).

The Executive Chef position was correctly classified as exempt. Parrotta's assertion that she was a line cook is counterfactual to her job description, the authority she exercised, and her $52,915.20 annual wage. If Parrotta had indeed been a line cook, she would have been obligated to work from Horizon's hours of operation between 5:00 p.m. to 10:00 p.m., negating the possibility of an accommodated work schedule.

Parrotta's claim of uncompensated overtime hours is unsupported and contradicts her documented hours worked during her employment with HIC. Parrotta's claim for 10 years' overtime back pay is without not only merit, but also is well beyond the two-year statute of limitations for FLSA claims. *See* 29 U.S.C. § 255.

Parrotta's claim regarding the PUMP Act is also without merit. The HIC fully complies with the Act's mandates and distributes the HIC Breastfeeding Break Brochure to all employees (including Parrotta) ex-

plaining the Act and HIC's policy and provisions regarding the Act. Parrotta did not submit any request to the HIC for any information pursuant to 29 U.S.C. section 218d(g) prior to commencing this action.

Despite these deficiencies, prior to and after the filing of her Complaint, the HIC apprised Parrotta by letter, pleadings and briefs that she was jurisdictionally barred from privately filing her civil action in federal court on the grounds of tribal sovereign immunity as per this Court's holding in *Bay Mills, supra*. (HIC Br. in Support of Motion to Dismiss Comp., RE 6-1, Page ID # 29; HIC Reply in Support of Motion to Dismiss Comp., RE 11, Page ID # 127-129; HIC Resp. in Opp. to Obj. to Rep. and Rec., RE 14, Page ID # 216-221). To ensure Parrotta the opportunity to address these procedural issues, the HIC stated in its correspondence, pleadings, and briefs that the only mechanism for enforcement would be filing a Department of Labor claim as per this Court's holding in *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 555 (6th Cir. 2015), that distinguished a private action barred on tribal sovereign immunity grounds from a federal-agency-initiated action to enforce applicable federal law that is not barred by tribal sovereign immunity. *Id.* To initiate agency enforcement, the FLSA established a Department of Labor complaint and investigation process. 29 U.S.C. § 216(b)(c), § 217; 15 U.S.C. § 2087; *see also e.g.*, *Su v. DRR Roofing, LLC*, [2024 U.S. Dist. LEXIS 124030, 2024 WL 3412695] (S.D. Ohio July 15, 2024)).

II. PROCEDURAL HISTORY

On or around January 12, 2024, Parrotta received a letter from the HIC advising her that her proposed filing would be barred on the grounds of tribal sovereign immunity, citing *Bay Mills*.

Parrotta filed her Complaint regardless, on April 11, 2024, offering *Little River Band*, *supra,* as support for her FLSA claims as applying to tribes. (Comp., RE 1, Page ID #1).

On May 24, 2024, the HIC filed its first Motion to Dismiss and Supporting Brief on the grounds of tribal sovereign immunity (*Bay Mills*) and the Tribal Exhaustion Doctrine, *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 56–57, 105 S.Ct. 2447, 85 L. Ed.2d 818 (1985). (HIC Motion to Dismiss Comp., RE 6, Page ID # 17; HIC Br. in Support of Motion to Dismiss Comp., RE 6-1, Page ID # 29). The HIC reiterated in its brief that the only action tribal sovereign immunity cannot bar is that of a jurisdictionally appropriate federal agency. Tribal sovereign immunity shields a tribe from the enforcement of federal law by a private citizen.

On June 10, 2024, Parrotta filed her First Amended Complaint citing no additional claims or case law, only a few additional irrelevant details. (First Am. Comp., RE 7, Page ID # 59).

On June 20, 2024, the HIC filed its Motion to Dismiss Plaintiff's First Amended Complaint and Brief in Support. (HIC Motion to Dismiss FAC, RE 8, Page ID # 60; HIC Br. in Support of Motion to Dismiss FAC, RE 9, Page ID # 62).

On July 15, 2024, Parrotta filed a Response in Opposition maintaining her claim that the FLSA applies to tribes under *Little River Band*. (Parrotta Resp. in Opp. to HIC Mot. to Dismiss FAC, RE 10, Page ID # 87).

On July 29, 2024, the HIC filed its Reply Brief, asserting that Parrotta refused to acknowledge *Bay Mills'* ruling on tribal sovereign immunity and *Little River Band*'s distinction between the jurisdictional standing of private citizens and federal agencies in an action to enforce a federal law against a tribe. (HIC Reply in Support of Motion to Dismiss Comp., RE 11, Page ID # 118).

On January 16, 2025, the Magistrate Judge entered its Report and Recommendation recommending that *Bay Mills* required dismissal on the ground of tribal sovereign immunity. (Report and Rec., RE 12, Page ID # 182).

On January 30, 2025, Parrotta filed her Objection to the Magistrate's Report and Recommendation. (Parrotta Obj. to Report and Rec., RE 13, Page ID # 199). In her Objection, Parrotta provided a fringe argument with no supporting case law that Article V, §2 of the HIC's Constitution (a provision that predates the FLSA, on file with the Library

of Congress, circa 1936) (HIC Const., RE 14-4, Page ID # 238; *see also* Library of Congress copy of HIC Const., Appellee's Appendix, AE Appx. at 001-008)[1] provides a waiver of tribal sovereign immunity. *Id.* Article V, §2 of HIC's Constitution (which predates the FLSA) states as follows: "The Council shall not exercise any of [its] foregoing powers so as to conflict with any laws of the United States which apply to the Hannahville Indian Community." (*See* HIC Const., RE 14-4, Page ID # 238). This is not a clear and unequivocal waiver of sovereign immunity.

On February 13, 2025, the HIC filed its Response to the Objection arguing that Parrotta was asking the court to infer a waiver, in contravention of *Bay Mills*. Such language has been deemed as separate and distinct from the issue of tribal sovereign immunity in a plethora of case law from this circuit (including *Bay Mills*) and others. The language has been construed as merely a commitment to follow applicable federal law, a general obligation shared by everyone. (HIC Resp. in Opp. to Obj. to Rep. and Rec., RE 14, Page ID # 209). Parrotta offered no supporting case to contradict these clear holdings.

On February 27, 2025, the District Court held that it could not infer a waiver into Article V, §2 of the HIC's Constitution in contravention of *Bay Mills* and entered an order approving and adopting the Magis-

[1] All references to Appellee's Appendix are noted as "AE Appx." in this Brief.

trate's Report and Recommendation and thereafter entered Judgment in favor of the HIC. (Order, RE 15, Page ID # 248; Judgment, RE 16, Page ID # 251).

On March 21, 2025, Parrotta timely filed her Notice of Appeal and Supporting Brief, ignoring *Little River Band*'s distinction between the jurisdictional standing of private citizens and federal agencies in an action to enforce a federal law against a tribe, and asking this Court to infer a waiver and insert language into Article V, §2 that is clearly not in Article V, §2 in contravention of *Bay Mills*. (Notice of Appeal, RE 17, Page ID # 252; Parotta Brief, Doc. 16).

III. ARGUMENT

There is no clear and unequivocal language in Article V, §2 of the HIC's Constitution that meets the high threshold of strict review as required in *Bay Mills* to waive sovereign immunity for this private action. The Court cannot infer a waiver in Parrotta's favor just because the FLSA may theoretically apply to the HIC. Without a clear and unequivocal waiver to bring her private FLSA claims, Parrotta should have filed her claim through the Department of Labor per the holding in *Little River Band*. For these reasons, the HIC requests that the Court AFFIRM the Judgment of the District Court dismissing this matter on the grounds of tribal sovereign immunity.

1. There Is No Clear and Unequivocal Waiver of Sovereign Immunity in Article V, §2 of the HIC's Constitution; and the Court May Not Infer Such a Waiver in Parrotta's Favor, Per *Bay Mills*.

Article V, § 2's statement that "the Council shall not exercise any of [its] foregoing powers so as to conflict with any laws of the United States which apply to the Hannahville Indian Community" says nothing about sovereign immunity, private lawsuits, forum, damages, and the FLSA. The lower court, like every other court that has addressed similar arguments, correctly concluded that the language is a commitment to follow applicable federal law, not a waiver of tribal sovereign immunity.

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed.2d 1112 (1991). "Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007) (internal citations omitted); *see also Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed.2d 981 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

"There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001). Any waiver must be clear and unequivocal and may not be implied. *See Bay Mills*, 695 F.3d at 414 ("An abrogation of tribal immunity cannot be implied but must be unequivocally expressed. Similarly, a tribe's waiver of its immunity must be clear."); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59, 98 S. Ct. 1670, 56 L. Ed.2d 106 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."). Similarly, congressional abrogation of sovereign immunity may not be implied and must be "unequivocally expressed" in explicit legislation. *Bay Mills*, 695 F.3d at 414–415. "The plaintiff bears the burden of showing a waiver of tribal sovereign immunity." *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 956–57 (E.D. Cal. 2009); *see also Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton, 2010 U.S. Dist. LEXIS 3992, *5–6, 75 Fed. R. Serv. 3d (Callaghan) 1192*, 2010 WL 299483 (W.D. Mich. Jan. 20, 2010).

In *Bay Mills*, the Bay Mills Indian Community opened a casino in Vanderbilt, Michigan. *Bay Mills*, 695 F.3d at 409. The State of Michigan (among others) brought a private enforcement action citing federal common and state law violations for the tribe's operation of the Vanderbilt casino. *Id.* at 409–411. The State argued that the casino was not authorized per the tribe/state gaming compact. *Id.* at 411–412. In lieu

of addressing the issue of applicability of the laws, which was not the core issue in dispute and separate from sovereign immunity, the Court addressed the jurisdictional issue of whether or not the State had the authority to privately sue the tribe to enforce the laws on tribal sovereign immunity grounds. *Id.* at 413–417. The State argued that the Bay Mills Gaming Ordinance provided a waiver because it bestowed upon the Gaming Commission certain powers "[t]o sue or be sued in courts of competent jurisdiction with the United States and Canada, subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity." *Id.* at 415–417. The State further pointed out that the Bay Mills Sovereign Immunity Code likewise bestowed upon the Commission and the Tribal Council the authority to waive immunity by formal joint resolution. *Id.* Applying the high threshold of clear and unequivocal review the Court found that, despite containing the words such as "sovereign immunity, sue or be sued and waiver," the ordinance language was not specific, clear nor certain to be considered an unequivocal expression of the intent of the tribe to waive its sovereign immunity for the State's benefit for violations of state and federal law. *Id.* at 416–17. This Court refused to imply a waiver or read language into the ordinances that simply was not in them, and classified the State's related arguments as "tendentious, junk drawer arguments." *Id.* at 416. It held that there was no clear and unequivocal expression of the tribe's intent to be privately sued for any federal and state law violations, no mention of a forum to bring

the dispute nor limitation of damages, and there was no language authorizing a private party (the State) to sue a tribe. *Id.* at 413–417. The Court further stated that these arguments "waste[d] opposing counsel's time and [the Court's]" because the language in the ordinances did not say what the State claimed it said. *Id.* at 416.

Like the ordinances in *Bay Mills*, Article V, §2 does not clearly and unequivocally waive sovereign immunity. This language says nothing about sovereign immunity, waivers, and private causes of action, forums, parties, damages, or the FLSA. By its plain language, it merely references an obligation to follow applicable federal law.

Parrotta's interpretation is not supported by anything other than her opinion. Black's Law Dictionary defines the term "clear" as "[f]ree from doubt; sure." Black's Law Dictionary (11th ed. 2019). It defines "unequivocal" as "[c]lear; plain; capable of being understood in only one way, or as clearly demonstrated" and states that it is synonymous with "unambiguous." *Black's Law Dictionary* 1528 (6th ed. 1990). These terms have been applied in this Circuit as requiring a standard of strict construction for purposes of waiver of rights, *see* *Cassano v. Shoop*, 10 F.4th 695, 701 (6th Cir. 2021) (holding that a request for self-representation be clear and unequivocal); judicial admissions, *see* *Com. Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007) ("Judicial admissions of fact must be deliberate and clear, while legal conclusions are rarely considered judicial admissions."); and contract interpretation,

Freed v Great Atl. & Pac. Tea Co., 401 F.2d 266 (6th Cir. 1968) (finding no clear and unequivocal language for purposes of an indemnification agreement).

Rejecting Parrotta's request to infer a waiver, the lower court correctly classified this clear and unequivocal standard in *Bay Mills* as requiring strict scrutiny review and interpreted the plain meaning of Article V, §2 as standing for exactly what is says: a commitment to follow applicable federal law (not a waiver).

In advancing her claims, Parrotta misrepresents the actual age and intent of the HIC Constitution. The original HIC Constitution, including Article V, §2, is on file in the Library of Congress dated circa 1936. (HIC Const., RE 14-4, Page ID # 238; *see also* AE Appx. at 001-008). Contrary to Parrotta's suggestion, Article V, §2 was not amended in 2020. The 2020 amended paragraphs are clearly marked in bold in the document and do not include Article V, §2, which is in the original 1936 Constitution on file with the Library of Congress. (HIC Const., RE 14-4, Page ID # 238; *see also* AE Appx. at 001-008). It was drafted from language from a model constitution distributed to tribes by the Bureau of Indian Affairs after the Indian Reorganization Act was passed in 1934. (*See* The Indian Reorganization Act, also known as the Wheeler-Howard Act, of June 18, 1934, 73 P.L. 383; 48 Stat. 984; 73 Cong. Ch. 576 (AE Appx. at 009-013); *see also* Cohen, Felix, On the Drafting of Tribal Constitutions, University of Oklahoma Press 2006, Intro-

duction and Model Constitution (AE Appx. at 014-019)). At that time, the Secretary of the Interior was responsible for developing rules for the acceptance and approval of tribal constitutions in conformance to the Indian Reorganization Act and conducted "secretarial elections" for the tribal membership to vote for the Bureau approved constitutions. 25 C.F.R. § 82.1(m); *King v. Norton*, 160 F. Supp. 2d 755, 763 (E.D. Mich. Aug. 29, 2001).

It is for these reasons that similar language to Article V, §2 shows up in some or if not the majority of all the originating documents of the 181 tribes that accepted the Indian Reorganization Act, including all of the Michigan Tribes who accepted the Indian Reorganization Act, as well as the plethora of case law from the other circuits that follow. (*See* excerpts from the Const. of the Sault Ste. Marie Tribe of Chippewa Indians, RE 14-5, Page ID # 244-245).

Parrotta has not disputed that the Tribe's Constitution by its terms applies only to tribal members. This document bestows no rights on Parrotta, a non-member. *See* e.g., *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 724–25 (W.D. Mich. Aug. 27, 2017) ("[T]he plain language of the *Bill of Rights* in the Tribe's Constitution clearly states that the Tribe's Constitution is applicable only to members of the Tribe…Thus, it appears that the Tribe's Constitution does not even apply to Lesperance because she is not a member of the Tribe."). Like the Plaintiff in *Lesperance*, Parrotta is, in fact, asserting

rights under Article V, §2, that she does not have as a non-member. *Saginaw Chippewa Indian Tribe v. Gover.*, 1999 US Dist. LEXIS 22690, *6–7, 1999 WL 33266029 (E.D. Mich. August 19, 1999) (recognizing that district courts do not have jurisdiction to resolve disputes involving tribal constitutions). Parrotta likewise does not dispute that the HIC Tribal Court has previously held in a similar employment action that the Tribal Council preserved its sovereign immunity for employment matters. (*See Pittman v. Pearson,* RE 14-3, Page ID # 231-233). The issue of waiver is addressed in clear and unequivocal language in the HIC Sovereign Immunity Code, which requires a formal specific resolution from the Tribal Council for waiver to be granted. (*See* excerpts from the HIC Sovereign Immunity Code, RE 14-2, Page ID # 228-229). Moreover, the Code's requirements along with a reaffirmation of the HIC's sovereign immunity were expressed to Parrotta in the HIC's employee manuals, which were applicable to Parrotta's employment. (*See* excerpt from the Island Resort and Casino Employee Manual, RE 14-6, Page ID # 247).

Parrotta's arguments are analogous to those in *Colmar v. Jackson Band of Miwuk Indians*, 2011 US Dist. Lexis 62832 (E.D. Cal. June 15, 2011), and *NERO v Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989). In *Colmar*, Plaintiff Colmar alleged a violation of the Age Discrimination Employment Act against his former employer, the Jackson Band of Miwuk Indians. *Colmar v. Jackson Band of Miwuk Indians*, at

*1–3. Like Parrotta, Colmar argued that the Jackson Band of Miwuk Indians waived sovereign immunity for all federal laws in Article X of its constitution, which reads as follows:

> Neither the Tribal Council nor the General Council shall exercise any powers in such a manner as to deprive any person of rights secured by this Constitution or applicable laws of the United States, including the provisions of the Indian Civil Rights Act.

Colmar v. Jackson Band of Miwuk Indians, 2011 US Dist. Lexis 62832, at *6–11. The court held that "this language merely acknowledges that the Tribal Council and General Council will not deprive anyone of rights secured by applicable federal laws [and does not meet the high standard of clear and unequivocal review]. In this regard, the passage is nothing more than mere acknowledgment of the Tribe's agreement to comply with federal law. However, a tribe's agreement to comply with federal law, without more, does not constitute an unequivocal waiver of tribal sovereign immunity." *Id.* at *11.

Likewise, in *Nero*, Plaintiff Nero, a former employee of the Cherokee Nation of Oklahoma, asked the Tenth Circuit Court to construe language in the Cherokee Constitution providing that "the appropriate protection guaranteed by the ICRA shall apply to all members of the Cherokee Nation," as an express waiver for a private lawsuit. *NERO*, 892 F.2d at 1460–1462. The court held that the "cited language no more consti-

tutes an unequivocal expression of waiver than does the language of the ICRA, which itself creates the substantive rights supposedly guaranteed to all members of the Cherokee Nation, language which the Supreme Court refused to interpret as a waiver…We are not persuaded that this language constitutes an 'unequivocal expression' of waiver by the Cherokee Nation of its sovereign immunity. Like the provisions of the ICRA at issue in [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978),] this provision only places substantive constraints on the Tribe, it does not waive the Tribe's immunity from a suit alleging non-compliance with these constraints." *Id.* at 1460.

Other courts that have considered similar language have all concluded that this language does not amount to a clear and unequivocal waiver of tribal sovereign immunity to allow for private lawsuits because a law's mere applicability to Indian tribes does not necessarily confer the ability to remedy violations of that law. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 755, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("There is a difference between the right to demand compliance with…laws and the means available to enforce them."); *Butrick v. Dev. Corp., 2024 U.S. Dist. LEXIS 197500, *9–12*, 2024 WL 4643258 (E.D. VA October 30, 2024) (holding that the statement from the Navajo Tribe in its employee manuals that it shall voluntarily comply with the federal Family and Medical Leave Act and state and local law does not constitute a waiver of sovereign immunity); *see also Seneca v. Great Lakes Inter-Tribal*

*Council, Inc., 2023 US App. LEXIS 16893,*5–7*, 2023 WL 4340699 (7th Cir. July 5, 2023) (holding that a non-profit consortium of tribes did not waive sovereign immunity by agreeing to "comply fully with all federal and state laws" in job postings because the postings do not mention "sovereign immunity, forums available for litigation, amenability to suit, or anything else that clearly waived the Council's immunity"); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 582–584 (8th Cir. May 20, 1998) (holding that the Yankton Sioux Tribe did not unequivocally waive sovereign immunity for purposes of a private employment discrimination claim arising under federal law by simply agreeing to comply for purposes of federal HUD housing documents "with applicable civil rights requirements, as set forth in Title 24 of the Code of Federal Regulation"); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 n.2 (8th Cir. 2000) ("Nor did the College [an arm of a tribal nation] waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964."); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047–1048 (9th Cir. 2006) (holding that the Tribe, which owned and operated a casino, did not clearly waive its immunity by stating in an employee handbook and orientation booklet that employees could be terminated "for any reason consistent with applicable state or federal law," or "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin…and other categories

protected by applicable federal laws"); *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1152–53 (10th Cir. 2011) ("We thus hold that the Tribe's agreement to comply with Title VII [in its employee manual as follows 'The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964'] may convey a promise not to discriminate, but in no way constitutes an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court") (internal citations omitted); *Sanderlin v Seminole Tribe*, 243 F.3d 1282, 1289 (11th Cir.) ("The contracts for federal financial assistance in which Billie promised that the Tribe would not discriminate in violation of federal civil rights laws merely convey a promise not to discriminate. They in no way constitute an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court on the specific claim alleged by Sanderlin. The Tribe, simply put, did not voluntarily waive its sovereign immunity.").

Indeed, Parrotta asks this Court to disregard the clear and unequivocal language in the HIC's Sovereign Immunity Code and Tribal Court case law and infer a waiver through the HIC's 1936 Constitution. Parrotta's request would imply that HIC ignorantly waived sovereign immunity for all federal claims by non-members when it received federal recognition in 1936. Such an oversight would have made HIC potentially liable for any federal violation without limitation of damages, nor choice

of forum. This blatantly inane action would have had to occur with the approval of the Secretary of Interior who provided the language in the model constitution. (AE Appx. at 014-019).

2. Parrotta Should Have Filed Her Claims with the Department of Labor, Per *Little River Band*.

Citing *Bay Mills* and *Little River Band*, the HIC provided notice to Parrotta on four occasions that her filings were procedurally barred on the grounds of sovereign immunity and that any claim under the FLSA against a tribe must be filed with the Department of Labor. In *Little River Band*, the National Labor Relations Board brought a federal-agency-initiated action to enforce the collective bargaining provisions of the National Labor Relations Act on behalf of certain Bay Mills Indian Community employees. *Little River Band*, 788 F.3d at 541. In the context of an agency-initiated lawsuit against a tribe, this Court held that tribal sovereign immunity could not be asserted against the federal government. *Id.* at 554–555. This Court went into detail about the proper forum and procedures for enforcement available when there is no waiver of tribal sovereign immunity for a private action in this context, as follows:

> We recognize that Indian tribes are immune from suit in both state and federal court unless 'Congress has authorized the suit or the tribe has waived its immunity.' *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). Indian tribes, however, have no sovereign immunity against the United States. *Fla. Paraplegic*

> *Ass'n*, 166 F.3d at 1135 (citing *Mashantucket Sand & Gravel*, 95 F.3d at 182)); *see also United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). Furthermore, Congress may choose to impose an obligation on Indian tribes without subjecting them to the enforcement of that obligation through a private right of action. *See Santa Clara Pueblo*, 436 U.S. at 65 (finding that although the Indian Civil Rights Act of 1968 did not waive tribal immunity, the act nevertheless imposes obligations on tribes which may be enforced through vehicles other than private right of action); *Fla. Paraplegic Ass'n*, 166 F.3d at 1134. That choice, however, simply does not evince Congress's intent that a statute not impose obligations on Indian tribes or that those obligations not be enforced by other means, for example, by agency action. *See Santa Clara Pueblo*, 436 U.S. at 65; *Fla. Paraplegic Ass'n*, 166 F.3d at 1134. The fact that Congress did not waive tribal sovereign immunity from private suits to enforce collective-bargaining agreements under Section 301 in no way suggests that the Band is immune from suits by the Board to enforce other requirements imposed by NLRA.

Id.

Despite being on notice, Parrotta tenaciously cites *Little River Band* for the contention that the FLSA applies to the HIC in this appeal. Parrotta misconstrues *Little River Band*, which is ironically inimical to her private claims. *Id.* Deciding the applicability of the FLSA can only occur after the issue of sovereign immunity has been decided and proper jurisdiction assigned. *Id.* The Department of Labor does indeed provide a mechanism for receipt of FLSA complaints, an investigation process, and it can sue on behalf of employees in tribal or federal court. 29 U.S.C. § 216(b)(c), § 217; 15 U.S.C. § 2087; *see also e.g.*, *Su v. DRR Roofing,*

LLC, 2024 U.S. Dist. LEXIS 124030, 2024 WL 3412695 (SD of Ohio July 15, 2024). If after investigation, the Department believed that a violation occurred, the agency would have had the discretion to either negotiate a resolution or bring Parrotta's claim in federal or tribal court. *Id.* Unfortunately, because of Parrotta's disregard of the binding Sixth Circuit authority, she will have no mechanism to receive accrued attorneys' fees or costs should she file with the Department of Labor at this juncture.

3. The Exhaustion Doctrine Requires Dismissal of This Matter.

This matter must be dismissed based on the Exhaustion Doctrine because it involves interpretation of a tribal constitution and scope of the HIC Tribal Court's jurisdiction. The burden is on Parrotta to establish an exception under the Doctrine. Here, Parrotta does not provide any legitimate exceptions in this matter.

On federal policy grounds, the Supreme Court has long recognized that as long as the issues in dispute are not patently violative of express jurisdictional prohibitions, the first determination of tribal court jurisdiction and matters of interpretation of a tribe's originating documents should take place in the tribal court rather than in federal courts because the Supreme Court's cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. *National Farmers Union Ins. Companies*, 471 U.S. at 856–857

("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination… The risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction… Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."). Thus, when there is a "colorable question" as to whether a tribal court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action to permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction. *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F. Supp. 2d 485, 487–89 (W.D.N.C. 2010) ("The operation and management of the Casino clearly implicates the economic interests and welfare of the Tribe. As such, the Plaintiffs' claims against Harrah's NC Casino raise at least a "colorable question" of tribal jurisdiction."); *Brown v. Western Sky Fin., LLC*, 84 F. Supp. 3d 467, 480–92 (M.D. N.C. January 30, 2015) (same). This doctrine applies regardless if the contested claims are to be defined substantively by state or federal law, and "regardless of whether an action is currently pending in tribal court." *Geroux v. Assurant, Inc., No. 2:08-cv-00184, 2010 US Dist. Lexis 24846, *34–48*, 2010 WL 1032648

(W.D. Mich. Mar. 17, 2010) (Hon. Edgar, Presiding) (dismissing a federal ERISA claim on tribal exhaustion doctrine grounds); *Madewell*, 730 F. Supp. 2d at 489.

There can be no dispute that the HIC Tribal Court has jurisdiction. The Supreme Court has long recognized that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land… A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566–566, 67 L. Ed.2d 493, 101 S. Ct. 1245 (1980); *see also Strait v. A-1 Contractors*, 520 U.S. 438, 445–46, 117 S. Ct. 1404, 137 L.Ed.2d 661 (1997). Parrotta's claims stem from alleged payroll and employment policies occurring on the Reservation at the Island Resort and Casino. Parrotta does not dispute (and in fact acknowledges in her Brief) that the operation of the Casino has a considerable impact on the economic interests and health and welfare of the HIC (of which it is the primary source of funding). Thus, *Strait* and *Montana* hold that the HIC has the power to regulate the employment activities of non-tribal member employees (such as Parrotta) of the HIC.

There are four recognized exceptions to the Exhaustion Doctrine whereas here there is at least a colorable claim of jurisdiction presented:

(1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, (2) the action is patently violative of express jurisdictional prohibitions, (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction, or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*. *See Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200–1201 (9th Cir. 2012). Parrotta does not meet any of the exceptions and does not present a legitimate argument in support of them.

Parrotta alleges that the Exhaustion Doctrine should not apply because the HIC Tribal Court may exhibit bias because the HIC's economic interests are at stake in this matter. This is not one of the four recognized exceptions to the Exhaustion Doctrine and must be rejected. S*ee Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18–19, 107 S. Ct. 971, 978, 94 L. Ed.2d 10, 21 (1987); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300–01 (8th Cir. 1994) ("The Supreme Court has declined to permit parties to excuse themselves from the exhaustion requirement by merely alleging that tribal courts will be incompetent or biased."); *Gustafson v. Poitra, 2014 U.S. Dist. LEXIS 134640, *8–11*, 2014 WL 4772663 (D. N.D. September 24, 2014) ("Since there is no question the Turtle Mountain Band of Chippewa Indians has a long-established tribal court system, any claim of futility would be unlikely to succeed. Suggestions of bias would also likely fail. In addition, a mere suggestion

of bias would also likely fail as bias will not be presumed."). Parrotta is not familiar enough with the HIC Tribal Court to call into question its integrity.

Parrotta also offers that the FLSA limits enforcement to only state and federal courts. This is also not one of the four exceptions to the Exhaustion Doctrine. Similar arguments were rejected in *Geroux* and *Madewell* because the Exhaustion Doctrine applies regardless whether the underlying claim is based on state or federal law.

Without any implicated exception, this matter must be dismissed under the Exhaustion Doctrine. At a minimum, deference should be made to the previous cited decision of the HIC Tribal Court in *Pittman v. Pearson (*RE 14-3, Page ID # 231-233). *See Tom v. Sutton*, 533 F.2d 1101, 1106, 1976 U.S. App. LEXIS 12464, *12–13 (9th Cir. March 10, 1976) ("Lastly, in defining the purpose, scope and operative effect of a state constitution, federal courts should accept the interpretation of the courts of that state unless there are federal constitutional questions involved. In our opinion, like deference should be given to tribal courts in regard to their interpretation of [their] tribal constitutions."); *Koopman v. Forest County Potawatomi Member Benefit Plan*, 2006 U.S. Dist. LEXIS 43171, *7–8, 2006 WL 1785769 (E.D. Wis. June 26, 2006) ("Thus, the motion to intervene underscores the fact that this [ERISA] lawsuit--ostensibly a simple dispute about a health benefit plan-has the potential to

blossom into a wide-ranging case about the tribal constitution, the role of the Council and the powers of tribal authorities. These are matters best left to the Tribe's courts themselves.").

This matter is similar to the issues addressed in *Geroux*. There, the court dismissed an ERISA benefits claim brought by tribal employee Geroux against the benefits provider of the Keweenaw Bay Indian Community because (like with the FLSA here) there is a colorable question of tribal jurisdiction and the law's application to tribes has not been yet addressed in this Circuit. *Geroux*, 2010 U.S. Dist. LEXIS 24847, at *34–48. "Where the law is still unclear on [the] issue [of applicability to the tribe], the court conclude[d] that the lack of clarity in the law weighs in favor of granting the remand as the Defendants bear the burden of proof on removal questions." *Id.* at *34. Like ERISA in *Geroux*, there is no language in the FLSA here mentioning tribes or waiving sovereign immunity of tribes. Due to the uncertainty of the laws applicability and lack of case law in this Circuit as it relates to the application of the FLSA to tribes, there is at least a colorable question of tribal jurisdiction and interpretation of the HIC Constitution should be reserved for the tribal court. *Id.*

CONCLUSION

For the aforementioned reasons, the Opinion and Order and Judgment of the lower court affirming the Magistrate's Recommendation to dismiss on the grounds of tribal sovereign immunity must be AFFIRMED.

Respectfully submitted,

Dated: June 20, 2025

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **7,197 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, **14-pt Century Schoolbook**, using TypeLaw.com's legal text editor.

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Certificate of Service

I hereby certify that I electronically filed the foregoing **BRIEF OF APPELLEE ISLAND RESORT AND CASINO** with the Clerk of the Court by using the Appellate CM/ECF system on **June 20, 2025**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

Dated: June 20, 2025

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DESIGNATION OF RECORD ON APPEAL

Pursuant to 6th Cir. R. 30(g), Appellee Island Resort and Casino designates the following filings in the district court for inclusion in the Record on Appeal:

Case No. 2:24-cv-00056
United States District Court for the Western District of Michigan

Dist. Ct Record Entry No.	Date	Description	Page ID Range
1	4/11/24	Complaint and Jury Demand	1-12
6	5/24/24	HIC Motion to Dismiss Complaint	17-18
6-1	5/24/24	HIC Brief in Support of Motion to Dismiss Complaint	19-46
7	6/10/24	First Amended Complaint and Jury Demand	47-59
8	6/21/24	HIC Motion to Dismiss First Amended Complaint	60-61
9	6/21/24	HIC Brief in Support of Motion to Dismiss First Amended Complaint	62-86
10	7/15/24	Parrotta Response in Opposition to HIC Motion to Dismiss FAC	87-117
11	7/26/24	HIC Reply Brief in Support of its Motion to Dismiss Complaint	118-181

Dist. Ct Record Entry No.	Date	Description	Page ID Range
12	1/16/25	Report and Recommendation	182-198
13	1/30/25	Parrotta Objections to Report and Recommendation	199-208
14	2/13/25	HIC Response in Opposition to Objection to Report and Recommendation	209-247
14-2	2/13/25	Excerpts from the HIC Sovereign Immunity Code	227-229
14-3	2/13/25	*Pittman v. Pearson*	230-233
14-4	2/13/25	HIC Constitution	234-242
14-5	2/13/25	Excerpts from the Constitution of the Sault Ste. Marie Tribe of Chippewa Indians	243-245
14-6	2/13/25	Excerpt from the Island Resort and Casino Employee Manual	246-247
15	2/27/25	Order Approving and Adopting Report & Recommendation	248-250
16	2/27/25	Judgment	251
17	3/21/25	Notice of Appeal	252

ADDENDUM OF UNPUBLISHED CASES

Pursuant to 6th Cir. R. 30(g), Appellee Island Resort and Casino designates the following filings in the district court for inclusion in the Record on Appeal:

Description	Page ID Range
Butrick v. Dev. Corp.	AA001 – AA006
Colmar v. Jackson Band of Miwuk Indians	AA007 – AA011
Geroux v. Assurant, Inc.	AA012 – AA025
Gustafson v. Poitra	AA026 – AA029
Koopman v. Forest Cnty. Potawatomi Member Benefit Plan	AA027 – AA032
Saginaw Chippewa Indian Tribe v. Gover	AA033 – AA036
Seneca v. Great Lakes Inter-Tribal Council, Inc.	AA037 – AA040
Su v. DRR Roofing, LLC	AA041 – AA042

Butrick v. Dev. Corp.

United States District Court for the Eastern District of Virginia, Richmond Division

October 30, 2024, Decided; October 30, 2024, Filed

Civil Action No. 3:23-cv-884-HEH

Reporter
2024 U.S. Dist. LEXIS 197500 *; 2024 WL 4643258

SHANNON N. BUTRICK, Plaintiff, v. DINÉ DEVELOPMENT CORPORATION, et al., Defendants.

Counsel: **[*1]** For Shannon N. Butrick, Plaintiff: Scott Gregory Crowley, LEAD ATTORNEY, Crowley & Crowley, Glen Allen, VA.

For Dine Development Corporation, Sarah Young, in her official capacity, Defendants: Joan C. McKenna, LEAD ATTORNEY, O'Hagan Meyer PLLC (Richmond), Richmond, VA; Melisa Azak, O'Hagan Meyer, Richmond, VA.

Judges: Henry E. Hudson, Senior United States District Judge.

Opinion by: Henry E. Hudson

Opinion

MEMORANDUM OPINION

(Granting Defendants' Motion to Dismiss)

THIS MATTER is before the Court on Defendants Diné Development Corporation ("Diné" or "DDC") and Sarah Young's ("Young"), in her official capacity, (collectively, "Defendants") Motion to Dismiss (the "Motion," ECF No. 6), filed on March 18, 2024. Defendants seek to dismiss Plaintiff Shannon N. Butrick's ("Plaintiff") Complaint (ECF No. 1) for lack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)*. (Mot. at 1.) The parties filed memoranda supporting their respective positions, including supplemental briefing pursuant to the Court's Order (ECF No. 16), and the Court heard oral argument on July 10, 2024. At the hearing, the Court granted Defendants' Motion for the reasons articulated below. (Minute Entry at 1, ECF No. 23.)

I. BACKGROUND

On August 3, 2020, Plaintiff **[*2]** was hired as a Contracts Administrator for Diné, a wholly owned corporation of the Navajo Nation that provides various professional services to governmental and commercial organizations. (Compl. ¶¶ 2, 6.) Diné's primary place of business is Arizona, but Plaintiff worked remotely from her home in Virginia. (*Id.* ¶¶ 2, 7.) Young is the Director of Contracts for Diné and acted as Plaintiff's supervisor throughout most of her employment. (*Id.* ¶¶ 3, 6.)

Plaintiff began maternity leave on March 7, 2023, and returned to work on May 30, 2023. (*Id.* ¶ 8.) On July 21, 2023, Plaintiff was placed on a Performance Improvement Plan ("PIP") by her supervisor, Alexandria Schlorman ("Schlorman"). (*Id.* ¶¶ 6, 12.) Prior to her placement on the PIP, Plaintiff had received awards, positive performance reviews, and meritorious pay increases over the course of her employment. (*Id.* ¶ 14.) Plaintiff complained that she was placed on the PIP in retaliation for taking maternity leave. (*Id* ¶ 13.) On August 17, 2023, Plaintiff requested to take off work between August 22-25, and Schlorman approved the request. (*Id.* ¶ 15.) However, on August 19, 2023, Defendants terminated Plaintiffs employment, "due to inefficiencies **[*3]** with [her] performance and impacts on the business operations." (*Id.* ¶ 16.)

Plaintiff alleges that Defendants violated the Family and Medical Leave Act ("FMLA") by interfering with her right to take maternity leave. (*Id.* ¶¶ 17-18 (citing *29 U.S.C. §§ 2615(a)(1)—(2)*).) Plaintiff believes that these violations began when Defendants reduced her work responsibilities and transferred an employee she supervised while Plaintiff was on maternity leave. (*Id.* ¶ 9.) Plaintiff further alleges that Diné denied her accommodation request that remote meetings and calls

be scheduled around her breast milk-pumping schedule. (*Id.* ¶ 11.) Instead, Defendants required her to attend in-person meetings over 100 miles away, despite being hired as a remote employee with minimal travel required. (*Id.*) Plaintiff believes that it was Young, her former supervisor, who made the decision to place her on the PIP for reasons that were "false and/or exaggerated, and thus pretextual." (*Id.* ¶ 19.)

Plaintiff brings two (2) counts against Defendants: (1) Interference with Exercise of Leave Rights Under FMLA, and (2) Retaliation for Complaining of Discrimination Under FMLA. (*Id.* at 6.) Plaintiff requests reinstatement and monetary damages of $500,000.00. **[*4]** (*Id.*)

II. LEGAL STANDARD

A Rule 12(b)(1) motion challenges the Court's jurisdiction over the subject matter of a complaint. Such a challenge can be facial, asserting that the facts as pled fail to establish jurisdiction, or factual, disputing the pleadings themselves and arguing that other facts demonstrate that no jurisdiction exists. Beck v. McDonald, 848 F.3d 262, 270 (4th Cir. 2017) (quoting Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)). For a facial challenge, "the plaintiff is 'afforded the same procedural protection as she would receive under a Rule 12(b)(6) consideration.'" *Id.* (quoting Kerns, 585 F.3d at 192). Accordingly, a plaintiff's well-pleaded factual allegations are taken as true, and the complaint is viewed in the light most favorable to the plaintiff. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009). However, a court "need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." Turner v. Thomas, 930 F.3d 640, 644 (4th Cir. 2019) (quoting Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012)).

"Suits against Indian tribes are [] barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). In the absence of waiver or abrogation, the Court lacks subject matter jurisdiction. *See* Hengle v. Treppa, 19 F.4th 324, 348 (4th Cir. 2021).

For a Rule 12(b)(1) motion, courts may consider documents that are either "explicitly incorporated into the complaint by reference" or "those attached to the complaint as exhibits." Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016) (citations omitted). A **[*5]** court may consider a document not attached to the complaint, when "the document [is] integral to the complaint and there is no dispute about the document's authenticity." *Id.* "[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached . . ., the exhibit prevails." *Id.* (quoting Fayetteville Invs. v. Corn. Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991)) (internal quotations omitted) (alteration in original).

III. ANALYSIS

Plaintiff concedes that Defendants are an arm of the Navajo Nation and ordinarily entitled to sovereign immunity. (Pl.'s Resp. in Opp'n at 3, ECF No. 12); *see also* Applied Scis. & Info. Sys., Inc. v. DDC Constr. Srvs., LLC, No. 2:19-cv-575, 2020 U.S. Dist. LEXIS 94435, 2020 WL 2738243, at *2-4 (E.D. Va. Mar. 30, 2020) (finding DDC is entitled to immunity as an arm of the Navajo Nation tribe). The parties diverge on whether Congress abrogated tribal immunity in enacting the FMLA.

A. Congressional Abrogation of Tribal Immunity in the FMLA

Plaintiff acknowledges the FMLA is silent about tribal immunity. (Pl.'s Resp. in Opp'n at 5.) Yet it is the statute's silence, Plaintiff argues, that marks it as generally applicable to everyone—and therefore applicable to Indian tribes. (*See id.* (citing Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960) ("[G]eneral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary . . .")).) The FMLA prohibits "any employer" **[*6]** from interfering with the exercise of leave rights, 29 U.S.C. § 2615(a), and, unlike other statutes, the Act defines employer broadly, 29 U.S.C. § 2611(4)(A). Accordingly, Plaintiff contends that "in the absence of language carving out an exemption for Indian tribes, tribal owned

businesses are no different than any other business in the United States and must honor the leave entitlements of eligible employees." (Pl.'s Resp. in Opp'n at 5.)

Defendants aptly note that Plaintiff's reliance on *Federal Power Commission* is misplaced. (Defs.' Reply at 2, ECF No. 13 ("Whether the FMLA applies to DDC has no bearing on whether DDC's sovereign immunity bars Butrick's claims.").) "[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1130 (11th Cir. 1999)* (emphasis in original). While a federal law may be generally applicable to an Indian tribe based on Congressional silence, silence is not sufficient to afford a private party with a remedy—"[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."[1] *Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 755, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)*. The Supreme Court has often held the initial presumption is that tribal immunity applies, and to "abrogate **[*7]** [such] immunity, Congress must 'unequivocally' express" its intent to do so. *Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014)* (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)*). Courts should "not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* To determine whether Congress unequivocally abrogated tribal immunity in the FMLA, the Court must look to the text of the statute. *Id.* ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader.") Assuming that Indian tribes *are* subject to the FMLA, the Act's silence regarding Indian tribes cannot unequivocally abrogate tribal immunity.[2]

As Plaintiff readily admits, the FMLA contains no mention or reference to Indian tribes. Congress knows, and often does, expressly indicate whether a statute abrogates immunity. *See, e.g.*, *Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6903(13)* (defining "municipality" to include "an Indian tribe or authorized tribal organization"). Plaintiff does not identify any court that has held the FMLA unequivocally abrogates tribal immunity.[3] On the contrary, while the Fourth Circuit has not yet weighed in on the question, courts elsewhere have uniformly held the FMLA **[*8]** does *not* abrogate Tribal immunity. *See Carsten v. Inter-Tribal Council of Nevada, 599 F. App'x 659, 660 (9th Cir. 2015)* ("The district court correctly held that the FMLA does not abrogate tribal sovereign immunity."); *Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004)* ("[Neither abrogation nor waiver has occurred in this case. The FMLA makes no reference to the 'amenity of Indian tribes to suit.'" (citation omitted)), *cert. denied*, *543 U.S. 966, 125 S. Ct. 429, 160 L. Ed. 2d 336 (2004)*. The Court joins those circuits in holding that Congress did not unequivocally abrogate tribal immunity under the FMLA.

Plaintiff suggests an alternative avenue for the Court to find an abrogation of sovereign immunity after the Supreme Court's decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 143 S. Ct. 1689, 216 L. Ed. 2d 342*. In *Coughlin*,

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[1] This is not to say that Plaintiff may have *no* means of recourse if the FMLA does not apply to Indian tribes. The Secretary of Labor is always capable of bringing suit for violations of the statute. *29 U.S.C. § 2617(b)*; *see Fla. Paraplegic, 166 F.3d at 1134-35* ("As we held in Part III.A, *supra*, Title III applies to Indian tribes; moreover, "[t]ribal sovereign immunity does not bar suits by the United States." (quoting *Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996)*)).

[2] The Court need not address whether the FMLA, as a statute of general applicability, applies to Indian tribes. The Court does note, however, that courts have not uniformly held that generally applicable laws necessarily apply to Indian tribes. *See, e.g., E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989)* (holding ADEA is not applicable).

[3] Plaintiff points to *Pearson v. Chugach Government Services, Inc.* from the District of Delaware for support, but *Pearson* is distinguishable. (Pl.'s Resp. in Opp'n at 6); *669 F. Supp. 2d 467 (D. Del. 2009)*. *Pearson* concerned an Alaskan Native Corporation, an entity the Fourth Circuit has held are "not comparable sovereign entities." *Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 213 (4th Cir. 2007)*. The Court in *Pearson* even noted, "The only courts to examine whether tribal organizations are subject to the FMLA's employer obligations held, based on the doctrine of tribal immunity, [that] there is not private cause of action under the FMLA against tribal organizations." *Pearson, 669 F. Supp. 2d at 477*.

the Court held that by broadly defining "governmental unit" in the Bankruptcy Code, "Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type." Id. at 390. The consequence of Congress's decision was the abrogation of tribal immunity. Following the Court's reasoning, Plaintiff argues that Congress's broad definition of "public agency" in the FMLA, 29 U.S.C. § 203(x), which is borrowed from the Fair Labor Standards Act, expresses a similar intent to abrogate tribal immunity. (Pl.'s Suppl. Br. at 4, ECF No. 19.) This Court disagrees.

In Coughlin, the Supreme Court **[*9]** noted that Congress defined "governmental unit" expansively, and concluded the definition "with a broad catchall phrase, sweeping in 'other foreign or domestic government[s].'" Coughlin, 599 U.S. at 389-90 (quoting 11 U.S.C. § 101(27)). In the FMLA, "public agency" is not defined expansively and nor does it contain a broad catchall phrase. Instead, § 203(x) specifically identifies only "the Government of the United States; the government of a State" and the political subdivisions and agencies thereof. Moreover, at least one court has held that the FLSA's definition of "public agency," which the FMLA borrows, does not expressly abrogate tribal immunity. Larimer v. Konocti Vista Casino Resort, Marina & RV Park, 814 F. Supp. 2d 952, 956-57 (N.D. Cal. 2011). Consequently, tribal immunity applies absent waiver by DDC or the Navajo Nation.

B. Waiver of Sovereign Immunity—DDC Employee Handbook

Plaintiff contends that even if Defendants are entitled to sovereign immunity, DDC expressly waived immunity. (Pl.'s Suppl. at 2.) The Employee Handbook states:

> Although the Company has sovereign immunity, the Company voluntarily complies with the federal Family and Medical Leave Act (FMLA), which requires employers to grant unpaid leaves of absence to qualified workers for certain medical and family related reasons. The Company also abides by any state and **[*10]** local leave laws. The more generous of the laws will apply to the employee if the employee is eligible under both federal and state laws.

(DDC Employee Handbook at 26-27, ECF No. 24)[4] Voluntary compliance with the FMLA, Plaintiff argues, constitutes waiver of sovereign immunity as it pertains to enforcing the FMLA. (Pl.'s Suppl. at 2.)

Conversely, Defendants argue that Plaintiff's position is untenable when assessing the Handbook as a whole. (Defs.' Mem. in Supp. of Mot. for Leave at 2-3, ECF No. 21.) The first numbered page of the Handbook reads: "DDC IS AN INSTRUMENTALITY OF THE NAVAJO NATION AND IS ENTITLED TO SOVEREIGN IMMUNITY. NOTHING IN THIS HANDBOOK IS INTENDED TO BE, OR SHALL BE, INTERPRETED AS A WAIVER OF THE SOVEREIGN IMMUNITY OF DDC OR ITS SUBSIDIARY LIMITED LIABILITY COMPANIES FOR ANY PURPOSE." (DDC Employee Handbook at 1 (emphasis in original).) In light of this clause, Plaintiff counters that the Court should read the specific waiver of immunity to trump the general assertion of immunity.

While the Fourth Circuit has not addressed waiver of tribal immunity, other Circuits have established guidelines instructive for a court considering whether an Indian tribe has chosen to **[*11]** waive tribal immunity. *See* Garcia v. Akwesasne Hous. Auth., 268 F.3d 76,86 (2d Cir. 2001). Analogous to waiver of immunity by states, "courts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest '"encompasses not merely *whether* it may be sued, but *where* it may be sued."' *Id.* (emphasis in the original) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)); *see also* Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011, 1016 (9th Cir. 2016) ("It is well settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." (quotations omitted) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). Furthermore, as the Court mentioned in its earlier discussion, a law's mere

[4] Both Plaintiff and Defendants filed copies of the Employee Handbook. Because Defendants submitted a copy of the whole Handbook, as opposed to the excerpts Plaintiff provided, and no party has disputed the authenticity of the copies, the Court will utilize the full Handbook. Citations will reflect the pagination contained within the Handbook.

applicability to Indian tribes does not necessarily confer the ability to remedy violations of that law. *See* Kiowa Tribe of Oklahoma, 523 U.S. at 755. Just as any entity may voluntarily comply with the law of any jurisdiction, an Indian tribe's voluntary compliance with a law does not automatically waive sovereign immunity or provide a cause of action beyond the remedies available to any party to a contract.[5]

Here, the Navajo Nation's putative waiver is not expressly waived. First, even if the Court were to read DDC's voluntary compliance as a waiver of immunity, which the Court does not, the two provisions, one explicitly invokes sovereign immunity and **[*12]** the other impliedly waiving immunity, are at best contradictory. Second, nowhere in the Handbook does DDC identify where a lawsuit should take place. Consequently, the Court declines to read into the Handbook any waiver of tribal sovereign immunity absent further language unequivocally waiving immunity.

C. *Ex Parte Young*

Finally, Plaintiff asserts that regardless of sovereign immunity, she should be entitled to pursue injunctive relief against Defendant Young under *Ex Parte Young*. (Pl.'s Resp. in Opp'n at 6.) Defendants counter that because Young was sued in her official capacity, she enjoys sovereign immunity against suit under *Ex Parte Young*.

"In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." Lewis v. Clarke, 581 U.S. 155, 162, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017). Ordinarily, sovereign immunity blocks claims against the sovereign, but in *Ex Parte Young*, the Supreme Court carved out an exception to this general rule. 209 U.S. 123, 159, 28 S. Ct. 441, 52 L. Ed. 714 (1908). This exception "allows private citizens, in proper cases, to petition a federal court to enjoin State officials in their *official capacities* from *engaging in future conduct* that would violate the Constitution or a federal statute." **[*13]** Antrican v. Odom, 290 F.3d 178, 184 (4th Cir. 2002) (emphasis added) (citing Ex Parte Young, 209 U.S. at 159; Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)). The *Ex Parte Young* doctrine also applies to tribal sovereign immunity. Hengle, 19 F.4th at 348 ("*Ex parte* Young-style claims do not accomplish an extra-congressional abrogation of tribal immunity but rather present a long-recognized *exception* to sovereign immunity." (emphasis in original)). Injunctive relief under *Ex Parte Young* must be both (1) prospective and (2) relief from an ongoing violation of federal law. Indus. Srvs. Grp. v. Dobson, 68 F.4th 155, 163 (4th Cir. 2023). The issue is whether Plaintiff does so here.

In the two sentences Plaintiff devotes to her argument, she contends that by seeking reinstatement of her employment, she pursues a claim for prospective injunctive relief remedying an ongoing violation of federal law. (Compl. ¶ 3; Pl.'s Resp. in Opp'n at 6.) The Court disagrees. The FMLA permits a civil action by employees to obtain "equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B). While reinstatement is clearly a form of equitable relief, it is unclear whether an action for reinstatement remedies an ongoing violation of federal law. *See* Morrison v. Viejas Enters., No. 11cv97 WQH (BGS), 2011 U.S. Dist. LEXIS 81922, 2011 WL 3203107, at *4 (S.D. Cal. July 26, 2011) (holding that the plaintiff did not "request[] any injunctive or declaratory relief against an agency officer in his official capacity" despite **[*14]** requesting reinstatement). Plaintiff directs the Court to the Second Circuit's decision in Chayoon where the court left open the possibility that the plaintiff could pursue injunctive or declaratory relief against the Indian tribe under the FMLA.[6] Chayoon, 355 F.3d at 142. The Court does not

[5] This is not to suggest that Plaintiff has a breach of contract claim. The Handbook explicitly disavows any such claim and such a claim is wholly dependent on the language of the contract itself. (DDC Employee Handbook at 1 ("This handbook and the Company's policies are not intended to constitute a contract of employment, either express or implied, between you and the Company. Accordingly, this handbook shall not and should not be interpreted or construed as an employment contract, either express or implied, between you and the Company.").)

[6] Note the Second Circuit in Chayoon did not address whether the FMLA was in fact applicable against Indian tribes. Thus, the question of applicability, which the Court does not resolve here, would also have to be answered in the affirmative for Plaintiffs to succeed on a claim under *Ex Parte Young*. *See supra* Section III.A.

dispute that injunctive relief under *Ex Parte Young* is *theoretically* available—whether it is *actually* available here is a separate question.

"[A] court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)* (cleaned up). Reinstatement is prospective. *See Diaz v. Michigan Dep't of Corr., 703 F.3d 956, 964 (6th Cir. 2013)*. However, the reinstatement requested here does not remedy any ongoing violation of federal law. Viewing the Complaint as true and assuming the FMLA applies to Defendants, Defendants violated federal law the moment they interfered with Plaintiff's rights under the FMLA—i.e., the moment Defendants "reduced Plaintiff's employment responsibilities, hired her replacement. and ultimately terminated her employment." (Compl. ¶ 17); *see 29 U.S.C. § 2615(a)(1)*. The last point in time that Defendants violated federal law was August 19, 2023, when Plaintiff's employment **[*15]** was terminated. (Compl. ¶ 16.) While the effects of this violation may still linger—as they do with most injuries—Plaintiff fails to demonstrate a *continuing* violation of federal law that would warrant injunctive relief. Additionally. Plaintiff fails to offer any case law that states otherwise. Accordingly, Plaintiff's equitable claim for reinstatement cannot be construed as viable relief under *Ex Parte Young* and therefore cannot overcome the Navajo Nation's sovereign immunity.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion (ECF No. 6) will be granted. Counts I and II will be dismissed without prejudice.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry E. Hudson

Henry E. Hudson

Senior United States District Juduc

Date: October 30, 2024

Richmond, Virginia

ORDER

(Granting Defendants' Motion to Dismiss)

THIS MATTER is before the Court on Defendants Diné Development Corporation ("Diné" or "DDC") and Sarah Young's ("Young"), in her official capacity, (collectively, "Defendants") Motion to Dismiss (the "Motion," ECF No. 6), filed on March 18, 2024. For the reasons stated in the accompanying Memorandum Opinion, the Motion is GRANTED. The Complaint is DISMISSED WITHOUT **[*16]** PREJUDICE, without leave to amend, rendering this Order final and appealable.

The Clerk is directed to send a copy of the Memorandum Opinion and Order to all counsel of record.

This case is CLOSED.

It is so ORDERED.

Date: October 30, 2024

Richmond, VA

/s/ Henry E. Hudson

Henry E. Hudson

Senior United States District Judge

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Colmar v. Jackson Band of Miwuk Indians

United States District Court for the Eastern District of California

June 13, 2011, Decided; June 15, 2011, Filed

No. CIV S-09-0742 DAD

Reporter
2011 U.S. Dist. LEXIS 62832 *; 2011 WL 2456628

STEVEN J. COLMAR, Plaintiff, v. JACKSON BAND OF MIWUK INDIANS, DBA JACKSON RANCHERIA CASINO, HOTEL & CONFERENCE CENTER, Defendant.

Prior History: *Colmar v. Jackson Band of Miwuk Indians, 2011 U.S. Dist. LEXIS 38522 (E.D. Cal., Mar. 31, 2011)*

Counsel: **[*1]** For Steven J. Colmar, Plaintiff: Bradley S. Thomas, John Clinton Bridges, LEAD ATTORNEYS, Mason & Thomas, Davis, CA.

For Jackson Band of Miwuk Indians, Doing business as Jackson Rancheria Casino, Hotel and Conference Center, Defendant: Jill Carla Peterson, LEAD ATTORNEY, Korshak, Kracoff, Kong & Sugano, LLP, Sacramento, CA.

Judges: DALE A. DROZD, UNITED STATE MAGISTRATE JUDGE.

Opinion by: DALE A. DROZD

Opinion

ORDER

This matter came before the court on June 3, 2011, for hearing of defendant's motion for reconsideration pursuant to *Federal Rule of Civil Procedure 60(b)(1)* (Doc. No. 22) and defendant's second motion to dismiss plaintiff's complaint pursuant to *Federal Rule of Civil Procedure 12(b)(1)* (Doc. No. 23). The parties have previously consented to Magistrate Judge jurisdiction pursuant to *28 U.S.C. § 636(c)*. (Doc. Nos. 9 and 10.) Attorney John Bridges appeared on behalf of plaintiff Steven Colmar and attorney Jill Peterson appeared on behalf of defendant the Jackson Rancheria Band of Miwuk Indians. Oral argument was heard and defendant's motions were taken under submission. For the reasons set forth below, defendant's motion for reconsideration will be granted in part, and defendant's second motion to dismiss **[*2]** will be granted.

DEFENDANT'S MOTION FOR RECONSIDERATION

On March 17, 2009, plaintiff filed a complaint alleging that the defendant unlawfully discriminated against him based on his age in violation of *29 U.S.C. §§ 621-634*. (Complaint (Doc. No. 1) at 2-5.) On May 22, 2009, defendant filed its first motion to dismiss pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. (Doc. No. 8). On March 31, 2011, the court issued an order denying defendant's first motion to dismiss. (Doc. No. 21.)

Defendant, the Jackson Rancheria Band of Miwuk Indians ("Tribe"), now moves pursuant to *Federal Rule of Civil Procedure 60(b)(1)* for reconsideration of this court's March 31, 2011 order denying defendant's May 22, 2009 first motion to dismiss. (Def.'s MTR (Doc. No. 22) at 1-2.) In that order the court stated:

> Instead, the filing of plaintiff's complaint in this action was subject to *29 U.S.C. § 626 (d)(1)(B)*, which provides that a civil action may be commenced within 300 days after the occurrence of the alleged unlawful practice. Plaintiff timely filed his complaint in this case just prior to the expiration of that 300-day limitation period.

(Order (Doc. No. 21) at 13.)

In moving for reconsideration, **[*3]** counsel for defendant observes that *29 U.S.C. § 626 (d)(1)(B)* actually provides that the plaintiff in an Age Discrimination in Employment Act ("ADEA") case has 300 days after the alleged unlawful practice to file a charge with the Equal Employment Opportunity

Commission ("EEOC"), not a complaint in a civil action.[1] (Def.'s MTR at 3.) Based on this error in the court's order, defendant seeks reconsideration and for the court upon reconsideration to grant defendant's motion to dismiss filed May 22, 2009. (Id. at 5.)

Counsel for plaintiff concedes that *29 U.S.C. § 626 (d)(1)(B)* actually provides that the plaintiff in an ADEA case has 300 days after the alleged unlawful practice **[*4]** occurred to file a charge with the EEOC, and not a complaint in a civil case. Nonetheless, plaintiff argues that defendant's motion to dismiss filed May 22, 2009, should still be denied because the misstatement in the court's March 31, 2011 order is "trivial and does not supersede the equitable doctrines behind both the ADEA and this Court's Order." (Pl.'s Opp.'n. to MTR (Doc. No. 24) at 1-3.)

Federal Rule of Civil Procedure 60(b) permits relief from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation, or other misconduct by an adverse party; (4) void judgment; (5) satisfaction, release, or discharge of the judgment; or (6) "any other reason justifying relief from the operation of the judgment." A court may correct an error of law under *Rule 60(b)(1)*. *Liberty Mut. Ins. Co. v. Equal Emp't Opportunity Comm'n, 691 F.2d 438, 441 (9th Cir. 1982)*. See also *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999)* (acknowledging that "a district court can correct its **[*5]** own mistake" under *Rule 60(b)*).

Here, it is apparent to the court and to the parties that the court did indeed misstate the statute of limitations found in *29 U.S.C. § 626 (d)(1)(B)* in the court's March 31, 2011 order denying defendant's first motion to dismiss. Plaintiff's motion for reconsideration of the court's March 31, 2011 order will therefore be granted and that order will be vacated.

However, the court has now reviewed defendant's second motion to dismiss filed April 29, 2011. Because defendant's second motion to dismiss is both persuasive and dispositive, the court need not reach the merits of the first motion to dismiss filed on May 22, 2009.

DEFENDANT'S SECOND MOTION TO DISMISS

Defendant now seeks dismissal of plaintiff's complaint in this action pursuant to *Federal Rule of Civil Procedure 12(b)(1)* on the grounds that this court lacks jurisdiction over the subject matter of this suit. Specifically, defendant argues that subject matter jurisdiction is lacking over plaintiff's ADEA claim because defendant is a federally recognized Indian Tribe that is immune from suit pursuant to tribal sovereign immunity.[2] (Def.'s MTD (Doc. No. 23) at 3-8.)

In opposing defendant's motion, plaintiff argues that the Tribe has waived its immunity. In this regard, plaintiff asserts that the Tribe waived its immunity through an official act of the tribal government by stating in Article X of its Tribal Constitution that:

> Neither the Tribal Council nor the General Council shall exercise any powers in such a manner as to deprive any person of rights secured by this Constitution or applicable laws of the United States, including the provisions of the Indian Civil Rights Act, *25 U.S.C. § 1302*.

(Pl.'s Opp.'n. to MTD (Doc. No. 25) at 2-3.)

In reply, defendant argues that Article X of the Tribal

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[1] Title *29 U.S.C. § 626(d)(1)(B)* provides that:

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

***

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

[2] Defendant is included on the Federal **[*6]** Register's list of recognized Indian Tribes. See *67 Fed. Reg., p. 46328*-01. "[T]he inclusion of a group of Indians on the Federal Register list of recognized tribes would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit." *Cherokee Nation v. Babbitt, 117 F.3d 1489, 1499, 326 U.S. App. D.C. 139 (D.C. Cir. 1997)*. Moreover, plaintiff acknowledges in his complaint that the defendant is "a business entity . . . owned and operated by the Jackson Rancheria Band of Miwuk Indians, a sovereign state." (Compl. (Doc. No. 1) at 2.)

Constitution does **[*7]** not mention the Tribe's sovereign immunity nor does it waive that immunity but instead merely sets forth limits on the Tribal Council with regard to individuals governed by the Tribal Constitution. In addition, defendant argues that waiver of the Tribe's sovereign immunity is actually addressed in Article VI, Section 2 of the Tribal Constitution, which specifies that the Tribe's sovereign immunity may only be waived if such waiver is clearly stated in writing and approved by the Tribal Council pursuant to a duly called meeting. (Def.'s Reply (Doc. No. 27) at 2-5.) According to defendant, such conditions have not been met.

LEGAL STANDARDS APPLICABLE TO DEFENDANT'S MOTION

Defendant's motion to dismiss has been brought pursuant to *Federal Rule of Civil Procedure 12(b)(1)*. *Federal Rule of Civil Procedure 12(b)(1)* allows a defendant to raise the defense, by motion, that the court lacks jurisdiction over the subject matter of an entire action or of specific claims alleged in the action. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in **[*8]** fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)*. When a *Rule 12(b)(1)* motion attacks the existence of subject matter jurisdiction in fact, no presumption of truthfulness attaches to the plaintiff's allegations. Id. "[T]he district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)*. Plaintiff has the burden of proving that jurisdiction does in fact exist. *Thornhill Publ'g Co., 594 F.2d at 733*.

ANALYSIS

I. Sovereign Immunity

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)*. See also *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)* ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). "Sovereign immunity limits a **[*9]** federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1015-16 (9th Cir. 2007)*.

"Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe." *Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 725 (9th Cir. 2008)*. See also *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)* ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Nanomantube v. Kickapoo Tribe in Kansas, 631 F.3d 1150, 1152 (10th Cir. 2011)* ("As a dependent sovereign entity, an Indian tribe is not subject to suit in federal or state court unless the tribe's sovereign immunity has been either abrogated by Congress or waived by the tribe."). "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001)*. "Any waiver must be **[*10]** unequivocal and may not be implied." *Kescoli v. Babbitt, 101 F.3d 1304, 1310 (9th Cir. 1996)*. See also *Santa Clara Pueblo, 436 U.S. at 58* ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."). Similarly, congressional abrogation of sovereign immunity may not be implied and must be "unequivocally expressed" in "explicit legislation." *Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004)*. "The plaintiff bears the burden of showing a waiver of tribal sovereign immunity." *Ingrassia v. Chicken Ranch Bingo and Casino, 676 F. Supp.2d 953, 956-57 (E.D. Cal. 2009)*.

Here, counsel for plaintiff states that while he "found no direct Congressional waiver in any statute or regulation,

it is clear that defendant has waived its immunity."[3] (Pl.'s Opp.'n. to MTD (Doc. No. 25) at 1.) Plaintiff's claim of a clear and unequivocal waiver of sovereign immunity by defendant is based solely upon the language of Article X of defendant's Tribal Constitution, which reads:

> Neither the Tribal Council nor the General Council shall exercise any powers in such a manner as to deprive any person of rights secured by this Constitution or applicable **[*11]** laws of the United States, including the provisions of the Indian Civil Rights Act, *25 U.S.C. § 1302*.

(Id. at 2-3.)

This language merely acknowledges that the Tribal Council and General Council will not deprive anyone of rights secured by applicable federal laws. In this regard, the passage is nothing more than an acknowledgment of the Tribe's agreement to comply with federal law. However, a tribe's agreement to comply with federal law, without more, does not constitute an unequivocal waiver of tribal sovereign immunity. See *Nanomantube, 631 F.3d at 1153* ("We thus hold that the Tribe's agreement to comply with Title VII, like similar agreements to comply with other federal statutes, may convey a promise not to discriminate, but it in no way constitutes an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court."); *Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006)* **[*12]** (finding that the Tribe, which owned and operated the casino, did not clearly waive its immunity by stating in an employee handbook that employees could be terminated "for any reason consistent with applicable state or federal law," or when it stated in an Employee Orientation Booklet that it would "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin . . . and other categories protected by applicable federal laws."); *Demontiney, 255 F.3d at 814* ("Demontiney provides no support for the proposition that the Tribe's incorporation of [the Indian Civil Rights Act] into its constitution and bylaws shows an intent to waive sovereign immunity in federal court."); *Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1044 n.2 (8th Cir. 2000)* ("Nor did the College waive its immunity by executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964."); cf. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 423, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)* (concluding that "under the agreement the Tribe proposed and signed, the Tribe **[*13]** clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court" thereby waiving sovereign immunity).

Article X of defendant's Tribal Constitution does not mention the Tribe's sovereign immunity, the waiver of that immunity or the scope of any such waiver. Under plaintiff's interpretation Article X waives the Tribe's sovereign immunity in its entirety and without limitation. However, Article VI, Section 2 of the Tribal Constitution specifically addresses the Tribe's sovereign immunity and waiver of that immunity, stating in relevant part, that:

> In particular, the Tribal Council is authorized to negotiate waivers of the Band's sovereign immunity from unconsented lawsuit, but no such waiver shall be effective unless the intent to so waive immunity, and the extent to which it shall be waived, is clearly stated in writing and approved by the Tribal Council pursuant to a duly called meeting.

(Def.'s MTD, Ex. A (Doc. No. 23-4) at 10.) Here, plaintiff has identified no asserted written waiver of the Tribe's immunity, other than Article X. Any suggestion that the Tribe intended to waive its sovereign immunity through the language of Article X is unpersuasive **[*14]** because such an interpretation would render Article VI, Section 2 of the Tribal Constitution unnecessary and contradictory.

For the reasons noted above, the court rejects plaintiff's argument that Article X of defendant's Tribal Constitution unequivocally waived the Tribe's sovereign immunity. The court finds that defendant is an Indian tribe entitled to sovereign immunity and that the Tribe's immunity has not been abrogated by Congress or

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[3] With respect to congressional abrogation of the Tribe's immunity, it has been held that the ADEA, the statute under which plaintiff brings this action, does not abrogate tribal sovereign immunity. See *Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 85-86 (2nd Cir. 2001)*.

unequivocally waived by the Tribe itself. This court's subject matter jurisdiction over this action is therefore precluded based on the defendant Tribe's sovereign immunity.[4] Accordingly, defendant's second motion to dismiss filed April 29, 2011 is granted.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's April 29, 2011 **[*15]** motion for reconsideration (Doc. No. 22) is granted in part;

2. The court's March 31, 2011 order (Doc. No. 21) is vacated;

3. Defendant's April 29, 2011 second motion to dismiss (Doc. No. 23) is granted;

4. Defendant's May 22, 2009 first motion to dismiss (Doc. No. 8) is denied as moot; t5. Plaintiff's March 17, 2009 complaint (Doc. No. 1) is dismissed; and

6. This matter is closed.

DATED: June 13, 2011.

/s/ Dale A. Drozd

DALE A. DROZD

UNITED STATE MAGISTRATE JUDGE

End of Document

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[4] Having found that sovereign immunity precludes the court's exercise of subject matter jurisdiction, the court need not address plaintiff's argument that the ADEA applies to the Tribe. See *E.E.O.C. v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1075 (9th Cir. 2001)* ("As a threshold matter, we first address the Tribe's contention that it enjoys sovereign immunity from the EEOC's inquiry and thus from this lawsuit.").

Geroux v. Assurant, Inc.

United States District Court for the Western District of Michigan, Northern Division

March 17, 2010, Filed

Case No. 2:08-cv-00184

Reporter
2010 U.S. Dist. LEXIS 24847 *

RICHARD GEROUX, Plaintiff, v. ASSURANT, INC., UNION SECURITY INSURANCE COMPANY, Defendants.

Prior History: *Geroux v. Assurant, Inc., 2009 U.S. Dist. LEXIS 109252 (W.D. Mich., Nov. 23, 2009)*

Counsel: **[*1]** For Richard Geroux, plaintiff, counter-defendant: Joseph P. O'Leary, LEAD ATTORNEY, O'Leary Law Office, Baraga, MI.

For Assurant, Inc., Union Security Insurance Co., defendants: Roger W. Zappa, LEAD ATTORNEY, Bensinger Cotant & Menkes PC (Marquette), Marquette, MI; Richard Nelson Bien, Lathrop & Gage LC, Kansas City, MO.

For Union Security Insurance Co., counter-claimant: Roger W. Zappa, LEAD ATTORNEY, Bensinger Cotant & Menkes PC (Marquette), Marquette, MI; Richard Nelson Bien, Lathrop & Gage LC, Kansas City, MO.

Judges: HON. R. ALLAN EDGAR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. ALLAN EDGAR

Opinion

MEMORANDUM

Plaintiff Richard Geroux initially brought a complaint for unpaid benefits pursuant to long-term disability coverage provided by his employer, the Keweenaw Bay Indian Community ("KBIC"), in the Tribal Court of the Keweenaw Bay Indian Community, L'Anse Reservation, Michigan. [Court Doc. No. 1, Complaint]. Plaintiff sought compensation for alleged underpayment of benefits under the policy of "approximately $ 230.39 per month since December 21, 1982." Plaintiff's complaint does not mention any claims pursuant to the Employee Retirement Income Security Act, *29 U.S.C. §§ 1001, et seq.* ("ERISA").

Defendants Assurant, **[*2]** Inc. ("Assurant") and Union Security Insurance Company ("Union Security") (collectively "Defendants") removed Plaintiff's case to this court on the basis of federal question jurisdiction, claiming that Plaintiff's claims were covered by ERISA. Defendant Union Security answered Plaintiff's complaint and brought a counterclaim for declaratory judgment pursuant to *28 U.S.C. § 2201* seeking a declaration from this court that it is the exclusive forum for Plaintiff's claims and that the tribal court lacks jurisdiction over Plaintiff's claims. The counterclaim further asserted that Union Security should not be required to exhaust its claims in tribal court because that court lacks jurisdiction over ERISA claims.

This court detailed the procedural history of this case in its November 23, 2009 memorandum. [Court Doc. No. 57]. As of that date the parties had failed to supply additional evidence and briefing despite this court's order denying further extensions of time [Court Doc. No. 54] and despite having had nearly a year in which to conduct jurisdictional discovery. The court thus granted the motion to remand the matter to tribal court and dismissed the defendants' counterclaim. [Court Doc. **[*3]** No. 56]. It was only *after* this court's grant of the motion for remand that the Defendants presented this court with further additional evidence supporting their position regarding this court's jurisdiction. [Court Doc. Nos. 57, 58].

I. Background

The complaint asserts that Plaintiff is Native American and that he is a former employee and member of the

KBIC. Complaint, II, P 2. The Keweenaw Community is located in Baraga and Marquette County, Michigan. Plaintiff claims that he is a third-party beneficiary of an insurance policy between the KBIC and Mutual Benefit Life Insurance Company ("Mutual Benefit") and its successors in interest, Defendants Union Security and Assurant.

Plaintiff asserts that on June 1, 1980 Mutual Benefit issued Group Policy # G25012, Certificate # 311 ("Policy") for the Keweenaw Community. The insurance provided long-term disability insurance for employees of the community. Plaintiff asserts that the coverage was "designed to provide benefits of 60% of an individual's monthly earnings up to a monthly payment limit of 70% of that individual's monthly earnings." Complaint, P 8.

Plaintiff contends that he was injured while he was working for the KBIC on December 21, **[*4]** 1982. Complaint, P 10. The injury allegedly led to his permanent disability. He asserts that at the time of his injury, his monthly earnings were $ 2,433.98 and that his monthly insurance benefits should have been $ 1,460.39. Plaintiff asserts that the Policy provided that increases in Social Security benefits pursuant to the Social Security Act would not affect the amount of benefits available pursuant to the Policy. Complaint, PP 9, 11. He contends that he has received under payments "of $ 81.00 per month from 1/1/86-12/31/88, of $ 229.00 from 1/1/89 - 12/31/91, of $ 335.00 from 1/1/92 - 1/31/2007 and of $ 367.00 from 2/1/2007 through the present." Complaint, P 5.

Defendants removed Plaintiff's case to this Court, claiming that his claims are preempted by ERISA and that, as such, the tribal court lacks jurisdiction over Plaintiff's claims. Plaintiff moved to remand the case to tribal court on August 9, 2008. [Court Doc. No. 7]. This is the issue still pending before this court.

II. Standard of Review

Local Rule 7.4 for the United States District Court for the Western District of Michigan states:

> Generally, and without restricting the discretion of the Court, motions for reconsideration **[*5]** which merely present the same issues ruled upon by the Court shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof.

W.D. Mich. L.Civ.R. 7.4(a). As this court previously noted, "a motion for reconsideration may not be used to raise issues that could have been raised in the previous motion, or to introduce evidence which could have been proffered during the pendency of a summary judgment motion." *Aero-Motive Co. v. Great American Ins., 302 F.Supp.2d 738, 740 (W.D. Mich. 2003)*. A motion for reconsideration may be treated as a motion pursuant to *Fed. R. Civ. P. 59(e)* to alter or amend the judgment. *See Huff v. Metropolitan Life Ins. Co., 675 F.2d 119, 122 (6th Cir. 1982)*. Such motions may be granted where "there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *GenCorp Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)* (citations omitted).

However, documents filed late do not constitute "newly discovered evidence" for purposes **[*6]** of a motion for reconsideration. *See e.g., School Dist. No. 1J, Multnomah Cty., Or. v. AC and S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)* (noting that "[t]he overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence'"). In addition, as several courts have noted, "[a] scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Dag Enterprises, Inc. v. Exxon Mobil Corp., 226 F.R.D. 95, 104 (D.D.C. 2005)* (quoting *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 610 (9th Cir. 1992)*); *see also, Columbia Gas Transmission Corp. v. Zeigler, 83 F. App'x 26, 31 (6th Cir. 2003)*; *Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998)*.

IV. Analysis

A. Removal and Federal Court Jurisdiction

28 U.S.C. § 1441 governs the removal of actions

generally. That statute states in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, **[*7]** to the district court of the United States for the district and division embracing the place where such action is pending. . . .
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. . . .

28 U.S.C. § 1441(a)-(b). Further, 28 U.S.C. § 1331 provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The defendant seeking removal has the burden of proving jurisdiction in the district court. *See* Williamson v. Aetna Life Ins. Co., 481 F.3d 369 (6th Cir. 2007). Further, as this court noted in its memorandum granting the Plaintiff's motion to remand, " '[b]ecause lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute **[*8]** should be strictly construed and all doubts resolved in favor of remand.'" Eastman v. Marine Mech. Corp., 438 F.3d 544, 549-550 (6th Cir. 2006) (quoting Brown v. Francis, 75 F.3d 860, 864-65, 33 V.I. 385 (3d Cir. 1996)). In addition, "[w]hen addressing the removability issues, a trial court is urged to resolve all disputed questions of fact in favor of the non-removing party." Lyons v. U.S. Steel Corp., No. 09-12097, 2010 U.S. Dist. LEXIS 5871, 2010 WL 374016, *1 (E.D. Mich. Jan. 25, 2010) (citing Coyne v. American Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999)).

Defendants removed the case to this Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1441(b) alleging federal question jurisdiction because Plaintiff's complaint relates to rights arising under the terms of a group long-term disability insurance policy governed exclusively by ERISA, 29 U.S.C. § 1001 et seq. Defendants allege that because Plaintiff claims to be the beneficiary of an "employee benefit plan" as that term is defined under ERISA, his remedy lies solely with ERISA, 29 U.S.C. § 1132(a)(1)(B). 29 U.S.C. § 1132(a)(1)(B) provides that:

> A civil action may be brought--
> (1) by a participant or beneficiary--
> . . .
>
> (B) to recover benefits due to him under the terms **[*9]** of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

29 U.S.C. § 1132(a)(1)(B). ERISA defines an employee welfare benefit plan, in relevant part, as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of sickness, accident, disability, death or unemployment . . . .

29 U.S.C. § 1002(1). ERISA applies to employee benefit plans "established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce . . ." 29 U.S.C. § 1003(a)(1). Governmental plans, among others, are excluded from coverage under ERISA. 29 U.S.C. § 1003(b)(1).

Defendants further argue that Plaintiff's claims in tribal court are pre-empted by ERISA and that the tribal court has no jurisdiction over such claims. 29 U.S.C. § 1144(a) states in part, ". . . the provision of this **[*10]** subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

Further, 29 U.S.C. § 1132(e) provides:

> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions

> under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e). Citizenship of the parties does not affect the jurisdiction of the district courts. "The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. § 1132(f).

There are two essential considerations at issue here. The first, raised in plaintiff's **[*11]** initial motion for remand, is whether removal was improper because 28 U.S.C. § 1441 allegedly does not provide for removal from tribal court. This question further implicates whether Plaintiff's claims are ERISA claims. The second major issue to be resolved is whether, despite this court having jurisdiction over Plaintiff's claims, the court must remand the case to tribal court for the tribal court to determine its own jurisdiction. Plaintiff relies on the theory of tribal exhaustion and comity in support of his position regarding remand.

B. ERISA Coverage of Tribal Benefit Plans

1. Whether the 2006 Amendment to ERISA Applies Retroactively

In 2006 Congress amended ERISA to exclude tribal benefit plans from ERISA's coverage. ERISA excludes "governmental plans" from coverage. *See* 29 U.S.C. § 1003(b)(1). Congress amended the definition of "governmental plan" to include:

> a plan which is established and maintained by an Indian tribal government . . . a subdivision of an Indian tribal government . . . or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential **[*12]** governmental functions but not in the performance of commercial activities.

29 U.S.C. § 1002(32). However, this amendment was included as § 906 of the overall Pension Protection Act, Pub. L. No. 109-280, 120 Stat. 780 (2006), and at least one federal district court has found that this amendment does not apply retroactively. *Dobbs v. Anthem Blue Cross and Blue Shield, No. 04-cv-02283-LTB, 2007 U.S. Dist. LEXIS 62277, 2007 WL 2439310, *3 (D. Col. Aug. 23, 2007)*. The notes to 29 U.S.C. § 1002(32) indicate that "Amendments by Pub.L. 109-280, § 906, [are] applicable to any year beginning on or after Aug. 17, 2006, see Pub.L. 109-280, § 906(c), set out as a note under 26 U.S.C.A. § 414." In *Dobbs* the plaintiff's complaint had been dismissed prior to the 2006 amendment, so the district court found that "[h]olding the [plaintiff's] plan retroactively exempt from ERISA would materially alter the rights, duties, and liabilities of the parties in this case." *2007 U.S. Dist. LEXIS 62277, [WL] at *3*.

In this case the Plaintiff's complaint was filed after the 2006 amendment. *See* Complaint. However, his claims are based on allegations of consistent underpayments for many years, most of which occurred prior to the 2006 amendments. In *Lockheed Corp. v. Spink,* **[*13]** the U.S. Supreme Court addressed whether amended provisions of ERISA relating to discrimination in pension plans on the basis of age applied retroactively. *517 U.S. 882, 116 S.Ct. 1783, 135 L. Ed. 2d 153 (1996)*. The Supreme Court determined that the amendment was not retroactive. *Id. at 896-97, 116 S.Ct. at 1792-93*. The Court noted that the note to the amendment at issue in that case expressly stated that the amendments should only apply to plan years beginning after a certain date. *Id.* (citing 29 U.S.C. § 623 note). The Court thus concluded that "[t]his language compels the conclusion that the amendments are prospective." *Id.* It further noted, "[w]hen Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute." *Id. at 897, 116 S.Ct. at 1793* (citing *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992)*). Thus, applying the reasoning of *Spink* to this case, it appears that the 2006 Amendment to ERISA is prospective only and does not

apply to the vast majority of Plaintiff's claims of underpayment. However, Plaintiff argues that **[*14]** the 2006 ERISA Amendment only served to codify the existing federal common law that considered benefit plans covering tribal governmental employees to be beyond the scope of ERISA.

2. Application of ERISA to Tribal Benefit Plans

Several other courts have determined that tribal benefit plans, prior to the 2006 amendment, were governed by ERISA. For example, in *Smart v. State Farm Ins. Co.,* the Seventh Circuit addressed whether a claim for unpaid medical expenses by an employee of the Chippewa Health Center owned and operated by the Chippewa Tribe was covered by ERISA. 868 F.2d 929 (7th Cir. 1989). The defendant insurance company had issued the health center a group health policy. Id. at 930. The court analyzed the issue in the following way:

> The issue before us is whether Congress intended ERISA to include an employment benefit plan which is established and maintained by an Indian Tribe employer for the benefit of Indian employees working at an establishment located entirely on an Indian reservation. Congressional intent is paramount in determining the applicability of a statute to Indian Tribes. On its face ERISA fails to reveal Congress' intent as to the Act's applicability to Indian **[*15]** Tribe employers. . . .
>
> The general rule, pronounced in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960), is that a "general statute in terms applying to all persons includes Indians and their property interests." *Tuscarora* presumes that when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes.
>
> But there is a significant *caveat* to the *Tuscarora* rule. Statutes of general application that would modify or affect Indian or Tribal rights sustained by treaty or other statute must specifically evince Congress' intent to interfere with those rights before a federal court will construe the statute in issue against those rights . . . . In Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), the Ninth Circuit, after accepting the general rule of *Tuscarora,* then identified three specific scenarios when the exception would arise:
>
> > A federal statute of general applicability that is silent on the issue of applicability to Indian Tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance **[*16]** in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not apply to Indians on their reservations . . ." In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

Smart v. State Farm Ins. Co., 868 F.2d 929, 932-33 (7th Cir. 1989) (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)) (other citations omitted). The Seventh Circuit determined that ERISA is a statute of general application and that none of the exceptions to Indian tribal coverage were applicable. Id. at 934-36.

In explaining the narrow exception relating to the "exclusive rights of self-governance in purely intramural matters," the Ninth Circuit explained that "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." Donovan, 751 F.2d at 1116. In that case **[*17]** the Ninth Circuit determined that the commercial operation of a produce stand selling produce to non-tribal members was not an aspect of tribal self-governance such that OSHA inspectors should be excluded. *Id.*

In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries,* the Ninth Circuit addressed whether ERISA applied to a tribally-owned and operated sawmill. 939 F.2d 683 (9th Cir. 1991). The court held that ERISA applied to the sawmill and that the tribal self-governance exception did not apply because the tribe's decision-making power was not usurped. Id. at 685. The court relied on *Donovan* for the

proposition that tribal business and commercial activities were not within the self-governance exception. *Id. at 685* (citing *Donovan, 751 F.2d at 1116*).

Other courts have examined whether additional federal laws, arguably of general application, apply to Indian tribes. For example, in *Reich v. Great Lakes Indian Fish and Wildlife Comm.,* the Seventh Circuit distinguished both *Smart* and *Lumber Industry Pension Fund* in determining that an Indian government commission was exempt from the overtime requirements mandated by the federal Fair Labor Standards Act ("FLSA"). *4 F.3d 490 (7th Cir. 1993)*. **[*18]** The court analogized the Indian police officers to other government police officers, who are exempt from the overtime provisions of the FLSA. *Id. at 494*. In determining that the FLSA did not apply to the police officers of the Indian fish and wildlife commission, the Seventh Circuit noted:

> We realize that other general federal statutes regulating employment, notably ERISA and OSHA, have been applied to Indian agencies when, as in the present case, no treaty right was at stake. But the employees in those cases were engaged in routine activities of a commercial or service character, namely lumbering and health care, rather than of a governmental character. They were not law enforcement officers, who if they had been employed by a state or local government would have been exempt from the law. . . . We do not hold that employees of Indian agencies are exempt from the Fair Labor Standards Act. We hold only that those agencies' law-enforcement employees, and any other employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act, are exempt. We have the support of the *Cherokee Nation* case, cited earlier. Noting **[*19]** that Title VII of the Civil Rights Act of 1964 explicitly exempts Indian tribes but that the Age Discrimination in Employment Act does not, the Tenth Circuit held that it would read the Indian tribal exemption into the latter statute. The court was rectifying an oversight. We do the same today, actuated by the same purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow.

4 F.3d at 495-96 (citing *Smart, 868 F.2d at 933-36*; *Lumber Industry Pension Fund, 939 F.2d 683*; *Equal Employment Opportunity Commission v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989))* (other citations omitted). The Seventh Circuit further distanced itself from dicta in its *Smart* decision:

> Our dictum in *Smart* . . . , that "federalism uniquely concerns States; there simply is no Tribe counterpart," goes too far. Indian tribes, like states, are quasi-sovereigns entitled to comity. Comity argues for allowing the Indians to manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a stronger indication than it has here that it wants to intrude on the sovereign functions of tribal government.

Great Lakes Indian Fish and Wildlife Comm., 4 F.3d at 495 **[*20]** (citing *Smart, 868 F.2d at 936*).

In determining whether other general application statutes apply to Indian tribes, other federal courts have analyzed the nature of the tribal entities involved and the nature of the dispute at issue. For instance, in *Equal Employment Opportunity Comm. v. Fond du Lac Heavy Equip. and Const. Co., Inc.,* the Eighth Circuit held that the Age Discrimination in Employment Act did not apply to the tribal situation confronting the court. *986 F.2d 246, 249 (8th Cir. 1993)*. The court noted that the dispute centered around an Indian applicant and a tribal employer. *Id.* It determined that "[f]ederal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government." *Id. See also, Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2d Cir. 1996)* (determining that OSHA regulations applied to Indian construction company with activities of a commercial nature and not a governmental nature); *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1129-34 (11th Cir. 1999)* **[*21]** (finding that tribal restaurant and casino were commercial enterprises which were not exempt from provisions of Americans with Disabilities Act, but that tribal sovereign immunity applied). In addition, it is true that not all federal statutes are alike. *See Morales v. Showell Farms, Inc., 910 F.Supp. 244, 248 (M.D.N.C.*

1995) (noting that "[i]n contrast to the sweeping pre-emptive provision of Section 502(a) of ERISA, the FLSA has a relatively narrow pre-emptive effect").

In his reply brief in support of the motion to remand, Plaintiff asserted that the 2006 Amendment to ERISA that excludes certain tribal benefit plans from ERISA as "government plans" merely served to codify a distinction that courts had already made through the case law. Plaintiff asserts that federal courts have noted the distinction between commercial tribal entities and purely governmental entities, citing *Smart.* Plaintiff further asserted in his reply brief that his employment was a purely governmental one in which he engaged in "essential governmental functions."

In this case the parties disagree regarding the substance of Plaintiff's duties as an employee of KBIC. Defendant attempts to demonstrate, with belatedly **[*22]** filed evidence, that Plaintiff worked for a "travel" and housing center. [Court Doc. Nos. 58-2, 58-3]. In response to the motion for reconsideration, Plaintiff has filed the Affidavit of Susan Lafernier, a member of the KBIC Tribal Council. [Court Doc. No. 60-2, Affidavit of Susan Lafernier ("Lafernier Aff.")]. Her affidavit asserts that the KBIC has never operated or owned a "travel" center, but does maintain a "tribal" center. *Id.* at P 3. She further asserts that Plaintiff worked for the Keweenaw Bay Ojibwa Housing Authority, which is a "non-profit entity created by the KBIC Tribal Council to serve the housing needs of low income tribal members living on the L'Anse Federal Indian Reservation." *Id.* at P 4. Thus, Plaintiff appears to be arguing that his work for KBIC is analogous to the governmental exclusion outlined in the case law analyzed *supra.* Upon a motion for remand, the facts must be construed in the light most favorable to the party opposing federal court jurisdiction. Lyons, 2010 U.S. Dist. LEXIS 5871, 2010 WL 374016 at *1. The court concludes that significant questions of fact still remain regarding whether the Plan is an ERISA plan or is a governmental plan excluded from ERISA.

C. Exhaustion of Tribal [*23] Remedies

1. Tribal Exhaustion Doctrine

Even if this court were to conclude that the Policy is an ERISA plan, another issue must also be addressed. This issue is the subject of Defendant's counterclaim and is raised in Plaintiff's motion to dismiss the counterclaim. Assuming that this court has jurisdiction over Plaintiff's claims pursuant to ERISA, the court must also determine that the Defendants are not required to exhaust their remedies in tribal court prior to maintaining an action in this court.

As the Ninth Circuit explained:

> Our analysis of the tribal court's jurisdiction starts with the Supreme Court's decision in *Montana,* a "pathmarking case concerning tribal authority of nonmembers." In *Montana,* the Court found that tribal courts have two bases for their authority. First, tribes possess inherent power "necessary to protect tribal self-government [and] to control internal relations." This includes the inherent power "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Second, tribes possess such additional authority as Congress may expressly delegate.

Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir. 2006) **[*24]** (quoting Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L. Ed. 2d 493 (1981) and Strate v. A-1 Contractors, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

The tribal exhaustion doctrine was outlined by the U.S. Supreme Court in National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L. Ed. 2d 818 (1985). In that case a motorcyclist hit a young Crow Indian boy in an elementary school parking lot on land owned by the state within the boundaries of the Crow Indian Reservation. Id. at 847, 105 S.Ct. at 2449. The child's guardian initiated a lawsuit in tribal court against the school district. *Id.* The school district failed to answer the complaint, and the tribal court entered a default judgment against the state school district. The defendant insurance company and the school district filed a complaint and a motion for a temporary restraining order in federal district court. The district court granted the motion and issued an order restraining the defendants from attempting to enforce the tribal court's

default judgment. *Id.* The district court later granted the school district and insurance company a permanent injunction, claiming that the tribal court lacked jurisdiction **[*25]** over the initial personal injury. *Id. at 848-49, 105 S.Ct. at 2449*.

The Supreme Court held that *28 U.S.C. § 1331* "encompasse[d] the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction," but it further held that exhaustion of tribal remedies was required before a federal court could address such a claim. *Id. at 857, 105 S.Ct. at 2454*. In explaining the tribal exhaustion doctrine, the Court stated:

> . . . the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that 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. Moreover **[*26]** the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Id. at 856-57, 105 S.Ct. at 2453-54. In *National Farmers Union* the Supreme Court recognized three general exceptions to the tribal exhaustion rule:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith,"or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because **[*27]** of the lack of an adequate opportunity to challenge the court's jurisdiction.

Id. at 856, n. 21, 105 S.Ct. at 2454, n. 21 (quoting *Juidice v. Vail, 430 U.S. 327, 338, 97 S.Ct. 1211, 1218, 51 L. Ed. 2d 376 (1977)*). A federal court may review a tribal court's determination that it has jurisdiction over an action. *See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L. Ed. 2d 10 (1987)*. In that lawsuit based on diversity jurisdiction pursuant to *28 U.S.C. § 1332*, the Supreme Court held that the exhaustion rule explained in *National Farmers Union* applied in a case based on diversity jurisdiction as well. *Id. at 16-17, 107 S.Ct. at 976-77*. The rules pertaining to exhaustion are based on comity and are prudential rather than jurisdictional. *See id. at 15, 107 S.Ct. at 976*; *Strate v. A-1 Contractors, 520 U.S. 438, 450-51, 453, 117 S.Ct. 1404, 1411-13, 137 L. Ed. 2d 661(1997)*.

There are limits to the scope of a tribal court's jurisdiction. In *Strate v. A-1 Contractors* the Supreme Court addressed whether a tribal court maintained jurisdiction over non-tribal member defendants in a personal injury action occurring on a state-maintained highway running through an Indian reservation. *520 U.S. 438, 442, 117 S.Ct. 1404, 1407, 137 L. Ed. 2d 661 (1997)*. **[*28]** In that case the Supreme Court described the general rule that

> absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions. The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 446, 117 S.Ct. at 1409-10. In *Strate* the Supreme Court determined that the tribal court did not have jurisdiction over what constituted a "commonplace state

highway accident claim." *Id. at 459, 117 S.Ct. at 1412*. The *Strate* Court further added an additional tribal exhaustion doctrine exception. The Court noted:

> [W]hen, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion **[*29]** requirement, must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459 n.14, 117 S.Ct. at 1416 n. 14 (citing *Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L. Ed. 2d 493 (1981)*); *see also, Nevada v. Hicks, 533 U.S. 353, 369, 121 S.Ct. 2304, 2315, 150 L. Ed. 2d 398 (2001)*.

Defendants rely on *Nevada v. Hicks* in support of their argument that there is no need to exhaust tribal remedies in this action. *533 U.S. 353, 121 S.Ct. 2304, 150 L. Ed. 2d 398 (2001)*. In *Nevada v. Hicks* the Supreme Court addressed whether a "tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id. at 355, 121 S.Ct. 2308*. The respondent was a tribal member who brought suit against several state and tribal defendants pursuant to *42 U.S.C. § 1983*, claiming that defendants had damaged his stuffed sheep heads while executing a search warrant in his home to investigate the alleged killing of protected California bighorn sheep. *Id.* The Supreme Court outlined its reasoning regarding what protections are needed to enhance tribal sovereignty:

> In *Strate,* we explained that what is **[*30]** necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," . . . Tribal assertion of regulatory authority over non-members must be connected to that right of the Indians to make their own laws and be governed by them. . . .
>
> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.

533 U.S. at 360-61, 121 S.Ct. at 2311 (quoting *Strate, 520 U.S. at 459, 117 S.Ct. at 1404* (brackets in original) (citing *Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L. Ed. 2d 493, (1981)*). The court held that the tribal court had no jurisdiction over *Section 1983* claims and that requiring the state and tribal defendants to defend their claims in tribal court "would serve no purpose other than delay." *Nevada, 533 U.S. at 369, 121 S.Ct. at 2315*. In determining that the **[*31]** tribal court had no jurisdiction over the *Section 1983* claims, and that therefore there was no need to exhaust tribal remedies, the Court explained:

> Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. But no provision in federal law provides for tribal-court jurisdiction over *§ 1983* actions. Furthermore, tribal-court jurisdiction would create serious anomalies, as the Government recognizes, because the general federal-question removal statute refers only to removal from *state* court, see *28 U.S.C. § 1441*. Were *§ 1983* claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court *§ 1983* defendants to seek a federal forum. The Government thinks the omission of reference to tribal courts in *§ 1441* unproblematic. Since, it argues, "[i]t is doubtful . . . that Congress intended to deny tribal court defendants the right given state court defendants to elect a federal forum for the adjudication **[*32]** of causes of action under federal law," we should feel free to create that right by permitting the tribal-court defendant to obtain a federal-court injunction against the action, effectively forcing it to be refiled in federal court. The sole support for devising this extraordinary

> remedy is *El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999)*, where we approved a similar procedure with regard to claims under the Price-Anderson Act brought in tribal court. . . . Surely the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain *§ 1983* suits.

Nevada, 533 U.S. 368-69, 121 S.Ct. at 2314-15.

Defendants also rely on *Neztsosie,* cited by the Supreme Court in *Nevada* for their assertion that exhaustion of claims in tribal court is not required. *526 U.S. 473, 119 S.Ct. 1430, 143 L. Ed. 2d 635 (1999)*. In *Neztsosie* the original plaintiffs were members of the Navajo nation who brought tort claims in a tribal court against a natural gas company, asserting that the company's uranium mines contaminated the plaintiffs' drinking water, causing them severe injuries. The defendant companies filed suit in federal **[*33]** district court seeking to enjoin the plaintiffs from pursuing their claims in the tribal court. *Id. at 477-78, 119 S.Ct. at 1434*. The Supreme Court reversed the Ninth Circuit's determination that the tribal court could determine its own jurisdiction over plaintiffs' claims, including any claims that were Price-Anderson Act claims, which were designed to provide limited liability for nuclear incidents. Relying on the broad removal provision in the Price-Anderson Act, the Court noted that "Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested." *Id. at 484-85, 119 S.Ct. at 1437*. The Court reasoned:

> We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot not tittle of deference. The apparent reasons for this congressional policy of immediate access to federal forums are as much **[*34]** applicable to tribal-as to state-court litigation.

Id. at 486, 119 S.Ct. at 1438. The Court relied on indications in the Price-Anderson Act itself that claims involving nuclear incidents should be consolidated where possible and resolved promptly and efficiently and that tribal exhaustion would defeat those goals. *Id.* The Court concluded that the "comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act" and that the federal district court should have decided whether the plaintiffs' claims arose under the Price-Anderson Act. *Id. at 487-88, 119 S.Ct. at 1439*.

Although it may be that the rationale applicable in *Neztsosie* applies to cases arising under ERISA, the parties disagree regarding whether this is an ERISA action. Further, the parties have not directed this court to any authority that definitively applies the *Neztsosie* rationale to ERISA actions filed in tribal court. Where the law is still unclear on this issue, the court concludes that the lack of clarity in the law weighs in favor of granting the remand as the Defendants bear the burden of proof on removal questions.

2. Removal of ERISA [*35] Claims from Tribal Court

Defendants argue that because this action is clearly an action involving a federal question, *28 U.S.C. § 1441(a)* does not apply and only *28 U.S.C. § 1441(b)* is relevant. *28 U.S.C. § 1441(a)* specifically limits removal from "State courts," with no mention of other tribunals, such as tribal courts. *28 U.S.C. § 1441(b)* does not refer to removal from only state courts, but discusses removal within the context of actions involving claims founded on federal statutes, treaties, or the Constitution. Therefore, Defendants' argument makes some semantic sense.

However, other district courts have interpreted the removal statute differently. For example, in *Weso v. Menominee Indian Sch. Dist.,* the district court discussed removal of an action brought under federal law in tribal court. *915 F.Supp. 73 (E.D. Wis. 1995)*. In that case the district court rejected an argument similar to the one Defendants are making in this case.

> The defendants argue that removal of this action from the tribal court is proper despite the limitation

under 28 U.S.C. § 1441(a) that removal be had from "State court" because such limitation is not applicable to the removal of an action, like the one at **[*36]** hand, over which the court has federal question jurisdiction. According to the defendants, removal of an action involving a federal question is governed solely by the provisions of 28 U.S.C. § 1441(b) which contains no language authorizing removal jurisdiction only from state courts. The defendants insist that conditioning federal question removal upon satisfaction of § 1441(a) would render the provisions of § 1441(b) superfluous.

In my opinion, neither the language of 28 U.S.C. § 1441 nor controlling case law supports the defendants' proposition. The statutory language of § 1441(a) makes its terms, including the state court requirement, applicable to ***any*** case of which the United States has original jurisdiction. This designation includes actions involving a federal question. Furthermore, contrary to the defendants' assertion, the language of § 1441(b) is not superfluous to the language of § 1441(a). Section 1441(b) provides that the citizenship and residence of the parties are immaterial to removal in federal question cases but highly relevant in other cases over which the court has original jurisdiction. This factor is not addressed in § 1441(a) . . . . Accordingly, I find that the **[*37]** state court prerequisite identified in § 1441(a) is applicable to actions purportedly removed under § 1441(b).

. . . In my opinion, the statutory language of 28 U.S.C. § 1441(a) limiting removal to actions commenced in "State courts" does not extend to an action originally commenced in the Menominee Tribal Court. When Congress intended to extend § 1441 to an entity other than courts of the fifty states, it has done so expressly.

Id. at 75-76. *See also,* Williams-Willis v. Carmel Financial Corp., 139 F.Supp.2d 773 (S.D. Miss. 2001) (granting motion to remand plaintiff's claims of fraud to tribal court, despite defendant's assertion that claims arose under federal Truth in Lending Act, 15 U.S.C. § 1601 et seq.).

When addressing remand to tribal court where jurisdiction is based on diversity, other courts have also concluded that "State courts" do not include tribal courts under 28 U.S.C. § 1441(a). For example, in *Gourneau v. Love,* the district court examined the meaning of 28 U.S.C. § 1441(a):

There is no ambiguity in the text of 28 U.S.C. § 1441: it refers specifically to state courts, and to state courts only.

When adherence to the plain terms of a statute would lead to an absurd result, **[*38]** the court can look to the intent of Congress and interpret the statute to fulfill that intent and avoid the absurd result. Not permitting removal from tribal courts while permitting removal from state courts may seem to be a questionable policy, but it is not an absurdity. Furthermore, even if congressional intent were to be considered, it appears that Congress understands § 1441 to refer only to state courts in the strict sense, as when Congress has decided to bring other non-federal trial courts within the ambit of § 1441, it has enacted legislation expressly doing so. . . . Congress has never enacted legislation either bringing tribal courts within the meaning of "State court" in § 1441 or separately authorizing the removal of actions brought in tribal courts.

To the extent that this is a close question, it must be resolved against removal in light of the United States Supreme Court's opinion in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

915 F.Supp. 150, 152-53 (D. N.D. 1994). *See also,* Williams-Willis, 139 F.Supp.2d at 777 (noting additional reason for remand of plaintiff's claims to be tribal exhaustion rule); Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990) **[*39]** (analyzing meaning of state courts in analogous provision of 28 U.S.C. § 1442(a) and determining that tribal courts do not fall within the meaning of state courts in that provision).

Both parties acknowledge only one case which discusses tribal court jurisdiction over ERISA claims explicitly. *See* White Tail v. Prudential Ins. Co. of America, 915 F.Supp. 153 (D. N.D. 1995). In that case the plaintiff brought suit in tribal court seeking a declaratory judgment regarding the scope of coverage

under an accidental death and dismemberment plan. *Id. at 153*. The parties agreed that ERISA covered the issues raised in the action. *Id.* The defendant insurer removed the case to federal district court, and as in this case, the plaintiff moved to remand the action to tribal court. Relying in part on *Becenti,* the magistrate judge in *White Tail* concluded:

> The underlying issue in this action is whether Congress intended tribal courts to be included in the jurisdiction section of ERISA along with federal courts and state courts. *See 29 U.S.C. § 1132(e)*. Because this court has held that Defendant's removal was improper, the question of whether the tribal court has jurisdiction to hear the ERISA claim is **[*40]** not before this court. Even if it were this court would allow the tribal court an opportunity to determine the scope of its jurisdictional powers as a matter of comity.

Id. at 155.

Defendants argue that *White Tail* is merely an outlier case and that no other court has commented on tribal court jurisdiction over ERISA claims. It is true that *White Tail* predates the Supreme Court's decision in *Neztsosie, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635*. ERISA is analogous to the carefully-outlined federal consolidation scheme under the Price-Anderson Act outlined in *Neztsosie.* In *Neztsosie* the Supreme Court relied upon the "the unusual preemption provision, see *42 U.S.C. § 2014(hh)*," under which "the Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident,' *§ 2210(n)(2)*." *526 U.S. at 484, 119 S.Ct. at 1437*. In a footnote, the Court then compared the preemption provision of the Price-Anderson Act to the complete preemption doctrine under ERISA:

> This structure, in which a public liability action becomes a federal action, but one decided under substantive state-law rules of decision that do not conflict with the Price-Anderson Act . . . resembles what **[*41]** we have spoken of as " 'complete preemption' doctrine," see *Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)*, under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'" *ibid.* (quoting *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)*). We have found complete preemption to exist under . . . [ERISA].

Id. at 484, 485 n.6, 119 S.Ct. at 1437 n.6. In *Metropolitan Life Ins. Co.* the Supreme Court held that Congress had so "completely pre-empted" the particular area relating to employee benefit claims that "causes of action within the scope of the civil enforcement provisions of § 502(a) [were] removable to federal court." *481 U.S. at 63, 66, 107 S.Ct. at 1546, 1548*.

It is true that the jurisdictional provision of ERISA does not say anything about ERISA claims brought in any forums other than state or federal courts. It states in relevant part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive **[*42]** jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1). The Act says nothing about tribal court jurisdiction over claims for unpaid benefits.

However, at least one other unpublished district court opinion addresses tribal court jurisdiction over ERISA claims. In *Koopman v. Forest County Potawatomi Member Benefit Plan,* the district court addressed whether to stay an ERISA action pending adjudication of the issues by the tribal court. *No. 06-C-163, 2006 U.S. Dist. LEXIS 43171, 2006 WL 1785769 (E.D. Wis. June 26, 2006)*. In dismissing the case without prejudice the district court noted:

> . . . the question presented is not whether this court could, in the abstract, decide disputed questions regarding an ERISA plan. Instead, the question is whether, under the principles of comity set forth in *LaPlante* and *National Farmers Union Ins. Co.* . . .,

> this court should rule on the issues **[*43]** raised by this lawsuit or whether it should defer to the tribal court.
>
> It is clear that this case presents a paradigmatic opportunity to defer to the tribal court. Although the plaintiffs attempt at times to portray this case as a simple dispute over ERISA benefits, it is clear from the filings that it is anything but. Instead, the case raises substantial questions about the role of the Tribe's General Council (which consists of all of the Tribe's voting members), the tribal constitution, the authority of the tribal leaders, the Tribe's employment practices, and even the Tribe's ability to retain counsel to represent it. . . .
>
> Thus, the motion to intervene underscores the fact that this lawsuit--ostensibly a simple dispute about a health benefit plan-has the potential to blossom into a wide-ranging case about the tribal constitution, the role of the Council and the powers of tribal authorities. These are matters best left to the Tribe's courts themselves.

*2006 U.S. Dist. LEXIS 43171, [WL] at *1-2*. Thus, the district court determined that the case involved "substantial issues of tribal governance" and tribal "internal political affairs," which made the tribal exhaustion doctrine particularly applicable. *2006 U.S. Dist. LEXIS 43171, [WL] at *3*. **[*44]** The court in *Koopman* relied on *Prescott v. Little Six, Inc.* for support of its position on tribal exhaustion. *See 2006 U.S. Dist. LEXIS 43171, [WL] at *3* (citing *Prescott v. Little Six, Inc., 897 F.Supp. 1217, 1222 (D. Minn. 1995))*.

In *Prescott* the district court addressed whether it should allow a tribal court to determine whether it had jurisdiction over plaintiffs' ERISA claims before proceeding to address those claims in federal court. The court ruled that "[t]he tribal court presumptively has jurisdiction to determine whether [defendant's] plans are valid ERISA plans" and order the parties to contest the validity of the plans in tribal court. *897 F.Supp. at 1224*. In discussing tribal court jurisdiction over possible ERISA plans, the court noted:

> Although federal courts have exclusive jurisdiction to award equitable relief under *29 U.S.C. § 1132(a)(3)*, federal courts do not have exclusive jurisdiction to determine whether an ERISA plan exists or whether benefits were wrongfully denied. The Eighth Circuit has recently explained:
>
> > ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA status *vel non* of a plan or fiduciary . . . . Until [plaintiff] has proven its allegation that ERISA applies, **[*45]** questions of preemption and exclusive federal jurisdiction do not enter this case. Until the preliminary issue of ERISA status is decided, [plaintiff] may not seek the exclusive federal protections available to an ERISA plan.
>
> *International Assoc. of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1269 (8th Cir. 1995)*, *reh'g denied, 1995 U.S. App. LEXIS 21047 (Aug. 4, 1995)*. *Angoff* concluded that the state court had jurisdiction to determine in the first instance whether an ERISA plan actually existed, despite the fact that plaintiff sought exclusively federal relief under *29 U.S.C. § 1132*. Thus this Court does not have exclusive jurisdiction to determine whether [defendant's] alleged ERISA plans are valid. This is especially significant in this case, where the validity of the plans appears to be the dispositive question. As a result, ERISA does not expressly bar the tribal court from considering whether [defendant's] benefit plans are valid ERISA plans.

897 F.Supp. at 1222.

In their motion for reconsideration, the Defendants failed to address the question of removal from tribal courts. They described the *White Tail* decision as an anomaly in their prior filings, but do not identify any countervailing authority **[*46]** or any recent change in the law. The court concludes, as it concluded in its October 14, 2008 memorandum, that substantial questions regarding this court's jurisdiction remain. The court asked the parties at that time to supply additional briefing and evidence pertaining to the specific questions of ERISA coverage of tribal employees like Plaintiff, tribal exhaustion and comity doctrines, and the ability to remove cases filed in tribal court. Although Defendants have filed additional evidence in connection with their motion for reconsideration, it is unclear to the court why they could not have presented this evidence in accordance with the pertinent briefing schedule

supplied in this action. *See* [Court Doc. Nos. 39 and 54].

As this memorandum demonstrates, jurisdiction in this case is a complicated matter, and even Defendants' additional evidence does not add much factual clarity to the record. Defendants have submitted additional evidence of in the form of the Affidavit of Thomas J. Vargo. [Court Doc. No. 58-2]. Mr. Vargo asserts that he is familiar with the Policy and with the administrative record in this action. *Id.* at P 3. However, the Defendants only provide this court with a **[*47]** minimal number of select pages from the administrative record which appears to be numbered in the hundreds of pages. *See* [Court Doc. No. 58-4, labeled US618-US623]. Nor does this court have clear information regarding the types of activities conducted by the Plaintiff's former employer. The parties recently filed evidence indicates that there is a dispute regarding what activities Plaintiff's employer conducted, i.e, running a "travel" center or a "tribal" center and a housing authority. The court specifically addressed its need for such factual information in its memorandum and order from October of 2008. [Court Doc. No. 20, pp. 6-7]. The court concludes that Defendants have failed to provide it with the undisputed factual underpinnings necessary to establish this court's ERISA jurisdiction. It may well be that ERISA is implicated in this matter, but the court has no way of determining ERISA jurisdiction based on the evidence presented.

For these reasons, the court concludes that the Defendants have not satisfied their burden that removal was proper in this case, and their motion for reconsideration will be **DENIED.** This court concludes that Defendants have failed to sustain their burden **[*48]** under *Fed. R. Civ. P. 59(e)*.

IV. Conclusion

As explained in its prior order, the court has determined that it will **GRANT** Plaintiff's motion for remand and **GRANT** Plaintiff's motion to dismiss Defendant Union Security's counterclaim. Defendants' motion for reconsideration will be **DENIED.**

A separate order will enter.

/s/ R. Allan Edgar

R. ALLAN EDGAR

UNITED STATES DISTRICT JUDGE

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Gustafson v. Poitra

United States District Court for the District of North Dakota, Northwestern Division

September 24, 2014, Decided; September 24, 2014, Filed

Case No. 4:12-cv-129

Reporter
2014 U.S. Dist. LEXIS 134640 *; 2014 WL 4772663

Darrel & Janine Gustafson, d/b/a 1 Stop Market, Plaintiffs, vs. Linus Poitra and Raymond Poitra, Defendants.

Prior History: *Gustafson v. Poitra, 2012 U.S. Dist. LEXIS 144362 (D.N.D., Oct. 5, 2012)*

Counsel: **[*1]** For Darrel Gustafson, doing business as 1 Stop Market, Janine Gustafson, doing business as 1 Stop Market, Plaintiffs: Reed Alan Soderstrom, LEAD ATTORNEY, PRINGLE & HERIGSTAD PC, MINOT, ND.

Linus Poitra, Defendant, Pro se.

Raymond Poitra, Defendant, Pro se.

Judges: Daniel L. Hovland, United States District Judge.

Opinion by: Daniel L. Hovland

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is a motion to dismiss filed by Defendants Linus Poitra and Raymond Poitra on October 17, 2012. See Docket No. 18. The Plaintiffs, Darrel and Janine Gustafson, filed a response in opposition to the motion on August 27, 2013. See Docket No. 23. For the reasons set forth below, the Court grants the motion.

I. BACKGROUND

The parties involved in this dispute have been embroiled in continuous and senseless litigation for more than a decade. The various actions between the Gustafson and Poitra families include multiple tribal, state, and federal lawsuits. The Poitras are enrolled members of the Turtle Mountain Band of Chippewa Indians. The Gustafsons are not tribal members. Both parties are North Dakota residents. The Gustafsons own and operate the 1 Stop Market, a gas station and convenience store located on non-Indian **[*2]** owned fee land in Rolette County, North Dakota, and within the exterior boundaries of the Turtle Mountain Indian Reservation. The Gustafsons brought this action under the Declaratory Judgment Act seeking declaratory and injunctive relief regarding the litany of ongoing disputes and battles between themselves and the Poitras, and numerous tortious acts committed against them by the Poitras. Along with the complaint, the Gustafsons filed a motion for a temporary restraining order concerning the Poitra's alleged interference with the operation of the Gustafsons' business. It is the contention of the Gustafsons that the Poitras deliberately blocked an access road to 1 Stop Market by parking a large truck and dumping debris in the driveway, rendering it impassable.

On October 5, 2012, this Court granted the Gustafsons' motion for a temporary restraining order. See Docket No. 10. On October 17, 2012, the Defendants moved to dissolve the temporary restraining order and to dismiss the case on the basis that the Plaintiffs had failed to exhaust tribal court remedies. See Docket No. 18. On October 18, 2012, a show cause hearing was held to determine whether the temporary restraining order should **[*3]** become a preliminary injunction pursuant to *Rule 65(a) of the Federal Rules of Civil Procedure*. That same day, the Court granted a preliminary injunction ordering the Poitras to remove all obstructions by the end of the following day, and enjoining them from interfering with the Gustafsons' property rights in any way. See Docket No. 20. The Court also ordered the Poitras' motion to dismiss be held

in abeyance pending the outcome of a settlement conference. Multiple attempts to settle the matter have failed. The goal was to hopefully end the chaos, seek a peaceful resolution, and impress upon the parties the need to be civil in their dealings with others. Suffice it to say that common sense has been non-existent. Counsel for the Poitras was granted leave of Court to withdraw on September 11, 2013. See Docket No. 25. The Poitras have failed to retain new counsel and are acting *pro se*. A bench trial is scheduled for October 21, 2014.

II. LEGAL DISCUSSION

In their motion, the Poitras ask the Court to dismiss the action based upon a failure of the Gustafsons to exhaust their tribal court remedies. It is well-established that principles of comity require that tribal court remedies be exhausted before a federal district court may consider **[*4]** granting relief in a civil case regarding tribal-related activities on reservation land. *Krempel v. Prairie Island Indian Comty., 125 F.3d 621, 622 (8th Cir. 1997)* (citing *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)*; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)*; *Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996)*). The Gustafsons acknowledge they have not exhausted their tribal court remedies but contend this matter fits within several well-recognized exceptions to the tribal exhaustion doctrine. Specifically, the Gustafsons contend exhaustion is not required because their "claims are not pending in tribal court," exhaustion would be futile, and the assertion of tribal court jurisdiction is motivated by a desire to harass. See Docket No. 23, p.6.

A. FEDERAL QUESTION JURISDICTION

A careful review of the motion, briefs, and complaint have caused the Court to question its jurisdiction over the matter. A federal court has a special obligation to consider whether it has subject matter jurisdiction in every case, and to raise the issue *sua sponte* when the court believes jurisdiction may be lacking. *Hart v. United States, 630 F.3d 1085, 1089 (8th Cir. 2011)*. Federal courts have an independent obligation to ensure that jurisdiction is proper. This obligation may be exercised at any stage of the litigation. *Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008)*.

It is well-established that federal courts are courts of limited rather than general jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. They possess only that power authorized by the United **[*5]** States Constitution and federal statute. Id. The mere fact that a case involves a tribal member, tribal property, or arises in Indian country does not provide a basis for federal jurisdiction. *Cohen's Handbook of Federal Indian Law, § 7.04[1][a]*, at 611 (Nell Jessup Newton ed., 2012).

In their complaint, the Gustafsons contend federal question jurisdiction exists under *28 U.S.C. § 1331* "because the issue of tribal court jurisdiction over a person who is not a member of the tribe and owns fee land within the confines of an Indian reservation is a federal question." See Docket No. 1, ¶ IV. This is the only assertion of federal question jurisdiction in the complaint.[1] There is no question diversity jurisdiction is lacking as all the parties are North Dakota residents. In addition, while the action is brought pursuant to the Declaratory Judgment Act, *28 U.S.C. 2201*, the Declaratory Judgment Act does not confer jurisdiction and is not an independent source of subject matter jurisdiction. 10 Federal Procedure, L. Ed. Declaratory Judgments § 23:39 (2007). Since the Declaratory Judgment Act does not confer jurisdiction, a federal question must appear on the face of a well-pleaded complaint. Id. at § 23:43.

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[1] The complaint contains allegations that the **[*6]** Poitras have made "false allegations by filing plats on the property in question," filed fraudulent liens in the Rolette County Recorder's office, blocked access to the 1 Stop Market, and filed false and fraudulent affidavits in state district court. The Gustafsons do not appear to suggest these contentions raise a federal question. Any contention such acts raise a federal question would fail as these are ordinary torts that do not require the interpretation of a federal statute, constitutional provision, or treaty. Cf. *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation, 495 F.3d 1017, 1023 (8th Cir. 2007)* (ordinary contract disputes involving an Indian tribe do not raise a federal question).

It is well-established that federal courts have jurisdiction to determine whether an Indian tribe has the power to compel non-Indians to submit to the civil jurisdiction of a tribal court. *Plains Commerce Bank, 554 U.S. at 324*; *Auto-Owners Ins. Co., 495 F.3d at 1021*. A federal court has jurisdiction to determine whether a tribal court has exceeded its jurisdictional limits because the question is one that must be answered by reference to federal law. *Auto-Owners Ins. Co., 495 F.3d at 1021*.

In this case, the complaint makes no reference to a pending tribal court case relating to the Gustafsons' right to access their property. There is no allegation a tribal court has exceeded its jurisdiction **[*7]** or compelled the Gustafsons to submit to its jurisdiction. Nor has the tribal court been named as a defendant in this action. The Gustafsons admit this particular dispute is not the subject of any tribal court action. In their response to the Poitras' motion to dismiss they state "Plaintiffs' claims are not pending in tribal court." See Docket No. 23, p. 6. While the complaint makes vague references to "multiple tribal court proceedings" and "various" causes of action brought in tribal court, there is nothing currently pending and active for this Court to review. See Docket No. 1, pp. 4 and 7. This Court will not decide tribal court jurisdictional issues in the abstract.[2] An allegedly improper assertion of jurisdiction by a tribal court presents a federal question only when there has actually been such a determination by the tribal court. See *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 847-48 (8th Cir. 2003)* (noting jurisdiction over a claim for declaratory relief under the Declaratory Judgment Act only exists if the action requires resolution of an issue of federal law). Since there is no pending action in tribal court in which the tribal court may have exceeded its jurisdiction, no federal question is presented which would sustain an action under **[*8]** the Declaratory Judgment Act. The Court finds it lacks subject matter jurisdiction.

B. TRIBAL EXHAUSTION DOCTRINE

In the event the current dispute finds its way to tribal court, the Gustafson's would be obligated, under the tribal exhaustion doctrine, to allow the tribal courts to examine the jurisdictional issue in the first instance. *Nat'l Farmers Union, 471 U.S. at 857*. Exhaustion of tribal remedies requires not only a jurisdictional determination by lower tribal courts, but also that tribal appellate courts have the opportunity to review the issue. *Iowa Mut. Ins. Co., 480 U.S. at 17*. Exhaustion is mandatory when a case fits within the doctrine. *Gaming World Int'l, Ltd., 317 F.3d at 849*. It is only after a tribal appellate court upholds a lower tribal court's determination that jurisdiction was proper that a party may challenge that determination in federal district court. *Iowa Mut. Ins. Co., 480 U.S. at 19*. This process, which is typically accomplished by an action brought under the Declaratory Judgment Act, must take **[*9]** place on a case-by-case basis because the analysis of whether a tribal court has jurisdiction over non-members is fact intensive. See generally *Plains Commerce Bank, 554 U.S. at 329-30* (applying the test announced in *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*).

Exhaustion is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union, at 857 n. 21* (citations omitted). The Gustafsons' claims of futility and bias are unlikely to excuse them from the tribal exhaustion requirement. The cases which have found exhaustion was not required due to futility based that conclusion upon a finding that no functioning tribal court existed. *Krempel, 125 F.3d at 622-23* (exhaustion not required where no tribal court system existed at the time the federal action was filed). Since there is no question the Turtle Mountain Band of Chippewa Indians has a long-established tribal court system, any claim of futility would be unlikely to succeed. Suggestions of bias would also likely fail. In addition, a mere **[*10]** suggestion of bias would also likely fail as bias will not be presumed. *Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1301 (8th Cir. 1994)*. The exception for bias focuses on whether the tribal court is biased. The Gustafsons' assertion of bias primarily

[2] The Gustafsons request for a declaration that the Poitras have no personal or subject matter jurisdiction over them is nonsensical. It is the courts, governments, and political and judicial subdivisions that exercise jurisdiction, rather than private individuals. See Black's Law Dictionary 855 (7th ed. 1999).

relates to the Poitras filing frivolous lawsuits in tribal court. They do not contend the tribal court itself is biased. The Poitras subjective motivations do not provide a basis for avoiding the tribal exhaustion doctrine.

The Court notes the equities clearly favor the Gustafsons, and the Court is sympathetic to the jurisdictional dilemma they find themselves in. The juvenile behavior and attitude of the Poitras that triggered the need for the issuance of the TRO in October 2012 is difficult for any reasonable person to understand. However, the plaintiffs cannot use the Declaratory Judgment Act as a vehicle to resolve a multitude of long-standing disputes which neither raise a federal question nor bear any relationship to a lawsuit over which the Court would have jurisdiction.

III. CONCLUSION

For the reasons set forth above, the motion to dismiss (Docket No. 18) is **GRANTED**. The case is dismissed without prejudice. The preliminary injunction (Docket No. 20) is dissolved.

IT IS SO ORDERED.

Dated this 24th **[*11]** day of September, 2014.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge

United States District Court

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Koopman v. Forest County Potawatomi Member Benefit Plan

United States District Court for the Eastern District of Wisconsin

June 26, 2006, Decided

Case No. 06-C-163

Reporter
2006 U.S. Dist. LEXIS 43171 *; 2006 WL 1785769

RALPH KOOPMAN and KATHY KOOPMAN, Plaintiffs, v. FOREST COUNTY POTAWATOMI MEMBER BENEFIT PLAN, et al., Defendants.

Prior History: *Koopman v. Forest County Potawatomi Mbr. Benefit Plan, 2006 U.S. Dist. LEXIS 12480 (E.D. Wis., Feb. 15, 2006)*

Counsel: **[*1]** For Ralph Koopman, Kathy Koopman, Plaintiffs: Maria DelPizzo Sanders, Terry E Johnson, Peterson Johnson & Murray SC, Milwaukee, WI.

For Forest County Potawatomi Member Benefit Plan, Forest County Potawatomi, Harold Frank, in his capacity as a fiduciary of Forest County Potawatomi Member Benefit Plan, Jeff Crawford, in his capacity as a fiduciary of Forest County Potawatomi Member Benefit Plan, Defendants: Michael B Apfeld, William H Levit, Jr, Anthony S Baish, Godfrey & Kahn SC, Milwaukee, WI.

For Loreen Alloway, FCPC Tribal member, Candice Daniels, FCPC Tribal member, Charlene Daniels, FCPC Tribal member, Charlotte Daniels, FCPC Tribal member, Chris Daniels, FCPC Tribal member, Joseph Daniels, FCPC Tribal member, Ned Daniels, III, FCPC Tribal member, Ned Daniels, Jr, FCPC Tribal Member, Robert Daniels, FCPC Tribal member, Steven Daniels, FCPC Tribal member, Unknown, John/Jane Doe, FCPC Tribal member, Missy Gorham, FCPC Tribal member, Lola Haskins, FCPC Tribal member, Carrey Tribett, FCPC Tribal member, Intervenors: Carol J Brown, Brown & La Counte LLP, Madison, WI.

Judges: William C. Griesbach, United States District Judge.

Opinion by: William C. Griesbach

Opinion

DECISION AND ORDER

[*2] Plaintiff Ralph Koopman, formerly an attorney employed by the Forest County Potawatomi ("the Tribe"), filed this action to enforce rights he asserts under the Tribe's employee insurance plan pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), *29 U.S.C. § 1161 et seq.*, and the Employee Retirement Income Security Act of 1976 (ERISA), *29 U.S.C. § 1001 et seq.* The Tribe has moved to dismiss or stay this action pending an adjudication of the issues by the tribal court. In addition, the plaintiff has moved to file a second amended complaint and disqualify the Tribe's attorneys, and several Tribe members have sought to intervene in this action.

ANALYSIS

The pertinent facts of this case are set forth in my February 15, 2006 Decision and Order denying the plaintiff's motion for a temporary restraining order. The defendants have now moved to dismiss or stay this case in lieu of an action they have filed in tribal court involving the same issues raised in this case. In support, they cite the principle of tribal exhaustion, which is a prudential doctrine grounded in comity. The Supreme Court has summarized **[*3]** the doctrine as follows:

> 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.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987) (citations omitted); *see also* Bryan Cahill, "Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians: Bringing the Federal Exhaustion Rule of Tribal Remedies Home to Wisconsin Courts," 2004 Wis. L. Rev. 1291, 1326 (summarizing doctrine). Several policies underlie the doctrine, but among the most important are the principles of comity and respect for tribal self-government: "The federal policy of promoting tribal self-government **[*4]** encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." LaPlante, 480 U.S. at 16-17.

The plaintiffs contest the defendants' motion. They protest that jurisdiction "clearly lies with this court" because this action involves the federal ERISA statute. They also state that any disputes governing the ERISA plan in this case will not involve any tribal governmental functions, and thus federal law can be applied regardless of the fact that an Indian tribe is involved. *See* Smart v. State Farm Ins. Co., 868 F.2d 929, 933 (7th Cir. 1989). Yet these arguments miss the mark entirely. Of course this court has jurisdiction, or else we would not even need to entertain an abstention or exhaustion argument. "As with the doctrine of abstention, the doctrine of tribal exhaustion does not deprive a district court of subject-matter jurisdiction." Altheimer & Gray v. Sioux Mfg. Corp. 983 F.2d 803, 813 (7th Cir. 1993). The doctrine presumes that tribal courts **[*5]** are competent to decide questions of federal law. Id. at 814. Further, the question presented is not whether this court could, in the abstract, decide disputed questions regarding an ERISA plan. Instead, the question is whether, under the principles of comity set forth in LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987) and National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), this court should rule on the issues raised by this lawsuit or whether it should defer to the tribal court.

It is clear that this case presents a paradigmatic opportunity to defer to the tribal court. Although the plaintiffs attempt at times to portray this case as a simple dispute over ERISA benefits, it is clear from the filings that it is anything but. Instead, the case raises substantial questions about the role of the Tribe's General Council (which consists of all of the Tribe's voting members), the tribal constitution, the authority of the tribal leaders, the Tribe's employment practices, and even the Tribe's ability to retain counsel to represent it.

For example, the plaintiffs have filed a motion to disqualify the Tribe's counsel. They assert that Godfrey & Kahn, the firm representing the **[*6]** Tribe in this action, has no authority to appear for them because its contract with the Tribe expired on August 30, 2005. Since the contract's expiration, the General Council, which in the plaintiffs' view has exclusive authority to retain counsel, has not acted to do so. It is clear that this court's ruling on that motion would involve substantial meddling in the manner in which the Tribe retains counsel and would require evaluation of the Tribe's internal affairs. Remarkably, in their reply the plaintiffs state that they have standing to challenge the Tribe's retention of Godfrey & Kahn because any judgment this court would enter could later be reversed if Godfrey & Kahn is later determined to have lacked authority to represent the Tribe. Rather than stating grounds for disqualification, however, this seems a perfect reason to abstain from deciding this action and defer to the tribal court for a determination of the propriety of counsel's retention. Even in the plaintiffs' own view, I cannot proceed to resolve the dispute over benefits until I determine the propriety of the Tribe's procedures for retaining counsel to defend it, a determination which involves the Tribe's own internal **[*7]** affairs.

In addition, I note that several Tribe members have petitioned to intervene in this action. Among other things, they state that they are "concerned General Council members seeking to protect the FCPC Const., Art IV inherent and fiduciary duties regarding the approval of attorney contracts." (Docket No. 60 at 3.) The petitioners also assert concern over the way the Tribe has treated Koopman and claim a right to intervene because the matter affects the Tribe's management of its assets. Again, they claim the Tribe is violating its own Constitution. Thus, the motion to intervene underscores the fact that this lawsuit-ostensibly a simple dispute about a health benefit plan-has the potential to blossom into a wide-ranging case about the tribal constitution, the role of the Council and

the powers of tribal authorities. These are matters best left to the Tribe's courts themselves.

The Seventh Circuit's decision in *Altheimer & Gray* provides a useful contrast. 983 F.2d 803. There, a tribal corporation had entered into a letter of intent with an Illinois corporation. Both parties had agreed that Illinois law would apply and that the matter would be decided in the state **[*8]** or federal courts of Illinois. The central dispute was the application of federal law to the letter of intent, and thus there was little impact on the tribe's internal affairs. The court concluded:

> In this case, . . . the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum. In the Letter of Intent, Sioux Manufacturing Corporation [SMC] explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. . . . If contracting parties cannot trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught.

Id. at 815.

In contrast, there is every indication that this case involves substantial issues of tribal governance and delves into the Tribe's internal political affairs. In this respect, this case is closer to *Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1222 (D. Minn. 1995),* **[*9]** in which the court dismissed the ERISA claims without prejudice to allow a tribal court to determine whether benefits had been validly extended to the plaintiffs. *See also Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir. 2004)* (holding that district court erred when, after requiring exhaustion in tribal court, it failed to defer to that court's determination the no ERISA benefit plans were created), *cert. denied, 544 U.S. 1032, 125 S. Ct. 2257, 161 L. Ed. 2d 1059 (2005)*.

To resolve this dispute in federal court when a tribal court is available is contrary to the tribal court exhaustion doctrine enunciated by the Supreme Court in *National Farmers Union* and *LaPlante*. Given the considerations the Supreme Court has set forth supporting tribal authority and tribal jurisdiction, I agree with the defendants that this court should defer to the tribal court. Accordingly, the case will be dismissed without prejudice. The remaining motions pending before me are denied as moot.

SO ORDERED this 26th day of June, 2006.

s/ William C. Griesbach

United States District Judge

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Saginaw Chippewa Indian Tribe v. Gover

United States District Court for the Eastern District of Michigan, Northern Division

August 19, 1999, Decided

CASE NUMBER: 99-10327

Reporter
1999 U.S. Dist. LEXIS 22690 *; 1999 WL 33266029

THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, a Federally Recognized Indian Tribe, Plaintiff, v. KEVIN GOVER, in his official capacity as Assistant Secretary for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, and THE UNITED STATES OF AMERICA, Defendants.

Subsequent History: Related proceeding at *Brown v. Brown, 2010 WI 104, 2010 Wisc. LEXIS 182 (2010)*

Disposition: [*1] Plaintiff's Motion for Temporary Restraining Order DENIED.

Counsel: For SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, plaintiff: Alysia E. LaCounte, Brown & LaCounte, Madison, WI.

For JAMES ARCHIE FOWLER, interpleader plaintiff: Miles J. Purcell, Picard & Purcell, Saginaw, MI.

For BUREAU OF INDIAN AFFAIRS, UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, defendants: James M. Upton, U.S. Department of Justice, Washington, DC.

For SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN TRIBAL COUNCIL, movant: Michael G. Phelan, Pirtle, Morisset, Mount Pleasant, MI.

For SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN TRIBAL COUNCIL, movant: Henry M. Buffalo, Jr., Jacobson, Buffalo, St. Paul, MN.

Judges: HON. VICTORIA A. ROBERTS, UNITED STATES DISTRICT JUDGE.

Opinion by: VICTORIA A. ROBERTS

Opinion

ORDER DENYING TEMPORARY RESTRAINING ORDER

I.

This matter is before the Court on Plaintiff's Motion for a Temporary Restraining Order ("TRO"). Defendants have responded, and the Court heard extensive oral argument on Wednesday, August 18, 1999. For the reasons set forth below, the Court **DENIES** Plaintiff's Motion.

II.

Plaintiff is comprised of the incumbent Tribal Council ("TC") of the Saginaw Chippewa Tribe. The Tribal Constitution provides that the TC is to be elected every two years. However, the Tribe has been having serious election disputes and related disputes regarding membership. Relying on the Election Code, [1] the incumbent TC has nullified four of the past five general and primary elections. More specifically, the following elections have been invalidated:

(1) October 14, 1997 Primary Election;
(2) November 4, 1997 General Election;
(3) January 27, 1998 General Election;
(4) November 24, 1998 Primary Election; and
(5) January 19, 1999 Primary Election.

The results of these elections **[*2]** had been certified as valid by an independent Caucus Committee prior to the decisions to invalidate them.

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[1] Section 18 of the Election Ordinance No. 4 of 1991 provides:

Any voter may protest an election for the district to which s/he voted. The written notice of protest must be made to the Tribal Council within seven (7) days after the election. The notice must set out the grounds of the protest. The Tribal Council shall schedule a hearing on the protest within ten days. The Tribal Council decision will be final.

The decision to void the January 1998 General Election results was challenged in the Tribal Court. The Tribal Court found, on the basis of tribal law only, that the TC did have the power to void the results based on protests claiming that persons with questionable membership voted. *Phil Peters, Sue Durfee v. Kevin Chamberlain, et al.*, File No. 98-CI-361 at 44 (April 21, 1998). Further, the Tribal Court reasoned that determinations regarding elections are committed to the TC under the **[*3]** Constitution, and that it would be improper under the political question doctrine for that Court to intervene. *Id.* at 45-47. Nonetheless, the Tribal Court ordered the TC to develop a plan to allow the Tribe to proceed with an election. It later held the group in contempt for failing to develop adequate plans, but the order of contempt was rescinded by another judge, who then later recused himself.

On June 9, 1999, the Assistant Secretary of Indian Affairs at the U.S. Department of Interior, Kevin Gover ("Gover"), sent a letter expressing his concern about the continuing membership dispute. Gover noted that the dispute had been used to justify nullifying the elections, and the Tribal Court had been unable to resolve it. Gover also urged the Chief to conduct an election within the next 45 days so that the Department of the Interior would know with whom to deal "for the purposes of maintaining the day-to-day government-to-government relationship with the Tribe." Finally, Gover warned that if the matter was not resolved, he would instruct area Department representatives to deal with the ten persons who received the highest number of votes in the January 1999 elections "on an interim **[*4]** basis until the next general election." That same day, Gover also sent a memo to staff indicating his intention to recognize eleven individuals from the 1999 election, since two of the candidates were tied for the tenth highest votes.

After Gover's letter, the TC scheduled another primary election for September 7, 1999. [2]

On August 10th, Gover released a decision stating that he was instructing Area representatives to implement the June 9th plan, since an election had not been held within 45 days. That same day, Plaintiff filed suit in Washington D.C., seeking a TRO. The Honorable Gladys Kessler denied Plaintiff's request. Plaintiff voluntarily dismissed that suit, and subsequently brought suit in this District. For the reasons stated on the record in open court on Wednesday, August 18, 1999, this Court denied Defendants' Motion to Transfer to the **[*5]** District Court for the District of Columbia.

[2] That election apparently has been canceled by the newly recognized TC. A primary election is now scheduled for October, and a general election for November 1999.

III.

In determining whether a TRO should issue, the Court considers the following four factors: 1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; 2) Whether the plaintiff has shown irreparable injury; 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; and 4) Whether the public interest would be served by issuing a preliminary injunction. *Southerland v. Fritz, 955 F. Supp. 760, 761 (E.D. Mich. 1996)*; *Fed R. Civ. P. 65*. The movant must show "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Friendship v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982)*. The four factors are generally balanced, rather than considered prerequisites. *See Mascio v. Public Employees Retirement System of Ohio, 160 F.3d 310, 313 (6th Cir. 1998)*. "A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc., 119 F.3d 393, 399 (6th Cir. 1997)*. **[*6]**

A. Likelihood of Success on the Merits

Turning to the first factor, the Court finds that Plaintiff has not shown a substantial likelihood of success on the merits. Plaintiff argues that it is likely to succeed on the merits of its dispute with the newly recognized TC, and that Defendants lack authority to require an election and/or to recognize the winners of the January, 1999 primary. However, both parties recognize that this Court has no jurisdiction to decide the underlying tribal dispute. *See Runs After v. United States, 766 F.2d 347 (8th Cir. 1984)* (district court did not have jurisdiction to resolve dispute involving interpretation of tribal constitution and law). Rather, the only question for the

Court is whether Plaintiff is likely to succeed in demonstrating that the decision of the Department of the Interior was arbitrary and capricious. *Goodface v. Grassrope, 708 F.2d 335, 337 (8th Cir. 1983)*; *5 U.S.C. § 706(2)(A)*.

Given the 8th Circuit's decision in *Goodface, supra*, this Court concludes that the decision to recognize the new tribal counsel is not likely to be found arbitrary and capricious. **[*7]** In *Goodface*, the Court held that the BIA was mandated to conditionally recognize either the old or the new Tribal Council. 708 F.2d at 339. There, the Court held, equity favored recognition of the new council, since the election results had been certified. *Id.*

Here, even if equity favored the incumbent TC (because it had the power to resolve protests under the Election Code), it is unlikely that Plaintiff will be able to demonstrate that the Defendants' decision was arbitrary and capricious. The January primary outcome was certified by an independent body, the Caucus Committee. Further, in *Goodface* the court found that the Bureau of Indian Affairs could temporarily recognize the new tribal council where the parties had not yet sought a tribal remedy. *Id.* Here, Defendants took no action until after the Tribal Court had an opportunity to consider the election disputes and determined that it was a political question. Thus, the tribal court left these issues unresolved and, as counsel for Plaintiff acknowledged at oral argument, disputes over membership, and the manner in which elections are conducted, remain. In other words, Defendants were forced to make **[*8]** a choice, and certainly could not rely upon the Tribal Court to resolve the remaining disputes anytime soon.

In making its choice, the Defendants relied upon the fact that the incumbent TC had invalidated five elections since 1997, all of which had been certified by an independent body established pursuant to the Election Code; that the Tribal Court had ordered the incumbent TC to submit a plan and schedule for elections by December, 1998, which it had failed to adequately do, despite the issuance of contempt orders by the Tribal Court (later rescinded by a different tribal judge, who then recused himself); that in the January election none of the incumbents finished among the top 20 votegetters; that the incumbent TC had remained in office 21 months beyond the end of their term of office; that the General Counsel for the Plaintiff Tribe had opined in November of 1997 that the incumbent TC had to effect a "transfer of power to a new, lawfully elected Tribal Council …without delay" (Memorandum of Michael Phelan dated August 11, 1999, Appendix E to Federal Defendants' Oppositiion at 3); and, that the General Counsel to the Tribe had opined that the incumbent TC members were acting **[*9]** in clear violation of the Tribe Constitution in failing or refusing to hold elections and transfer power (*See* Appendix E to Federal Defendants' Opposition).

The Court recognizes that this case does not stand on all fours with *Goodface*, inasmuch as the Constitution here apparently allows the TC to override the certification of the independent Caucus Committee. However, Defendants were clearly bound to recognize one group or another, and in light of *Goodface*, the choice to recognize the independently certified primary winners does not appear arbitrary or capricious. Indeed, Defendants' choice was apparently based on its consideration of several factors, not the least of which is the fact that the Tribal Court had not successfully resolved the dispute. While federal law is clear that the government has no authority to take action contrary to tribal resolution of internal disputes, this bright line can only be drawn when an independent tribal forum is available. *Wheeler v. United States Department of the Interior, 811 F.2d 549, 553 (10th Cir. 1987)*.

In the present case, given the decision of the Tribal Court, Defendants could reasonably doubt whether there **[*10]** was a tribal forum available that would act to resolve election disputes. Thus, in light of all the circumstances, the difficult choice to recognize the winners of the 1999 primary on an interim basis until the next general election is held is not likely to be found arbitrary or capricious. Accordingly, Plaintiff cannot establish a likelihood of success on the merits.

B. Irreparable Harm

Turning to the second factor, the Court finds that Plaintiff has not made a convincing showing that an injunction is needed to prevent irreparable harm to the Tribe. Admittedly, if the incumbent TC is legally in power, then the Gover designees are depriving them of their right to govern and may be making decisions

contrary to those that the incumbent TC would make. Moreover, the failure to enjoin recognition of the Gover designees will likely cause irreparable harm to the incumbent TC's ability to govern in the future, since the incumbent TC loses credibility each day it does not govern. Further, to the extent that the threat of violence persists, the harm to the Tribe may be substantial, as relations among its members dissolve.

However, the irreparable harm inquiry is complicated by the particular **[*11]** nature of this case. As both sides apparently recognize, the question of who is lawfully in power is an internal tribal matter, and this Court does not have jurisdiction to interpret the Tribal Constitution or decide election disputes. Since the Court is unable to determine whether the incumbent TC is lawfully in power, it cannot conclude with any certainty that the Tribe itself will actually suffer irreparable harm should an injunction not issue. To the extent that an injunction assists the wrong group, it could actually cause, rather than prevent, irreparable harm. Thus, while Plaintiff has demonstrated that the incumbent TC may suffer irreparable harm without an injunction, it is less than clear whether the Tribe itself would also suffer. Accordingly, the Court cannot conclude that this factor weighs strongly in Plaintiff's favor.

C. Balance of the Harms and Public Interest

The final two factors -- balance of the harms and public interest -- do not point clearly in any direction. The issuance of an injunction would clearly help the incumbent TC, but it is unclear to what extent it would injure others. Again, since this Court cannot resolve the underlying election dispute, **[*12]** it is difficult to determine to what extent an injunction would wrongfully force Defendants to recognize the incumbent TC. Additionally, given the ongoing disputes, an injunction would likely disrupt Defendants' efforts to maintain consistent federal-tribal relations.

Finally, it is in the public interest to allow the Tribe to resolve it's own internal disputes, but it is also in the public interest for the federal government to have a cognizable tribal council. As such, neither of these factors persuasively favors the issuance of the injunction.

IV.

In sum, the Court finds that the balance of factors weigh in favor of denying the injunction. While the incumbent TC may suffer irreparable harm if it is not recognized by Defendants, the harm, if any, to the Tribe is less than clear. Furthermore, Plaintiff cannot demonstrate a substantial likelihood of success on the merits, and the remaining factors do not strongly point in either direction. Accordingly, Plaintiff's Motion is **DENIED**.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS

UNITED STATES DISTRICT JUDGE

dated: 8/19/99

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Seneca v. Great Lakes Inter-Tribal Council, Inc.

United States Court of Appeals for the Seventh Circuit

March 22, 2023*, Submitted; July 5, 2023, Decided

No. 22-2271

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).

Reporter
2023 U.S. App. LEXIS 16893 *; 2023 WL 4340699

DEAN S. SENECA, Plaintiff-Appellant, v. GREAT LAKES INTER-TRIBAL COUNCIL, INC., Defendant-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Western District of Wisconsin. No. 21-cv-304-wmc. William M. Conley, Judge.

Seneca v. Great Lakes Inter-Tribal Council, Inc., 2022 U.S. Dist. LEXIS 91831, 2022 WL 1618758 (W.D. Wis., May 23, 2022)

Disposition: AFFIRMED.

Counsel: DEAN S. SENECA, Plaintiff - Appellant, Pro se, Cattaraugus, NY.

For GREAT LAKES INTER-TRIBAL COUNCIL, INC., Defendant - Appellee: Dieter J. Juedes, Attorney, Samuel Mark Mitchell, Attorney, HUSCH BLACKWELL LLP, Milwaukee, WI.

Judges: Before MICHAEL Y. SCUDDER, Circuit Judge, THOMAS L. KIRSCH II, Circuit Judge, DORIS L. PRYOR, Circuit Judge.

Opinion

ORDER

Dean Seneca sued the Great Lakes Inter-Tribal Council, a non-profit consortium of Indian tribes, alleging employment discrimination. The district court dismissed the case. It correctly ruled that, like its constituent member tribes, the Council enjoys tribal sovereign immunity from suit. We therefore affirm.

We begin with two procedural observations. First, we take Seneca's factual allegations as true and draw all reasonable inferences in his favor. *Aluminum Trailer Co. v. Westchester Fire Ins. Co., 24 F.4th 1134, 1136 (7th Cir. 2022)*. Second, as the district court did, we also rely on uncontested information about the structure and function of the Council set forth in one of the declarations supporting the Council's motion to dismiss. By relying on materials outside of the complaint, the district court **[*2]** converted the motion to dismiss into one for summary judgment. *See Fed. R. Civ. P. 12(d)*. Doing so normally requires notice to each party of that conversion and a chance to present relevant materials. *United States v. Rogers Cartage Co., 794 F.3d 854, 861 (7th Cir. 2015)*. But on appeal Seneca does not argue that he would have submitted materials to contest the Council's structure or function; thus this deviation from *Rule 12(d)* is irrelevant. *See id.*

The Council is a non-profit composite of its member Indian tribes, which are federally recognized and own and control it. It offers government services related to community development; assistance for families, the elderly, people with disabilities, and children; oversight of health and epidemiology; and vocational training. It does not generate its own revenue and instead relies on dues from member tribes and federal, state, and private grants. The Council employed Seneca as director of epidemiology for under a year, discharging him in 2018. Seneca alleges that the Council fired him because of his race, color, national origin, age, sex, gender identity, and sexual orientation in violation of federal law, including *Title VII of the Civil Rights Act of 1964*.

The Council successfully moved to dismiss his suit. It sought dismissal based on tribal sovereign immunity and its view that **[*3]** the federal statutes Seneca invoked exclude claims against Indian tribes. The district court accepted this first argument and did not reach the second, reasoning that the Council, as a consortium of its members, enjoys tribal sovereign immunity. Noting that tribal sovereign immunity is not a jurisdictional defense, it ruled that Seneca failed to state a claim. *See Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 820 (7th Cir. 2016)*.

On appeal, Seneca asserts that the court erred for three reasons. First, it applied the wrong test when deciding that the Council enjoys sovereign immunity. Second, the

Council had waived sovereign immunity. Third, shielding the Council with sovereign immunity violates his due process rights.

We review de novo dismissals based on the doctrine of tribal sovereign immunity. *See* Meyers, 836 F.3d at 820 (citing Miller v. Herman, 600 F.3d 726, 732-33 (7th Cir. 2010)); Aluminum Trailer Co., 24 F.4th at 1136. This doctrine is over two centuries old, *see, e.g.,* Parks v. Ross, 52 U.S. (11 How.) 362, 13 L. Ed. 730 (1851), and the Supreme Court has consistently affirmed it, *see, e.g.,* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014). Under the doctrine, "[s]uits against Indian tribes are ... barred ... absent a clear waiver by the tribe or congressional abrogation." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). It is undisputed that each member of the Council enjoys tribal immunity from suit. It is also undisputed that the Council is a combination of its member tribes, which own and operate the **[*4]** Council's not-for-profit services. Thus, the tribal immunity of its members extends to the Council.

On appeal, Seneca contests this conclusion about immunity. First, he urges us to adopt the test in McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247, 251-52 (Wis. Ct. App. 2004). There, the court determined that a for-profit corporation did not enjoy tribal sovereign immunity after a tribe bought all of its shares. Id. at 250. We have not adopted McNally's test, but it would not help Seneca even if we had. As McNally held, its ruling was "narrow" and confined to cases where, unlike here, a tribe buys all the shares of "an existing for-profit corporation." Id. at 253. Seneca also argues that the Council is not entitled to immunity under other tests involving corporate ownership. *E.g.,* J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163 (D.S.D. 2012); Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents, 84 P.3d 437 (Alaska 2004); Cash Advance & Preferred Cash Loans v. State ex rel. Suthers, 242 P.3d 1099 (Colo. 2010). But these tests do not cut in favor of Seneca either: the Council is a non-profit combination of its member Indian tribes, organized to provide government-like services to members of its community and their families, children, people with disabilities, and the elderly. Put simply, it is an arm of the tribes and therefore entitled to tribal sovereign immunity. *See* Mestek v. Lac Courte Oreilles Cmty. Health Ctr., F.4th , No. 22-2077, 2023 U.S. App. LEXIS 16507, 2023 WL 4240807, at *3 (7th Cir. June 29, 2023) (adopting the arm-of-the-tribe test).

Seneca's next argument—that the Council waived its sovereign immunity—also fails. First, he argues that the Council **[*5]** waived its immunity by agreeing to abide by Title VI of the Civil Rights Act of 1964 when it accepted federal funds. Title VI allows for judicial review of claims of discriminatory exclusion from federally funded programs. *See* 42 U.S.C. § 2000d-2. Even if the Council's receipt of federal funds waived its sovereign immunity under Title VI (a question we do not decide), that would not help Seneca. He asserts employment discrimination under Title VII and similar employment-protection laws, not Title VI. As the Supreme Court has explained, "it was unnecessary to extend Title VI more generally to ban employment discrimination, as Title VII comprehensively regulates such discrimination." CONRAIL v. Darrone, 465 U.S. 624, 632 n.13, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984). And Seneca does not cite any provisions in the laws he sued under that purport to waive sovereign immunity based on a receipt of federal funds.

Seneca also argues that the Council waived sovereign immunity through its job postings. The postings stated that the Council is an equal opportunity employer and will "comply fully with all federal and state laws." This is not the required "clear waiver by the tribe" of immunity from suit. Okla. Tax Comm'n, 498 U.S. at 509. The job postings do not mention sovereign immunity, forums available for litigation, amenability **[*6]** to suit, or anything else that clearly waived the Council's immunity. *See, e.g.,* Nanomantube v. Kickapoo Tribe, 631 F.3d 1150, 1152-53 (10th Cir. 2011).

Finally, Seneca argues that, unless we deem the Council to have waived its tribal sovereign immunity, he will have no forum to litigate the merits of his discrimination claims, which is an outcome that he asserts would violate his right to due process under the Fifth and Fourteenth Amendments. But neither the Fifth Amendment nor the Fourteenth Amendment applies to

Indian tribes. *Talton v. Mayes, 163 U.S. 376, 384, 16 S. Ct. 986, 41 L. Ed. 196 (1896)*; *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*. Seneca responds by citing Public Law 280, which grants certain states criminal jurisdiction over persons in "Indian country" and opens some states' courts to civil claims arising there. *18 U.S.C. § 1162*; *25 U.S.C. §§ 1321-26*; *28 U.S.C. § 1360*. But the Supreme Court has rejected Seneca's assumption that this law overcomes tribal sovereign immunity. *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877, 892, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986)*.

We have considered Seneca's remaining arguments, and none has merit.

AFFIRMED

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Su v. DRR Roofing, LLC

United States District Court for the Southern District of Ohio, Eastern Division

July 15, 2024, Filed

Civil Action 2:24-mc-19

Reporter
2024 U.S. Dist. LEXIS 124030 *; 2024 WL 3412695

JULIE A. SU, Secretary, Department of Labor, Petitioner, v. DRR ROOFING, LLC, et al., Respondents.

Subsequent History: Magistrate's recommendation at *Su v. DRR Roofing, LLC, 2024 U.S. Dist. LEXIS 190820 (S.D. Ohio, Oct. 21, 2024)*

Counsel: **[*1]** For Secretary of Labor Julie A. Su, Julie A. Su, Secretary of Labor, United States Department of Labor, Petitioner: Adam Lubow, U.S. Department of Labor, Office of the Solicitor, Cleveland, OH.

Judges: CHELSEY M. VASCURA, UNITED STATES MAGISTRATE JUDGE. Judge Sarah D. Morrison.

Opinion by: CHELSEY M. VASCURA

Opinion

ORDER

This matter is before the Court on the Petition of Julie A. Su, Acting Secretary for the United States Department of Labor, pursuant to *§ 9 of the Fair Labor Standards Act, 29 U.S.C. § 209*, to compel Respondents DRR Roofing, LLC, and Daniel Ruiz to comply with the subpoena *duces tecum* issued by the Regional Administrator, Wage and Hour Division, United States Department of Labor. (ECF No. 1.) For the following reasons, the Petition is **GRANTED**.

Pursuant to *29 U.S.C. § 211(a)*, the Regional Administrator of the Department of Labor's Wage and Hour Division issued a subpoena *duces tecum* on October 10, 2023, requiring Respondents DRR Roofing, LLC, and Daniel Ruiz (DRR's owner and statutory agent) to produce 23 categories of records and documents concerning Respondents' business structure, revenue, income taxes, and employment practices by October 20, 2023. (*See* Subpoena *Duces Tecum*, ECF No. 1-8.) To date, Respondents have failed to produce any documents or otherwise respond **[*2]** to the subpoena. (Pet. 5, ECF No. 1.) Nor have Respondents appeared in this action or responded to the Petition.

"A subpoena enforcement proceeding is a summary process designed to decide expeditiously whether a subpoena should be enforced." *Equal Emp. Opportunity Comm'n v. Ferrellgas, L.P., 97 F.4th 338, 344 (6th Cir. 2024)* (quoting *EEOC v. United Parcel Serv., Inc., 859 F.3d 375, 378 (6th Cir. 2017)* and *EEOC v. Roadway Express, Inc., 750 F.2d 40, 42 (6th Cir. 1984)*). Indeed, "a district court plays only a limited role in the enforcement of an administrative subpoena." *Doe v. United States, 253 F.3d 256, 262 (6th Cir. 2001)* (quoting *United States v. Markwood, 48 F.3d 969, 976 (6th Cir.1995)*). "All the district court must do in deciding whether to enforce an administrative subpoena is 1) determine whether the administrative agency to which Congress has granted the subpoena power, in this case the [Department of Labor], has satisfied the statutory prerequisites to issuing and enforcing the subpoena, and 2) determine whether the agency has satisfied the judicially created standards for enforcing administrative subpoenas." *Doe, 253 F.3d at 262*.

In this case, *§ 9 of the FLSA, 29 U.S.C. § 209*, and *§§ 9* and *10 of the Federal Trade Commission Act*, *15 U.S.C. §§ 49*, *50*, grant Petitioner the authority to subpoena the production of documents with respect to an investigation under *§ 11(a) of the FLSA*. Petitioner's request for production of documents from Respondents is within the statutory authority cited and the Court finds that it is relevant to the investigation at issue. Moreover, the undersigned finds that the subpoena satisfies the judicially **[*3]** created standards for enforcing administrative subpoenas; that is, the requested documents are relevant to the Department of Labor's

investigation, the information sought is not already in the Department of Labor's possession, and enforcing the subpoena will not constitute an abuse of the Court's process. *See* *Doe, 253 F.3d at 265*; *Markwood, 48 F.3d at 980*.

Accordingly, the Petition to Enforce Administrative Subpoena *Duces Tecum* (ECF No. 1) is **GRANTED**. The Respondents are **ORDERED** to produce, **WITHIN 30 DAYS** of the date of this Order, the documents identified in the Subpoena *Duces Tecum* (ECF No. 1-8). The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED.

/s/ *Chelsey M. Vascura*

CHELSEY M. VASCURA

UNITED STATES MAGISTRATE JUDGE

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