IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA (SOUTHWESTERN DIVISION)

JAY MEILSTRUP,	)	
	)	
Plaintiff,	)	Case No. 1:25-cv-00162
	)	
v.	)	
	)	
STANDING ROCK SIOUX TRIBE,	)	
STANDING ROCK TRIBAL COUNCIL	)	
And RYAN HERTLE,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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I. EXHAUSTION OF TRIBAL REMEDIES IS REQUIRED.

The Tribe's motion to dismiss discussed that *because* there is a colorable claim for Tribal Court jurisdiction, Plaintiff *must* exhaust Tribal Court remedies before proceeding to federal court.

Plaintiff's primary response is a conclusory assertion that this Court should permit discovery regarding whether jurisdiction lies in this Court or the Tribal Court before it dismisses for failure to exhaust Tribal Cout remedies. Plaintiff's assertion is insufficient because it is factually unsupported. § II.B.2-3, *infra*. Additionally, Plaintiff's assertion that discovery is needed confirms that exhaustion of tribal court remedies is required. Plaintiff has not cited, and Defendant has not located any federal court case which has permitted "jurisdictional discovery" in federal court prior to resolving a motion for failure to exhaust tribal court remedies. The reason for that lack of any such case appears self-evident. Discovery would not inform the legal issue of whether or not there is a colorable claim of tribal court jurisdiction. It also would not inform the related issue of whether tribal remedies have been exhausted, which would be shown by court order.

In *National Farmers Union* the Supreme Court discussed that a core purpose of the exhaustion doctrine is to have the Tribe's Court develop the factual record needed to determine if the case comes within the Tribe's jurisdiction. Citation. As the Ninth Circuit, explained "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." *FMC v. Shoshone–Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). All federal courts which have reached the issue, including the Eighth Circuit, have adopted the Ninth Circuit's analysis on this issue of law. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d, 1294, 1300 (8th Cir. 1994); (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (citing *FMC*).

The courts in *National Farmers Union* and subsequent cases also explained that another primary purpose and benefit from exhaustion is that the Tribal Court will provide its expertise on

the application of tribal law and policy to the jurisdictional question. Citation. That is particularly important here, because Plaintiff was the manager of the Tribe's casino. Only the Tribe, through its fora can determine the paramount tribal gaming regulatory issues presented in this matter. Plaintiff now claims he could fulfill his gaming management functions from Pennsylvania.[1] Plaintiff also purported to put someone without a primary gaming management license in charge of the casinos during his extended absences. Exhibits. 1, 2, 3 (emails in which Meilstrup places Wes Longfeather as the acting casino manager).[2] The Tribe's view is that both of these actions are very significant violations of the Tribe's gaming law. SRST Code § 23-206 (Defining primary management official); § 23-501 (anyone exercising primary management official must hold a primary management official license); § 23-502 (barring, under the undisputable fact here, Plaintiff from transferring his license to anyone); § 23-302 (providing the Tribe's Gaming Commission with authority to conduct and remedy violations of the Tribe's gaming laws or regulations); § 23-317 (providing a forum for employee grievances and requiring exhaustion of those remedies); Casino Employee Handbook § 6.6, Exhibit 4, (regular attendance is required unless approved by appropriate supervisor); §§ 8.5, 8.9-4 (showing that Meilstrup had not been employed long enough to qualify for FMLA, and was not eligible for more than 3 days of leave without pay).[3]

[1] Plaintiff now asserts that this Court should assume he was not on leave prior to February 27, 2025. That assertion is factually frivolous—his own emails state he was on leave during those times. Exhibits. 1, 2.

[2] The undersigned has confirmed with Mr. Longfeather that he does not have a primary management official license

[3] In his response brief, Meilstrup does not dispute the Tribe's discussion that Meilstrup was not on authorized leave because Meilstrup had not followed the required tribal law to obtain leave. But in paragraphs 7-9 of his response Meilstrup asserts his termination was wrongful because, he claims, someone with "apparent authority" authorized his leave and because he claims, he did not know the applicable tribal law. Those assertions raise issues of tribal law and therefore are currently immaterial. But the Tribe further notes that it is a "well established principle that the party contracting with the government cannot rely upon apparent authority but instead has the burden of knowing the law and ascertaining whether the one purporting to contract for the government is staying within the bounds of his or her authority." *Johnson v. United States*, 15 Cl.Ct. 169, 174 (1988) (citing *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 63 (1984)); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, (1947)). In addition, the Tribe is confident that if Meilstrup had sought review of his termination, his feigned lack of knowledge would have been shown to be false.

Where, as here, there are significant issues of tribal law, and in particular issues of tribal gaming law, where the Indian Gaming Regulatory Act completely preempts state law and provides for exclusive tribal regulation of casino managers' violations of tribal gaming laws, exhaustion of tribal court remedies is, at the very least, required, *Bruce H Lien Co. v. Three Affiliated Tribes*, 93, F.3d 1412 (1996) (requiring casino manager to exhaust tribal court remedies and discussing IGRA's complete preemption); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 548–49 (8th Cir.1996) (discussing IGRA's complete preemption) ; 25 U.S.C. § 2710(d)(3)(C), *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (barring post-exhaustion substantive review of tribal court ERISA decision); *Koopman v. Forest Co. Potawatomie Member Benefit Plan*, 2006 WL 1785769 (E.D. Wis. 2006) (requiring exhaustion on alleged ERISA claim because of tribal law issues presented); *Geroux v. Assurant, Inc.*, 2010 WL 1032648 (W.D. Mich. 2010) (same).

Plaintiff cites (albeit insufficiently and without disclosing that it is an unreported decision) one case which he claims reaches a contrary result. *Vandever v. Osage Nation Enterprise, Inc.*, 2009 WL 702776 (N.D. Okla. 2009). *Vandever* has never been cited for a matter remotely like the present case. Vandever was a low-level hourly casino employee, who brought a federal court suit seeking to have the casino health care plan provide coverage. In contrast, in the present matter, Plaintiff claims he was wrongfully terminated from his position as the senior casino management officer. Only three other courts have cited the holding in *Vandever* which Plaintiff cites, and all three courts distinguish *Vandever*. *Peabody Holding Co. v. Black*, 2013 WL 2370620 (D. Ariz, 2013); *Life Ins. Co. of N. Am. v. Hudson Ins.*, 2015 WL 1966667 (E.D. Okla. 2015); *Coppe v. Sac & Fox Casino Healthcare Plan*, 2015 WL 1137733 (D. Kans. 2015). As one of those courts explains, the Court in *Vandeve*r incorrectly held that ERISA provides that the federal courts have exclusive jurisdiction over claims brought under 29 U.S.C. § 1132(a)((1)(B). In actuality, ERISA

expressly provides that complete preemption does not apply to such claims. 29 U.S.C. § 1132(e)(1). *See Life Ins. Co of N. Am, supra* (discussing the error in *Vandever*).[4]

Even if one were to assume that Plaintiff stated a claim under ERISA (which, as discussed below, he did not) exhaustion of tribal court remedies is required because of the substantial tribal law and tribal policy issues, including significant gaming regulatory issues for which IGRA completely preempts non-tribal jurisdiction.

II. PLAINTIFF'S ATTEMPT TO DELAY DISMISSAL THROUGH "JURISDICTIONAL DISCOVERY" IS CONTRARY TO LAW.

As the Tribe discussed in its opening brief, sovereign immunity is a threshold issue, which generally must be decided before discovery and before any other issue. Determining sovereign immunity prior to other issues is required because it "avoid[s] subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (internal quotation marks omitted). There are rare exceptions to this general rule, but Plaintiff does not argue that any of those exceptions apply here. Instead, ignoring the applicable law, Plaintiff asserts that if he asks for "jurisdictional discovery," the Court must grant that request.

A. BASED UPON THE TRIBE'S CORRECT AND UNDISPUTED ARGUMENT THAT FAILURE TO PLEAD A WAIVER OF SOVEREIGN IMMUNITY REQUIRES DISMISSAL, THIS CASE MUST BE DISMISSED.

As the Tribe discussed and as Plaintiff does not dispute, Plaintiff did not plead a waiver of the Tribe's sovereign immunity. In fact, he did not mention sovereign immunity at all. Plaintiff also does not dispute the Tribe's discussion that to protect sovereign immunity, courts require a

[4] Meilstrup seems to suggest through an undeveloped discussion in paragraph 23 of his response, that tribal courts lack jurisdiction to apply federal substantive law. If that is his assertion, it is wrong. As a matter of law, Tribal Courts are competent to adjudicate cases which rely upon federal law. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n. 7 (1999) ("[T]ribal courts, like state courts, can and do decide questions of federal law …")

plaintiff to plead (subject to Rule 11) the plaintiff's alleged basis for waiver of immunity. That should be the end of the inquiry. He did not meet his burden to plead a waiver.

B. EVEN IF THIS COURT DID NOT DISMISS FOR THE UNDISPUTED FAILURE TO PLEAD A WAIVER, THIS COURT IS REQUIRED TO DISMISS WITHOUT PERMITTING "JURISDICTIONAL DISCOVERY."

Plaintiff now claims that he should be provided "jurisdictional discovery" before his inadequate complaint is dismissed. Case law is contrary to his undeveloped argument. And again that case law is based upon the requirement that courts resolve immunity as a threshold issue.

In *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the Eighth Circuit discussed at length the legal and procedural difference between a motion to dismiss for lack of jurisdiction and a summary judgment motion. *Osborn* is a well known and very frequently cited case.[5] Under *Osborn*, a defendant can challenge jurisdiction or a claim of waiver of sovereign immunity on the pleadings; on the pleadings as supplemented by undisputed facts; or on the facts. Plaintiff asserts, directly contrary to this settled law, that this Court must apply the summary judgment standard to a Rule 12(b)(1) motion to dismiss. *Osborn* expressly rejected Plaintiff's argument 35 years ago. This Court should expect that by now attorneys would know that settled law.

1. Plaintiff's complaint does not survive a facial challenge, and therefore "jurisdictional discovery" is not permitted.

Here, the Tribe challenges jurisdiction and the claim of waiver on the pleadings or on the pleadings supplemented by the terms of the contract.[6] There are no material facts which need be resolved before the Court rules on the Tribe's motion to dismiss. E.g. Ballard

[5] Westlaw currently shows almost 5,000 citing references to *Osborn*, including 77 citations by this Court.

[6] The Tribe attached to its complaint the contract and a record of a tribal governmental decision. Those documents can be considered on a motion to dismiss on the pleadings. *E.g., Stahl v. U.S. Dept. Agric.*, 727 F.3d 697, 700 (8th Cir. 2003). The analysis and result would be exactly the same even if plaintiff were to claim that the Tribe's challenge in on the pleadings supplemented by undisputed facts. Plaintiff's complaint references the contract and references his termination, and the undisputable contents of the primary documents related to those allegations can be considered.

Plaintiff acknowledges that he has not exhausted tribal court remedies. Dismissal is required and discovery on that issue is neither needed nor permitted.

Independently, dismissal is required and discovery is not permitted because Plaintiff does not and cannot dispute that the plain language of the contract limits claims to Tribal Court and does not waive sovereign immunity for claims in this Court.

Independently, dismiss is required and discovery is not permitted because Plaintiff does not and cannot dispute that the plain language of the contract requires application of the Tribe's laws, and limits the waiver of sovereign immunity to claims under the Tribe's laws, and therefore that waiver does not apply to any of Plaintiff's claims.

2. Even if Plaintiff could overcome a facial challenge to his inadequate complaint, Plaintiff would still not be entitled to "jurisdictional discovery."

If a defendant challenges jurisdiction on the facts under Rule 12(b)(1), the Court has an affirmative duty to expeditiously resolve any factual disputes which impact the analysis of immunity. The Court can and should weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. *Osborn*, 918 F.2d at 728-29.

> the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Osborn, 918 F.2d at 730 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

Here, Plaintiff has not provided evidence showing jurisdiction or showing a waiver of immunity (nor could he have). Instead, Plaintiff seeks to defeat "summary judgment" through a

general denial. Under *Osborn*, that attempt is insufficient, and dismissal is required because Plaintiff has not carried his burden.

3. Even if this Court applied Rule 56 by analogy, Plaintiff failed to make any showing of a need for discovery prior to this Court ruling on "summary judgment."

In his response, Plaintiff asserts that the Tribe's motion to dismiss should be treated as a Rule 56 motion. If that were true, then Plaintiff's request for jurisdictional discovery would need to be supported by a motion under FRCP 56(d). *E.g., Freeman v. United States*, 556 F.3d 326 (5th Cire. 2009); *Exch. Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976) (applying Rule 56(f) (now 56(d)) by analogy to a motion to dismiss under Rule 12(b)(1), and holding that "just as under Rule 56, a party opposing a Rule 12(b)(1) motion cannot rest on the mere assertion that factual issues may exist"). "A prerequisite to granting relief pursuant to Rule 56(f) . . . is an affidavit furnished by the nonmovant [which] must explain why facts precluding summary judgment cannot be presented." *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (quoting *Comm. for the First Amend. v. Campbell*, 962 F.2d 1517, 1922 (10th Cir. 1992)). *See also First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 298-99 (1968).

> The party seeking [jurisdictional] discovery bears the burden of showing its necessity. … [A] party is not entitled to jurisdictional discovery if the record shows that the requested discovery is not likely to produce the facts needed to withstand a Rule 12(b)(1) motion. This is particularly true where the party seeking discovery is attempting to disprove the applicability of an immunity-derived bar to suit because immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery.

Freeman v. United States, 556 F.3d 326, 341–42 (5th Cir. 2009) (internal citations omitted). *See also Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1190 (10th Cir. 2010) (affirming dismissal based upon tribal immunity and affirming denial of a request for jurisdictional discovery for the reasons stated in *Freeman*, and noting that a "conclusory assertion that jurisdictional discovery was necessary seems almost like an attempt to use discovery

as a fishing expedition rather than to obtain needed documents to defeat the tribal immunity claim."); *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH&Co.*, 646 F.3d 589 (8th Cir. 2011).

Plaintiff does not identify any jurisdictional fact that is in dispute, does not discuss what discovery he would seek, and does not link that discovery to any jurisdictional issue. He has not provided the requisite showing for jurisdictional discovery (nor could he have if he had tried).

4. If discovery were required, it must be conducted in the Tribe's Court based upon the Exhaustion Doctrine

As discussed in section I of this brief, a core purpose of the Exhaustion Doctrine is to provide for the creation of the record in the Tribal Court, so that the Tribal Court can apply that record to the tribal law and provide the definitive interpretation of the significant tribal law issues, including tribal gaming law, raised by Plaintiff's claim that he should not have been fired for taking unauthorized leave. Even if one assumed that discovery should be permitted, it must be in the tribal forum.

III. THERE IS NO WAIVER OF THE TRIBE'S SOVEREIGN IMMUNITY.

A. PLAINTIFF HAS NOT STATED FACTS SUPPORTING AN ERISA CLAIM, AND THEREFORE EVEN IF EXHAUSTION WERE NOT REQUIRED, THIS COURT WOULD LACK JURISDICTION OVER PLAINTIFF'S "ERISA CLAIM."

In paragraph XXVI of his complaint, Plaintiff makes a conclusory assertion that his ERISA claim is based upon a breach of a "duty to pay benefits regulated by ERISA." That assertion is based upon Plaintiff's "theories" for recovery stated in paragraph XXV of his complaint—that he was wrongfully terminated and therefore he should have continued to received benefits. Not one of Plaintiff's theories for recovery cites to or is based upon ERISA.[7] There is no ERISA claim and therefore this Court does not need to consider the hypothetical question of whether ERISA waives

[7] In his complaint, Meilstrup appears to suggest that he was not timely provided with notice regarding COBRA, but he does not state a claim based upon that allegation. Nor could he have: Meilstrup admits that he received COBRA notice within about a week of his termination, Compl. ¶ XIV, well within the 30-day provided for in COBRA.

the Tribe's sovereign immunity or the hypothetical question of whether Plaintiff's agreement to exclusive tribal court jurisdiction prevents Plaintiff from filing any hypothetical ERISA claim in this Court.

B. 28 U.S.C. § 1367 DOES NOT WAIVE A TRIBE'S SOVEREIGN IMMUNITY.

Plaintiff asserts that if he has an ERISA claim, he can bring "state law" claims under 28 U.S.C. § 1367. In addition to the flaws that he has not asserted an ERISA claim, that he has not plead a waiver of tribal sovereign immunity and that the contract bars "state law claims, the Tribe's sovereign immunity bars his "state law" claims. As best the Tribe can tell from the vague response brief, Plaintiff appears to be asserting that 28 U.S.C. § 1367 provides the requisite clear and unequivocal waiver of the Tribes' sovereign immunity for supplemental "state law" claims against a sovereign. Long ago, the Supreme Court clarified that § 1367 does not waive a sovereign's immunity. Even if a claim is supplemental to a claim over which there is a waiver, the supplemental claim remains barred unless there is some separate waiver applicable to the supplemental claim. *E.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002); *Pennhurst Stat School & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984); *San Juan Co. v. United States*, 503 F.3d 1163, 1181 (10th Cir.2007), *abrogated in part on other grounds*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) ("Section 1367(a) is expressed in general terms, applying to all litigants. There is no mention of sovereign immunity or of the special status of the government as a litigant. Under settled law, ... this statute does not waive federal sovereign immunity."); *Dunn & Black v. United States*, 492 F.3d 1084, 1088 n. 3 (9th Cir.2007) (same); *United States v. Certain Land Situated in City of Detroit*, 361 F.3d 305, 307 (6th Cir.2004) (same); *Doran v. Condon*, 983 F. Supp 886 (D. Neb. 1997) (same).

The above cases are based upon the undisputed analysis of sovereign immunity contained in the Tribe's opening brief—any waiver must be clear and unequivocal, and § 1367 is a general

statute which does not even reference sovereign immunity, let alone contain a clear and unequivocal waiver of it.

C. PLAINTIFF'S UNDEVELOPED ASSERTION THAT HE *COULD HAVE* PLED A CLAIM BASED UPON DIVERSITY IS FRIVOLOUS.

In his response brief, Plaintiff now makes a one sentence assertion that this Court has jurisdiction over his state law claims based upon diversity. That argument is frivolous. In fact, 25 years ago, a plaintiff in this circuit was sanctioned for making an identical argument. *Charland v. Little Six, Inc.*, 112 F. Supp. 2d 858, 866 (D. Minn. 2000); *aff'd sub nom. Charland v. Little Six*, 13 F. App'x 451 (8th Cir. 2001). In *Charland*, plaintiff asserted diversity jurisdiction in a response to a tribal entity's motion to dismiss. The Court held that the argument was frivolous for two independent reasons: 1) plaintiff had not alleged citizenship of the parties in the complaint, and 2) the settled law in this Circuit is that a tribe is not a citizen of any state and therefore cannot be sued in diversity. *Id.* (citing *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (holding "it is clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."). *See also Auto–Owners Ins. Co. v. Tribal Ct. of the Spirit Lake Indian Res.*, 495 F.3d 1017, 1020 (8th Cir. 2007); *Oglala Sioux v. C&W Enter., Inc.*, 487 F.3d 1129 (8th Cir. 2007); *Oglala Sioux Tribe v. Schwarting*, 894 F. Supp. 2d 1195 (D. Neb. 2012). All other circuits which have reached the issue have relied upon and adopted the holding from *Dorgan*. *Cohen's Handbook of Federal Indian Law* (2012 ed.), § 7.04[1][c] at n.65 (collecting cases from 1st, 2d, 9th, and 10th Cir.). Here, Plaintiff did not plead diversity, did not plead citizenship of the parties, and in any case the settled law bars diversity jurisdiction.

CONCLUSION

For all of the reasons stated in this brief and the Tribe's opening brief, this matter must be dismissed.

Respectfully submitted September 19, 2025.

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