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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

VANIR CONSTRUCTION MANAGEMENT, INC., Plaintiff, v. MONTE GRAY, et al., Defendants.	Case No. 4:25-cv-00210-AKB **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS GRAY AND BACON**

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INTRODUCTION

Plaintiff Vanir Construction Management Inc.'s ("Vanir") claims against Defendants Bill Bacon and Monte Gray ("Associate General Counsel Gray") (collectively, "Tribal Attorney Defendants") cannot be heard in this Court. Vanir lacks standing to bring them, because Vanir has not suffered any injury, it has itself revealed the information it claims is "confidential," and it has no credible risk of future injury. Moreover, Vanir seeks relief that would run against the Shoshone-Bannock Tribes ("Tribes"), and so its claims are barred by tribal sovereign immunity. Even if Vanir could get past these insuperable obstacles, it fails to state a claim against Tribal Attorney Defendants. Its claims are barred by the litigation privilege. Vanir's allegations also show no privity with Tribal Attorney Defendants or breach of the alleged non-disclosure agreement ("NDA"). Finally, Vanir *must* exhaust its remedies in Shoshone-Bannock Tribal Court ("Tribal Court") before suing here. Even if the Court has jurisdiction, Vanir's failure to exhaust would doom its claims in this Court. For all these reasons, Vanir's claims should be dismissed.

BACKGROUND

Vanir sues Tribal Attorney Defendants for alleged breach of contract. First Am. Compl. ¶¶ 44-52, ECF No. 10 ("Compl." or "Complaint"). Its claims ultimately arise from a dispute between Vanir and the Tribes, being litigated in Tribal Court, over a construction project on the Tribes' Reservation. *See id.* ¶¶ 4, 10-14; *Shoshone-Bannock Tribes v. Vanir Constr. Mgmt., Inc.* (*Vanir I*), No. 4:23-cv-00160, 2023 WL 4706007, at *1 (D. Idaho July 24, 2023) (discussing details giving rise to Tribal Court case).[1] Vanir alleges that, in order to facilitate a possible settlement of this dispute, one of the Tribes' attorneys signed an NDA with Vanir, and pursuant to the NDA Vanir

[1] The Court may take judicial notice of the undisputed facts underlying the Tribal Court litigation since those are "matters of public record." *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018).

provided information about its financial situation to the Defendants. Compl. ¶¶ 13-22, 29. Section 3 of the NDA provides that "Recipient shall, and will cause its Representatives to, keep all of the Confidential Information of the Discloser confidential and will not disclose, permit access to or use the Confidential Information except as required to carry out the Purpose." *Id.* Ex. A.

Vanir alleges that on January 31, 2025, Associate General Counsel Gray emailed "Vanir's outside independent accounting firm"[2] informing the auditor he is a lawyer for the Tribes and stating "I did not see any disclosure of our lawsuit in your audit according to GAAP standards" and "in 2023 we filed a breach of contract action in Shoshone-Bannock Tribal Court against Vanir …. The Tribes are requesting recovery in the amount of $3,200,000.00." *Id.* ¶ 31. Vanir alleges this breached the NDA. *Id.* ¶ 47. Vanir seeks "specific performance under the NDA," *id.* ¶ 52, and seeks relief requiring Defendants and "any of their agents, employees, or representatives" to comply with the NDA and not to contact the auditor, *id.* Prayer for Relief 2, and "specific performance of Defendants' obligations under the NDA," *id.* Prayer for Relief 3.

STANDARD OF REVIEW

Facial challenges to constitutional standing are properly brought under Federal Rule of Civil Procedure 12(b)(1). *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). In such an attack, the court accepts plaintiff's allegations as true, draws all reasonable inferences in the plaintiff's favor, and "determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Id.* Rule 12(b)(1) is also "a proper vehicle for invoking sovereign immunity from suit." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). When a defendant asserts tribal sovereign immunity, "'the party asserting subject matter jurisdiction has the burden of proving its existence,' i.e. that immunity does not bar the suit." *Id.* (quoting *Miller v. Wright*,

[2] Vanir since filed a letter from other Defendants' counsel, identifying the "independent outside accounting firm" as one managed by a member of Vanir's board. *See* ECF No. 22-5 at 3 n.2.

705 F.3d 919, 923 (9th Cir. 2013)). On such a motion, "no presumptive truthfulness attaches to a plaintiff's allegations" and "a district court may hear evidence regarding jurisdiction and resolve factual disputes where necessary." *Id.* (quotation omitted) (cleaned up).

Rule 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. "[D]ismissal under Rule 12(b)(6) is appropriate … where the complaint lacks a cognizable legal theory …." *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)). The court "take[s] all factual allegations in the complaint as true and 'construe[s] the pleadings in the light most favorable to the nonmoving party.'" *Estate of Bride ex rel. Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1175 (9th Cir. 2024) (quoting *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009)).

On a Rule 12 motion, "[a]lthough factual allegations are taken as true, [courts] do not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)); *see also Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003). A court does is not required to accept "unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quotation omitted). And the Court may consider judicially noticeable material. *DeFiore v. SOC LLC*, 85 F.4th 546, 553 n.2 (9th Cir. 2023).

ARGUMENT

I. The Complaint Should Be Dismissed Under Rule 12(b)(1).

A. Vanir Facially Lacks Standing.

Vanir facially lacks Article III standing to maintain its suit. Article III standing is a constitutional requirement that applies to all claims in federal court. *See Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). There are three requirements for Article III standing:

> (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

Bras v. Cal. Pub. Utils. Comm'n, 59 F.3d 869, 872 (9th Cir. 1995) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992)). At the motion to dismiss stage, "the party invoking federal jurisdiction must allege a 'case or controversy within the meaning of Art. III of the Constitution.'" *Meland v. Weber*, 2 F.4th 838, 843-44 (9th Cir. 2021) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979)). "[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Vanir fails to satisfy these requirements.

1. Vanir Has No Injury and Does Not Seek Redress for Past Harm.

Vanir only alleges the January 31 email breached the NDA and files for breach of contract on that basis. For three reasons, Vanir lacks standing to seek relief based on the January 31 email.

First, past events cannot establish standing for a claim for prospective relief. When a party seeks prospective relief, "it is insufficient … to demonstrate that he was injured in the past; [plaintiff] must instead show a very significant possibility of future harm …." *Bras*, 59 F.3d at 873 (quoting *Coral Constr. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991)). What's more, prospective relief like that Vanir seeks will not redress a past injury, which is necessary to establish the third element of standing. Controlling how Defendants and others act in the future, see Compl., Prayer for Relief ¶¶ 2-3, will not undo any impacts from the January 31 email.[3]

[3] Vanir cannot use its request for attorneys' fees, Compl. Prayer for Relief ¶ 4, to bootstrap standing, as a plaintiff "cannot manufacture [Article III] injury by incurring litigation costs." *La As'n de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

Second, Vanir does not allege cognizable injury from the January 31 email. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). To be "concrete," an injury must "actually exist." *Id.* at 340. Injury must be "real impact on real persons." *Perry v. Newsom*, 18 F.4th 622, 630 (9th Cir. 2021) (quoting *TransUnion*, 594 U.S. at 424). Mere communications between third parties could not have injured Vanir. *See TransUnion*, 594 U.S. at 434-35 (retention of information by a third party does not establish injury). Indeed, Vanir does not allege injury from the January 31 email itself. Vanir instead alleges that its auditor told Vanir about the communication and, in a conclusory fashion, alleges that the relationship with its auditor has been undermined. Compl. ¶¶ 33, 49. Vanir makes no allegation that this has resulted in any concrete, particularized impacts to Vanir. Therefore, Vanir did not suffer an injury-in-fact.

Third, Vanir has mooted the question of whether the January 31 email breached the NDA. Vanir itself revealed the entire email to the public in its initial, operative, and proposed complaints. It then revealed its "independent outside accounting firm" in a subsequent filing. *See* ECF No. 22-5 at 3 n.2. Any harm arising from the email is now traceable to Vanir's own disclosure of it to the entire world. Vanir therefore lacks a "legally cognizable interest in the outcome" of claims arising from the January 31 email. *See Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009).[4]

[4] Vanir cannot show standing by alleging that its relationship with its auditor was injured by the January 31 email. *See Foretich v. United States*, 351 F.3d 1198, 1212-13 (D.C. Cir. 2003) ("where reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible and the injury cannot satisfy the requirements of Article III").

2. Vanir Makes Only Speculative Allegations of Possible Future Injuries.

Vanir's allegations do not establish that it faces any risk of future harm, either. "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, *at least so long as the risk of harm is sufficiently imminent and substantial*." *TransUnion*, 594 U.S. at 435 (emphasis added). "A plaintiff threatened with future injury has standing to sue if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quotation and quotation marks omitted). Allegations of future injury are too speculative to establish a likelihood of future injury when they rely on a "multi-link chain of inferences" requiring speculation on independent choices by multiple actors. *Id.* at 1025-26 (discussing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401, 410-13 (2013)). Vanir has failed to demonstrate that harm is "certainly impending" or that there is a "substantial risk that … harm will occur." The risks Vanir alleges are too speculative, fail to show Vanir might be injured, or cannot be traced to Defendants.

Vanir alleges that Defendants will "improperly seek money from Vanir through settlement of their [Tribal Court] appeal." Compl. ¶ 43. An offer of settlement would not harm Vanir.[5] Vanir then argues that Defendants will "challenge Vanir's efforts at being reimbursed for its costs and fees" in the Tribal Court case. *Id.* Vanir itself raised the NDA in its motion for costs and fees in Tribal Court. *See* Ex. A, Memo. in Supp. of Vanir Const. Mgmt., Inc.'s Mot for Attys' Fees & Costs at 9-10.[6] Vanir's self-imposed costs from defending its own motions are not injuries-in-fact. *See Trabajadores*, 624 F.3d at 1088. In any event, the Tribes did not rely on any allegedly

[5] Vanir refashions this as a "reasonable" expectation of "attempts to extort a settlement," Compl. ¶ 49, but that is only rhetoric, unmoored from Vanir's other allegations. It is also speculative, for the same reasons as Vanir's allegations of risk of punishment, *see infra* at 7.

[6] The Court may take judicial notice of filings in Tribal Court. *See, e.g.*, *Fercho v. United States*, No. CV 18-86-BLG-DLC-TJC, 2019 WL 5678152, at *1 n.1 (D. Mont. Aug. 1, 2019).

"Confidential Information" in opposition, *see* Ex. B, Opp. to Vanir Constr. Mgmt., Inc.'s Mot. for Attys.' Fees & Costs at 9. Vanir also argues that defendants may "punish Vanir for [the Tribes'] loss in the Tribal Court Case" by "continu[ing] their unauthorized use of Vanir's confidential financial information" or "repeat[ing] this wrongful conduct." Compl. ¶¶ 43, 49. That speculation hinges entirely on the January 31 email, sent nearly three months before Vanir filed its operative complaint, which was not repeated and did not impact Vanir in any concrete way. The allegation that this so-called "punish[ment]" will "continue" or "repeat" does not show injury. It also depends on an unreasonable inference, as *Vanir* has sought to "punish" *the Tribes* through litigation, including this suit and in the Tribal Court case. *See* ECF No. 23-3 (motion for $3.2 million in sanctions against Tribes and their attorneys); Ex. A (motion for $1.2 million in attorneys' fees and costs from the Tribes); Ex. B at 2-3 (describing history of Vanir's litigation tactics).

Vanir's alleged risks of "unnecessary audits," *see* Compl. ¶ 50, depend on the actions of third parties, whom Defendants do not control. Given Vanir's own disclosure of "Confidential Information" in this lawsuit, that risk is self-imposed. And it is entirely speculative, as Vanir never alleges that any "unnecessary" audits have happened or that they are imminent. None of this establishes a "certainly impending" risk of any harm attributable to Defendants, or a "substantial risk that … harm *will* occur." *See Zappos*, 888 F.3d at 1024 (quotation omitted) (emphasis added).

B. Tribal Attorney Defendants are Protected by Tribal Sovereign Immunity.

The Tribes are a federally recognized Indian tribe, 89 Fed. Reg. 99,899, 99,901 (Dec. 11, 2024), protected by tribal sovereign immunity, *see Doe v. Shoshone-Bannock Tribes*, 367 P.3d 136, 144-45 (Idaho 2016). The Tribes *cannot* be sued unless they have clearly waived immunity or Congress has unequivocally abrogated it. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Tribal immunity from suit is a "core attribute of sovereignty." *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 907 (9th Cir. 2021).

"Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority …." *Miller*, 705 F.3d at 928 (quoting *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)) (ellipsis in original). Suits against tribal officers acting in their official capacities "represent only another way of pleading an action against an entity of which an officer is an agent" and the relief sought in them 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 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). When determining whether a suit against tribal officials is against them in their official capacities, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* (citing *Ex parte New York*, 256 U.S. 490, 500-02 (1921)).[7] Under these principles, Vanir cannot make its claims against Tribal Attorney Defendants—who are Tribal officers, *see* Compl. ¶¶ 2-3.

1. The Relief Requested Would Run Against the Tribes.

Vanir's requested relief would run against the Tribes. Claims "to obtain specific performance of a sovereign's contract" are barred by sovereign immunity, as they "lie directly against the sovereign even when styled as a claim for injunctive relief against an individual governmental officer." *Jamul*, 974 F.3d at 994-95. This is such a case. Vanir alleges that it entered

[7] There is an exception to tribal sovereign immunity for claims against tribal officers that seek purely prospective relief to remedy ongoing violations of plaintiff's federal rights. *See Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1307 n.10 (9th Cir. 2013) (citing *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007)). However, that exception is not available to Vanir. Vanir is seeking to bind the Tribes to a contract and thus seeks relief that runs against the Tribes, *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 994-95 (9th Cir. 2020); *see infra* at 9, its claim is a *state* law contract claim, Compl. ¶ 6, 44-52; and it does not allege a *continuing* violation of law, *see supra* at 4; *infra* at 15.

a contract with the Tribes and seeks to order specific performance by Tribal employees. Vanir alleges that Defendant Gabel "executed the NDA on behalf of [the Tribes,]" Compl. ¶ 22, that "[the Tribes] agreed, among other things, that [the Tribes] and Defendants would 'keep all of the Confidential Information of the Discloser confidential[,]'" *id.* ¶ 27, and that "[the Tribes] and its Counsel" agreed that Vanir could seek equitable relief for breach, *id.* ¶ 28. Vanir alleges it "is entitled to specific performance under the NDA," *id.* ¶ 52, and seeks a permanent injunction to require Tribal employees to comply with the NDA, including Tribal Attorney Defendants and their "agents, employees, or representatives," *id.* Prayer for Relief ¶ 2, and seeks "specific performance of Defendants' obligations under the NDA," *id.* Prayer for Relief ¶ 3.

Vanir's requested relief therefore requires the Court to determine that the Tribes is a "Party" to the NDA and require their employees to comply with it. Its requested relief would require Tribal Attorney Defendants and a panoply of Tribal officers and employees to comply with the NDA, *see* Compl. ¶ 26 (quoting definition of "Representatives" bound by NDA); Fed. R. Civ. P. 65(d)(2) (a federal court injunction runs against the parties, "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation" with them). Vanir seeks to control the actions of the Tribes through their officers and employees, and therefore its claim "runs against" the Tribes. *Jamul*, 974 F.3d at 994-95; *see Acres*, 17 F.4th at 911 (immunity applies where "the judgement sought would … interfere with the public administration or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act" (quotation omitted)). Therefore, Vanir can only maintain its claims against Tribal Attorney Defendants if the Tribes' sovereign immunity has been abrogated or waived.

2. The Tribes' Immunity Has Not Been Abrogated or Waived.

Congress has not abrogated the Tribes' immunity from Vanir's lawsuit. And there is no factual dispute that the Tribes did not waive their immunity. As Vanir itself acknowledges, the Tribes never agreed to waive their immunity for actions to enforce the NDA.

A contract cannot waive a core element of tribal sovereignty unless the Tribe itself authorized that waiver. *See Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 112-13 (S.D. 1998) (rejecting argument that a tribe's attorney could waive tribal immunity because "[a] waiver must be clear and unequivocal and must issue from a tribe's governing body, not from unapproved acts of tribal officials"). However, the Tribes did *not* waive sovereign immunity in the NDA. As Vanir alleges, Defendant Gabel informed Vanir that the NDA would "just [be] limit[ed] … to the lawyers" and Vanir should "just … let me sign." Compl. ¶ 19. He was clear that the Tribes and the Fort Hall Business Council ("FHBC") would *not* approve the NDA: "If [the Tribes]/FHBC is going to be subject to this NDA, we will have to get formal authorization, which will require a vote. We do not believe this will happen quickly and it might not even be approved." *Id.*[8] Instead of seeking the Tribes' approval, Vanir agreed "to allow counsel for [the Tribes] to sign." *Id.* ¶ 20. Defendant Gabel, not the Tribes or FHBC, signed the NDA. *Id.* ¶ 22. None of this alleges Tribal consent to suit. And indeed, the Tribes never gave consent. *See* Appenay Aff. ¶ 5.

If there were any question here, it would be resolved by Tribal law, which plainly provides that "[t]he Shoshone-Bannock Tribes and all its constituent parts, subordinate organization, boards or committees … are immune from suit in any jurisdiction except to the extent that such immunity has been expressly and unequivocally waived by the Tribes or the United States." Shoshone-

[8] The FHBC is the governing body of the Tribes. *See* Shoshone-Bannock Tribes Const. art. II, § 1, https://www.sbtribes.com/constitution-bylaws/.

Bannock Tribal Code § 19-3-6; *accord id.* §§ 19-7-24, 19-2-5. Tribal law consistently and expressly protects the Tribes' sovereign immunity and establishes that it cannot be waived without approval by the FHBC. *See id.* §§ 2-2-82, 3-2-7, 19-1-18, 19-5-11, 20-2-9, 25-1-43, 26-2-17;[9] Appenay Aff. ¶ 3. So, the Tribes' immunity could not have been waived without the FHBC's official approval—which was never given.

Even if the Tribes had *authorized* a waiver of their immunity, the NDA does not *actually* waive the Tribes' sovereign immunity. "[A]ny waiver of [tribal] sovereign immunity must be expressed in clear and unequivocal terms." *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1032 (9th Cir. 2022) (citing *C & L Enters. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 417-18 (2001); *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) (Gorsuch, J.)). Contracts can waive tribal sovereign immunity when they identify a specific tribunal in which claims against the tribe may be heard. *See, e.g.*, *C & L Enters.*, 532 U.S. at 414 (requiring submission of disputes to binding arbitration and enforcement of arbitration awards "in any court having jurisdiction thereof"); *see also Demontiney v. United States ex rel. Dep't of Interior*, 255 F.3d 801, 812-13 (9th Cir. 2001) (contract provisions discussing remedies "[a]t best … establish only the Tribe's willingness to face suit in tribal court").

The NDA says nothing at all about tribal sovereign immunity. It defines no forum for adjudication and does not refer to suits against the Tribes or Tribal officers. In Section 11, each Party agrees that a disclosing party "shall be entitled to seek equitable relief, including injunctive relief, for any breach or threatened breach of this Agreement," but it does not define a proper defendant. Section 11 also says that the Parties agree certain defenses to injunctive relief are not

[9] The Shoshone-Bannock Tribal Code is available at https://library.municode.com/tribes_and_tribal_nations/shoshone-bannock_tribes/codes/the_law_and_order_code. Any question about the meaning of Tribal law must be resolved in the first instance by the Tribal Court, *see infra* at 18.

available—i.e., adequate remedy at law, availability of damages, or failure to post bond—although notably tribal sovereign immunity is not among these waived defenses.[10] Without a clear waiver of tribal sovereign immunity, the NDA cannot waive that immunity.

II. The Complaint Should Be Dismissed under Rule 12(b)(6).

Even if this Court had jurisdiction over the claims against Tribal Attorney Defendants, they must be dismissed under Rule 12(b)(6). Vanir lacks a legally cognizable claim. Vanir's claim fails because Defendants are protected by the litigation privilege, Vanir fails to state a claim for breach of contract, and Vanir failed to exhaust its tribal court remedies against Tribal Attorney Defendants.

A. Tribal Attorney Defendants are Protected by Litigation Privilege.

Diversity suits are properly dismissed under Rule 12(b)(6) when they are barred by a state law litigation privilege. *See Morales v. Coop. of Am. Physicians, Inc., Mut. Prot. Tr.*, 180 F.3d 1060, 1062, 1064 (9th Cir. 1999); *Oei v. N. Star Cap. Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1104 (C.D. Cal. 2006); *see also Searcy v. Esurance Ins. Co.*, 243 F. Supp. 3d 1146, 1155 (D. Nev. 2017). In Idaho, "the litigation privilege shall be found to protect attorneys against civil actions which arise as a result of their conduct or communications in the representation of a client, related to a judicial proceeding." *Taylor v. McNichols* (*Taylor I*), 243 P.3d 642, 656 (Idaho 2010).[11] "[I]f

[10] The Tribes' suit against Vanir in Tribal Court and their opposition to Vanir's removal of that case to federal court did not waive tribal immunity, either. "By consenting to the court's jurisdiction to determine its own claims … a tribe does not automatically waive its immunity as to claims that could be asserted against it, even as to 'related matters … aris[ing] from the same set of underlying facts.'" *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1017 (9th Cir. 2016) (quoting *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989)) (second ellipsis and alteration in original); *accord Ute Indian Tribe*, 790 F.3d at 1009; *see also United States v. Shaw*, 309 U.S. 495, 503 (1940) ("The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it.").

[11] Although developed in the defamation context, the litigation privilege applies to all forms of civil claims. *See Taylor II*, 336 P.3d at 267 (citing *Taylor I*, 243 P.3d at 659-63).

any circumstances would support a finding that attorney actions are pertinent to litigation then absolute immunity should protect the attorney." *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co.*, 434 P.3d 1275, 1284-85 (Idaho 2019) (quoting *Taylor I*, 243 P.3d at 657). That presumption is only overcome where "plaintiff pleads facts sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or if he has acted solely for his own interests and not his client's." *Taylor I*, 243 P.3d at 657.[12] But *even when* the plaintiff argues that the presumption should be overcome, "a cause of action against one party's opponent's attorney in litigation, based on conduct the attorney committed in the course of that litigation, *may not be properly instituted prior to the resolution of that litigation* …." *Taylor v. Riley* (*Taylor II*), 336 P.3d 256, 267 (Idaho 2014) (quoting *Taylor I*, 243 P.3d at 659).

Vanir's claim against Tribal Attorney Defendants falls squarely within the litigation privilege. Vanir sues attorneys for the Tribes, who currently or did represent the Tribes in the Tribal Court litigation, which is ongoing and in which Vanir and the Tribes are adversaries. Vanir alleges that Associate General Counsel Gray sent an email stating he is "an attorney representing" the Tribes, Compl. ¶ 31, and that the email contained information that was shared with the Tribes as part of an effort to settle the Tribal Court litigation, *id.* ¶¶ 10, 34-42, 47-48. Settlement of litigation is certainly "pertinent" or "related to" that litigation.[13] And Vanir asserts risks of future harm that, while specious, relate to that ongoing litigation, *see id.* ¶ 49. Vanir does not allege that Tribal Attorney Defendants have acted beyond the scope of their representation of the Tribes or

[12] Oregon has acknowledged an exception—not established in Idaho—for allegations that attorneys have subverted judicial authority by falsely initiating litigation or defrauding the court. *Chase v. Gordon, Aylworth & Tami, P.C.*, No. 3:18-cv-00568-AC, 2020 WL 1644310, at *6-11 (D. Or. Feb. 14, 2020). Even if Oregon law applied here—it does not—there are no such allegations.

[13] *See Taylor I*, 243 P.3d at 654 ("encouraging settlement" is a purpose of the privilege (quoting *Clark v. Druckman*, 624 S.E.2d 864, 870 (W.Va. 2005))).

that they are solely pursuing their own interests. But even if Vanir made such allegations, its suit would *still* be barred while the Tribal Court case is ongoing, which it is now, *id.* ¶ 42. *See Taylor II*, 336 P.3d at 267 (quoting *Taylor I*, 243 P.3d at 659). Vanir therefore fails to state a claim.

B. Vanir Cannot Maintain a Breach of Contract Claim.

Vanir fails to state a claim because it cannot maintain a breach of contract action against Tribal Attorney Defendants. *Cf.* Compl. ¶¶ 44-52. Such a claim can only be brought against a defendant in privity with the plaintiff—meaning they actually entered into a contract. *See DAFCO LLC v. Stewart Tit. Guar. Co.*, 331 P.3d 749, 754 (Idaho 2014). When the privity requirement is met, "[t]he elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC v. Berryhill & Co.*, 297 P.3d 232, 278 (Idaho 2013). Vanir's does not allege privity against Tribal Attorney Defendants or the elements of a contract claim.[14]

1. Vanir is Not in Privity with Tribal Attorney Defendants.

Vanir clearly lacks a cause of action against Tribal Attorney Defendants. "It is axiomatic in the law of contract that a person not in privity cannot sue on a contract. Privity refers to those who exchange the [contractual] promissory words or those to whom the promissory words are directed. A party must look to that person with whom he is in a direct contractual relationship for

[14] Vanir alleges conspiracy to breach the contract, as well as violations of, and conspiracy to violate, the covenant of good faith and fair dealing. Compl. ¶¶ 32, 47-48. These are not independent causes of action, and since the NDA was not breached, and Tribal Attorney Defendants acted consisted with its purposes, these allegations do not state a claim. *See Tricore Invs., LLC v. Estate of Warren ex rel. Warren*, 485 P.3d 92, 123 (Idaho 2021) ("[A] civil conspiracy 'is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself.'" (quoting *McPheters v. Maile*, 64 P.3d 317, 321 (Idaho 2003))); *Thurston Ents. v. Safeguard Bus. Sys.*, 435 P.3d 489, 503 (Idaho 2019) (violation of covenant of good faith and fair dealing "occurs only when 'either party … violates, nullifies or significantly impairs any benefit of the … contract …'" (quoting *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 863 (Idaho 1991))).

relief, in the event that his expectations under the contract are not met." *DAFCO*, 331 P.3d at 754 (quoting *Wing v. Martin*, 688 P.2d 1172, 1177 (Idaho 1984)). "Privity is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff." *Campbell v. Parkway Surgery Ctr., LLC*, 354 P.3d 1172, 1178 (Idaho 2015) (quoting *OAIC Com. Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 738 (Tex. App. 2007)). Vanir's claims against Tribal Attorney Defendants collapse right out of the gate because the Tribal Attorney Defendants are not in a "direct contractual relationship" with Vanir and did not exchange promises with it. *See Peregrine Falcon LLC v. Piaggio Am., Inc.*, 446 F. Supp. 3d 654, 668 (D. Idaho 2020). They did not sign the NDA. Instead, *Defendant Gabel* did, purportedly on behalf of *the Tribes*. Compl. ¶ 22 & Ex. A at 2. Vanir thus has no breach of contract cause of action against Tribal Attorney Defendants.

2. Vanir Has Not Shown a Breach.

The plaintiff bears the burden of proving the existence of a contract and the fact of its breach. *Mosell*, 297 P.3d at 278 (citing *O'Dell v. Basabe*, 810 P.2d 1082, 1099 (Idaho 1991)). Vanir cannot establish a breach of contract action for potential future breaches, *see* Compl. ¶ 49, because none of those breaches have yet occurred so there is no "fact" of breach. Therefore, Vanir could only rely on the January 31 email to maintain its claims. *Cf.* Compl. ¶¶ 47-48 (relying on January 31 email to allege breach). But the January 31 email did not breach the NDA.

Vanir's claim can only succeed if sending the January 31 email was contrary to the NDA. "The interpretation of a contract begins with the language of the contract itself." *Dickinson*, 434 P.3d at 1290 (quotation omitted). The NDA "must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Smith v. Smith*, 561 P.3d 459, 467 (Idaho 2024) (quoting *Kelly v. Kelly*, 518 P.3d 326, 338 (Idaho 2022)). Section

3 requires the parties to keep Confidential Information "confidential," and not "disclose, permit access to or use" it "except as required to carry out the Purpose."

What do these obligations require? "[C]onfidential" is not defined, but it commonly means "secret." *See, e.g.*, *American Heritage Dictionary* 385 (5th ed. 2018); *New Oxford American Dictionary* 364 (3d ed. 2010) ("intended to be kept secret"); *cf. ABK, LLC v. Mid-Century Ins. Co.*, 454 P.3d 1175, 1183 (Idaho 2019) (relying on dictionary for plain meaning of contractual term). The "Purpose" is "to assure the protection and preservation of certain confidential and/or proprietary information disclosed or made available by a Party to the other Party and/or its respective affiliates in connection with the Parties' discussions of a potential transaction involving the potential financing of a settlement agreement." NDA, Prelim. Statement. So, in Section 3, the Parties agree to keep "Confidential Information" secret while discussing the potential financing of a settlement agreement.

What is the "Confidential Information" that must be kept secret? "Confidential Information" means "all information disclosed to a Party or its affiliates ('Recipient') or any of their respective Representatives (as defined below) by or on behalf of the other Party or its affiliates ('Discloser') or any of their respective Representatives … on or after the Effective Date of this Agreement." NDA § 1(A). "Confidential Information" does *not* include "information that Recipient can prove: (i) at the time of disclosure is, or thereafter becomes, generally available to and known by the public other than as a result of, directly or indirectly, any violation of this Agreement by the Recipient or any of its Representatives …." *Id.* § 1(A).

The January 31 email did not breach Section 3 of the NDA. Contacting Vanir's auditor about the financial statement did not affect the secrecy of any "Confidential Information" and was part of the "Purpose" of the NDA. Vanir's auditor obviously already knew they were Vanir's

auditor and the contents of the financial statement they prepared. Mentioning information to someone who already knows it does not affect its secrecy. And evaluating a potential settling party's financial condition by referencing a financial statement to a party's own auditor is necessary to the NDA's "Purpose"—i.e., discussing the potential financing of a settlement agreement. Mentioning the Tribal Court lawsuit did not violate the NDA, either, because that was not "Confidential Information." Even if the auditor was previously unaware of that lawsuit, the existence of that suit and the amount the Tribes sought had not been disclosed by Vanir under the NDA. *See* NDA § 1(A). And the details of that suit would fall under the exception in Section 1(A)(i), since that information was "generally available" as a matter of public record, partly due to Vanir's failed effort to remove the lawsuit, *see Vanir I*, 2023 WL 4706007.

3. Vanir Cannot Show the Existence of Damages or Causation.

Additionally, to prove breach of contract, a plaintiff "has the burden to prove that he was injured and his injury was the result of the defendant's breach ….'" *Hull v. Giesler*, 331 P.3d 507, 516 (Idaho 2014). As discussed *supra* at 5, Vanir does not allege any injury at all from the result of the alleged January 31 email. Because Vanir has not alleged any injury, it also cannot show causation. Therefore, it cannot meet these elements of the requirements for breach of contract, and its claim is legally insufficient.

C. Even if this Court Had Jurisdiction, Vanir Would Have to Exhaust Remedies in Tribal Court.

Assuming only for sake of argument that this Court had jurisdiction, Vanir's claims against Tribal Attorney Defendants would be controlled by the tribal exhaustion doctrine. That doctrine requires the Court to dismiss Vanir's suit against Tribal Attorney Defendants and that Vanir pursue its claims in Tribal Court. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008). "Principles of comity require federal courts to dismiss or to abstain from deciding claims over

which tribal court jurisdiction is 'colorable,' provided that there is no evidence of bad faith or harassment." *Id.* at 920 (quoting *Atwood v. Fort Peck Tribal Ct.*, 513 F.3d 943, 948 (9th Cir. 2008)). "[T]he tribal exhaustion requirement also applies to issues of tribal sovereign immunity." *Sharber v. Spirit Mtn. Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (per curiam). Exhaustion of tribal remedies is "mandatory," *Marceau*, 540 F.3d at 920 (quoting *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991)), and "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement," *id.* at 921 (quoting *Sharber*, 343 F.3d at 976 (alteration in original)); *accord Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("Whether proceedings are actually pending in the appropriate tribal court is irrelevant.").

First, if there is any question of tribal law about the scope of tribal sovereign immunity, that question must be exhausted in Tribal Court. Where determination of waiver of tribal sovereign immunity requires "study of the application of tribal laws," the federal court should "stay its hand until after the … Tribal Courts have the opportunity to resolve the question." *Sharber*, 343 F.3d at 976 (quoting *Stock W. Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc)); *see also Burlington N.*, 940 F.2d at 1246 ("initial exercise of tribal jurisdiction would not only bolster tribal self-government, but also would provide any subsequently reviewing federal court with authoritative interpretation of" tribal law).

Assuming, again only *arguendo*, that Vanir's claims were not barred by tribal sovereign immunity, tribal exhaustion would also be required because Tribal Court jurisdiction over Vanir's claims against Tribal Attorney Defendants is "colorable." Vanir sues Tribal Attorney Defendants for breach of contract in an attempt to bind the Tribes and their employees, *see supra* at 8-9, and its claims ultimately arise from a dispute over construction on tribal land, *see Vanir I*, 2023 WL

4706007, at *1. Because Vanir alleges that it entered into a consensual relationship with the Tribes that was related to disputes over construction on tribal lands, the Tribal Court at least has colorable jurisdiction to determine whether such a relationship exists and, if it does, adjudicate its meaning. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (a tribe has jurisdiction over a nonmember who has entered a "consensual relationship[] with the tribe or its members"); *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 878-82 (9th Cir. 2024), *rehearing en banc denied* 117 F.4th 1106, *cert. denied* No. 24-884, 2025 WL 1426677 (U.S. May 19, 2025) (tribe has jurisdiction under *Montana* over non-tribal commercial partner that entered into insurance contracts with the tribe for buildings on tribal land); *see also FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932-33 (9th Cir. 2019) (Tribes have jurisdiction over a non-Indian who "should have reasonably anticipated that [its] interactions might 'trigger' tribal authority" (alteration in original) (quotation omitted)).

Vanir has already asked the Tribal Court to adjudicate whether the Tribes breached the NDA. Compl. ¶ 34; *see* Ex. A; Ex. C, Order on Def.'s Emergency Mot. for Sanctions, *Shoshone-Bannock Tribes v. Vanir Constr. Mgmt., Inc.*, No. 2023-CV-CM-0051 (Shoshone-Bannock Tribal Ct. Feb. 5, 2025) ("Tribal Ct. Order").[15] The Tribal Court rejected Vanir's attempt to raise the issue in a motion for sanctions, but acknowledged that jurisdiction for a breach of contract claim was at least colorable, as Tribal Court jurisdiction "over a breach of contract action related to this alleged breach of the NDA is not readily apparent and the basis for jurisdiction would have to be developed in some sort of evidentiary proceeding." Tribal Ct. Order at 5-6 (footnote omitted).[16]

[15] Vanir incorporated the Tribal Court's order by reference, *see* Compl. ¶¶ 36-39, and the Court may take notice of it, *see United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

[16] The Tribal Court's footnote cited provisions of the Tribal Code governing Tribal Court adjudicatory authority but did not analyze how they might apply to Vanir's claims. Tribal Court Order at 6 n.1. The Tribal Court reasoned that "[a]ssuming tribal jurisdiction, it would also require an evidentiary hearing to determine if the NDA was breached," *id.* at 6, but it did not have the benefit of a pleading, or motion practice, on which to make that determination.

The Tribal Court could not resolve whether the NDA was breached on a sanctions motion because of the limited scope of its authority to impose sanctions, not because the Tribal Court would lack jurisdiction to hear claims for breach of the NDA. *Id.* at 4-5. Vanir's claims might be barred in Tribal Court for pleading deficiencies or other reasons, but that is for the Tribal Court to decide.[17]

There are exceptions to tribal court exhaustion, but none apply. *Cf. Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 847 (9th Cir. 2009) (citing *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)) (discussing four exceptions). There is no "evidence of bad faith or harassment" in tribal jurisdiction, *see id.*, as Vanir itself has raised its breach of contract claims and has already submitted the issue to Tribal Court. Jurisdiction is also not "patently violative of express jurisdictional prohibitions," *see id.*; *see also El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999), since there is nothing that expressly prohibits the Tribal Court from exercising jurisdiction. Exhaustion would not be "futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *see Elliott*, 566 F.3d at 847 (alteration in original), since as the Tribal Court acknowledged it would hold a hearing on the question of tribal jurisdiction, and Vanir could challenge jurisdiction in that proceeding. And it is not "plain" that tribal jurisdiction is lacking, *see id.*, because as just explained jurisdiction is at least colorable, *see supra* at 18-19.

CONCLUSION

For the foregoing reasons, Tribal Attorney Defendants respectfully request that the Court dismiss Vanir's claims against them.

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[17] Courts may stay cases, instead of dismissing, where a short statute of limitations might prevent re-filing. *Sharber*, 343 F.3d at 976; *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13-14 (9th Cir. 2012). Here, Vanir's statute of limitations is five years. *See* Idaho Code § 5-216.

Date: June 16, 2025

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June 2025, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the individuals who are registered with the U.S. District Court CM/ECF System.

/s/ Frank S. Holleman
Frank S. Holleman