UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MONSTER TECHNOLOGY GROUP, LLC **3708 Las Vegas Boulevard** **Suite 2102W** **Las Vegas, Nevada 89109** **Plaintiff,** **v.** **GARRETT A. ELLER, JUDGE** **TRIBAL COURT** **IOWA TRIBE OF OKLAHOMA** **335588 East 750 Road** **Perkins, Oklahoma 74059** **Defendant.**	)	**Case No. CIV–21–879–J**

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR RECONSIDERATION

A longtime, very well respected member of the Oklahoma Bar – and retired United States Magistrate Judge – answered a call from the American Arbitration Association ("AAA") to serve as Arbitrator in the commercial dispute between Plaintiff and the Iowa Tribe of Oklahoma. *See Nitro-Lift Technologies, LLC v Howard.*, 568 U.S. 17, 133 S.Ct. 500, 503, 184 L.Ed. 2d 328 (2012) "[W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the [Federal Arbitration] Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'...." (citations omitted))

Rather than participate in arbitration – which would almost certainly have resulted in a decision on the merits by now – the Tribe instead hastened to its own Tribal Court, where Garrett A. Eller, a newly appointed judge of the Court, promptly entered a preliminary injunction purporting to bar the arbitration from proceeding.[1]

Plaintiff treated at some length the absence of any jurisdictional predicate for entertaining a contractual dispute between the Tribe and a non–Indian corporation relating to services to be rendered far from Tribal lands, with respect to operations to be conduct outside the United States.

Judge Eller treated the fundamental jurisdictional issue in a single, conclusory sentence: "The Court has subject matter jurisdiction of the above–styled action." Preliminary Injunction ("Preliminary Injunction") (District Court of the Iowa Tribe), Case No. CIV–21–02 (April 13, 2021), ¶ 1 (Exhibit 3 to Complaint for Interlocutory and Injunctive Relief ("Complaint").

Moreover, the basis for Plaintiff's claim in arbitration was plainly the Agreement of November 2016 between the Tribe and Plaintiff's predecessor in interest UEG. Complaint, ¶ 42. Yet Judge Eller also proceeded tofind that "Monster initiated an arbitration ... [in which it] alleges breaches of **the [September] 2017 Asset Purchase Agreement**." (emphasis added), Preliminary Injunction, ¶ 4, so enjoined arbitration on

[1]The AAA was not a party to the litigation in the Iowa Tribal Court, or otherwise subject to its jurisdiction. It nonetheless stayed the arbitration pursuant to longstanding policy.

the basis of a purported agreement to which Plaintiff was not a party.

We submit that any purported basis for exercising jurisdiction here – which Judge Eller made no effort to explain beyond a single sentence– is of necessity much less compelling than the predicate which the Tenth Circuit held insufficient for a Tribal Court to exercise jurisdiction in *Crowe Dunlevy. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). There Tribal Court Judge Stidham directed several attorneys appearing before him – who had sought and obtained membership in the Bar of the Tribal Court – to disgorge attorney fees pending decision as to whether they and their law firm received them appropriately.

The Tenth Circuit in *Stidham* overruled the lower court and held the basis for exercising Tribal Court jurisdiction so manifestly inadequate that an injunction was indeed warranted to restrain the Tribal Court from any continued exercise of jurisdiction as against non–Indian attorneys, notwithstanding voluntary membership in the Bar of the Tribal Court.

Plaintiff here noted an appeal to the Iowa Supreme Court almost immediately following entry of the preliminary injunction. That was nearly six months ago. It took some time for the Clerk, first, to docket the appeal; and second, to inform counsel that the Supreme Court will not be entertaining the matter any time soon: The Supreme Court now consists of just one judge, who lacks the capacity to set a briefing schedule, hear oral argument, or render a decision.

This Court has squarely held that "[I]f the Tribal Supreme Court upholds the lower court's determination that it has jurisdiction, Plaintiff may challenge that ruling before this Court. *See Nat'l Farmers Union*, 471 U.S. at 853. But unless and until that happens, because the exhaustion of tribal court remedies is required before Plaintiff's claims may be considered by a federal court, and because Plaintiff has not exhausted its tribal court remedies, this case is hereby DISMISSED without prejudice." Order, Case No. CIV–21–879–J (September 15, 2021).[2]

The Tribal Supreme Court already had little incentive to fill vacant judicial seats in order to entertain an appeal by a party suing the Tribe for significant economic relief. This Court's holding gives it even less incentive to fill longstanding judicial vacancies.

The Tenth Circuit has defined "clear error" element of the standard on Rule 59(e) reconsideration as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc*., 259 F.3d 1226, 1235 (10th Cir. 2001).

We have found no instance where the Tenth Circuit has defined "manifest injustice in a Rule 59(e) context. However, the venerable Mr. Black has defined "injustice" as "[t]he withholding or denial of justice. In law, almost invariably applied to the act, fault or omission of a court, as distinguished from that of an individual." *Black's Law*

[2]The definitive nature of the Court's holding on exhaustion has dissuaded us from seeking reinstatement of the complaint and opportunity for amendment. However, if the Court were to reinstate the Complaint and deem it appropriate, we would certainly take the opportunity to amend.

Dictionary, Revised Fourth Ed. (1968). As for "manifest", Mr. Black defines it in part as "synonymous with open, clear, visible, unmistakable, indubitable, evident, and self evident." *Ibid.*

Like "clear error', "manifest injustice" is plainly a high standard. We do not argue for such a judicial finding lightly. But the Court has effectively placed the keys to the federal courthouse in the pocket of an adversary with no incentive to hand them over any time soon, if at all. In the meantime, the Court's holding serves to prevent a very well respected, very experienced lawyer designated by the American Arbitration Association as Arbitrator from promptly hearing and deciding the matter on the merits. We respectfully submit this represents a judicial "denial of justice" in this instance that is "clear ... unmistakable ...", *ibid.,* and easily remediable by reinstatement of the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reinstate the Complaint and permit the litigation to go forward. If the Court should grant the request, Plaintiff would have no objection – upon entry of appearance for Defendant – to staying the lawsuit, with the requirement of status reports at regular intervals. *Cf. Legg, LLC v. Seneca Nation of Indians,* 518 F.Supp. 2d 274, 275 (D.D.C. 2007). Close judicial oversight should mean some incentive to the Tribe to fill long vacant seats on its Supreme Court, and attendant incentive for the Court to hear and decide the appeal.

Respectfully submitted this 13th day of October 2021,

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