UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SICHENZIA ROSS FERENCE, LLP and WELTZ LAW P.C.

Plaintiffs,

vs.

SKULL VALLEY BAND OF GOSHUTE INDIANS OF UTAH,

Defendant.

Case No. 1:23-cv-6415

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

INTRODUCTION

The Skull Valley Band of Goshutes Indians (the Band) is a federally recognized Indian Tribe. Since time immemorial the Band has lived in a harsh desert environment in the Great Salt Lake basin, west of Salt Lake and into eastern present-day Nevada. Unlike some other tribes, the Band does not have a casino, significant natural minerals or agricultural lands, or a large land base. The Band's present-day Skull Valley Reservation (Reservation) and the surrounding area remain very sparsely populated to this day, limiting other economic opportunities.

Beginning in about 1996, the Band invested in REMICs, a relatively uncommon form of security. In two New York state court cases, the courts held, under materially indistinguishable contracts and facts, that a large national bank which was the trustee for the REMICs had wrongly kept the proceeds when it closed out the REMICS—any value was owed to the investor, not the trustee bank. The Band brought suit to recover the amount the bank owed it under its REMICS.

Plaintiff Law Firms (hereinafter the Law Firms or Plaintiffs) represented the Band for a period of time in that suit. When the Band declined to accept a below-value settlement that the Law Firms and the Bank were both trying to push the Tribe to accept, the Law Firms abandoned the suit in mid-stream. The Law Firms then wrongly filed liens in state court and in this Court, even though they admit that at all relevant times, they have known they have no right to a lien![1] They now bring this suit, seeking to enjoin a tribal court case that the Band filed 20 months ago.

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1 Federal case law uniformly holds that attorney liens against tribes and other governments are barred if the government has not waived immunity for the lien. *E.g., Yankton Sioux Tribe v. Bernard,* D.D.C. case 03-01603 (lien barred), *appeal dismissed as moot after tribe received the settlement in the underlying case*, D.C. Cir. case 15-5099; *Elam v. Monarch Life Ins. Co.*, 598 A.2d 1167 (D.C. Cir. 1937); *Watters v. WMATA*, 295 F.3d 36 (D.C. Cir. 2002); *Peterson v. Islamic Republic of Iran*, 724 Fed. App'x 1 at 4 (D.C. Cir. 2018); *Knight v. U.S.*, 982 F.2d 1573, 1578-79. (Fed. Cir. 1993) (because there was no waiver of federal sovereign immunity, a law firm could not assert a lien against the United States); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (tribal sovereign immunity barred law firm's suit on a contingent fee contract.

Even though they admit they did not bargain for, and did not obtain, a right to a waiver of sovereign immunity and therefore do not have a legal right to the abusive lien which they filed, they attempt to appeal to racially tinged "equity," claiming they are the victims of an Indian tribe.

SUMMARY OF THE ARGUMENT

The two merits issue for the Law Firm's case in this Court are: 1) have Plaintiffs met their burden to plead and prove a waiver of, or exception to, the Band's sovereign immunity from suit; and 2) if so, is there a *colorable claim* that the C.F.R. Court which serves as the Band's Court (the CFRC) has subject matter jurisdiction over the suit which the Band filed in the CFRC. If there is a colorable claim in the CFRC, under the interlocutory posture of the case in the CFRC, the CFRC is not currently violating a federally imposed limitation on tribal court subject matter jurisdiction, and this Court cannot enjoin the suit in the CFRC.

Plaintiffs would have to prevail on both of the merits issues, but they have no discernable chance of prevailing on either issue. 1) Plaintiffs did not even plead a waiver of immunity, and the Tribe has not waived its immunity for the current suit. 2) There is obviously much more than a colorable claim that the CFRC has jurisdiction over the Band's lawsuit. The Band's view is that Plaintiffs' suit is frivolous.

Plaintiffs' complaint and brief do not even discuss the first of the two issues, and Plaintiffs devote less than two pages to the second issue. Their argument on the second issue lacks any legal merit and is also based upon their disputed (and in part false) factual assertions. Most of the Law Firms' brief discusses their noncognizable, disputed and dubious allegations of fact and their meritless view on other immaterial issues.

Plaintiffs' primary errors both stem from their view that this Court decides all of their legal and factual allegations de novo. It does not. Instead, as summarized above, this Court's review is very narrow.

Second, Plaintiffs wrongly contend that this Court relies on the statements of fact in their complaint and the self-serving affidavits they submitted in this Court. Federal case law is all to the contrary. On this issue, the Court's review is akin to review from an administrative agency. It is strictly limited to the record in the CFRC (and then only as it relates to CFRC subject matter jurisdiction for the reason discussed above). In the current posture, because the CFRC has so far only denied a motion to dismiss on the pleadings, this Court must apply the facts related to subject matter jurisdiction alleged by the CFRC plaintiff, i.e., the Band, together with the Law Firms' subsequent binding admissions in the CFRC.

The Band is aware that this Court is not often called upon to decide issues of federal Indian law, and the Band will provide the legal background so that the Court can see that the merits issues are as stated above.

Plaintiffs also cannot show irreparable injury. In fact, they do not show any cognizable injury.

Finally, the balance of harm and public interest strongly weighs against a preliminary injunction.

STATEMENT OF CFRC PROCEDURAL HISTORY

As a federally recognized Indian Tribe, the Band has sovereign immunity from unconsented suit and sovereign immunity from unconsented attorney liens. For purposes of the current case, the Law Firms bindingly admit that they have, at all relevant times, known this. Pl. Admissions 15, 21. Nevertheless, after the Law Firms abandoned the Band's lawsuit against the bank in mid-stream, the Law Firms wrongly filed attorney liens in state and federal court.

On or about December 1, 2021, the Band brought a declaratory judgment action against the Law Firms in the C.F.R. Court[2] for the Western Region of the United States (CFRC), the federally-operated court system[3] which provides civil and criminal court services for the Band on the Band's Reservation.[4] Through its CFRC complaint, the Band seeks declaratory relief to resolve a dispute regarding on whether the Band had waived sovereign immunity to suits or liens.

Plaintiffs filed a naïve and meritless motion to dismiss under CFRC Rule 3.15, a rule analogous to FRCP 12. In their motion, as in this Court, Plaintiffs admitted that they had a consensual fiduciary relationship with the Band, effectively admitting CFRC jurisdiction. Plaintiffs admitted they had directed substantial contacts to the Band on the Reservation—including calls, emails, letters, the proposed settlement, etc. (although they grossly understated the full scope of their contacts). Their argument for lack of personal jurisdiction was dependent upon their own disputed and in part false version of facts, and also dependent on a legal theory that the United States Supreme Court rejected decades ago—that physical entry is absolutely required for

[2] These federal courts are commonly referred to as CFR Courts because they are governed by 25 C.F.R. Part 11. They are also, though less commonly, referred to the Court of Indian Offenses, a potentially confusing term given that the courts also handle civil matters.

[3] For most issues relevant to the current suit, the analysis of C.F.R. Court is identical to analysis of courts operated by tribes (tribal courts). The case load of C.F.R. courts and reported federal court decisions stemming from C.F.R. Courts, is very small compared to tribal courts. *See generally Denezpi v. United States*, 142 S. Ct. 1838 (2022) (providing a detailed discussion of the history and function of C.F.R. courts).

[4] In their brief, Plaintiffs provide a red herring factual assertion that their work for the Band did not result in sufficient contacts with Arizona and Nevada. That factual assertion cannot be accepted under the current posture, but it is also immaterial for multiple reasons. First, this Court has no authority to act as an appellate body over the CFRC decision on personal jurisdiction. Second, the Band is not located in Arizona or Nevada. The Band, and the Courtroom the CFRC uses when providing judicial services to the Band, are on the Skull Valley Reservation in Utah. Plaintiffs' transparent attempt to distract, like many of their other utterly meritless assertions, reflects that they have no serious argument on the actual issues presented.

personal jurisdiction. Plaintiffs also sought to add an additional requirement that the physical entry had to be by an employee of the Defendant, not some other agent of the Defendant.[5]

The CFRC denied the Law Firms' motion under the standard for motions to dismiss on the pleadings. The federally retained CFRC Judge very reasonably did not even view the motion to have sufficient merit to warrant more than an order of summary denial.

The Law Firms filed an appeal from the order denying their motion to dismiss. The appeal was filed with the Court of Indian Appeals, the appellate body for the CFRC. They filed the appeal even though 25 C.F.R. Part 11 does not permit any interlocutory appeals. Instead, parties in the CFRC must wait until there is a final judgment before they can appeal. Their appeal was therefore dismissed as premature, without review of the merits of the trial court decision.

The parties then returned to the CFRC, and the discovery phase of the case began. The parties are about four months into the five month discovery period. Discovery closes on September 20, 2023. The Band sought discovery regarding whether or not agents for the law firms travelled to the Reservation.[6] The Band also sough discovery on the other very substantial contacts which they had with the Tribe as the Tribe's fiduciary agent. The Law Firms refused (and are still refusing) to provide discovery on any of those issue, asserting, inter alia, that the scope of their contact with the Reservation is irrelevant and immaterial in the CFRC. Dkt. 8-23.

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[55] The Band's understanding is, as a matter for the CFRC to determine and not an issue for this Court, Plaintiffs have now waived any claim of lack of personal jurisdiction. Redundantly, they have also definitively admitted facts which are more than sufficient to establish personal jurisdiction when the CFRC decides personal jurisdiction on the facts. Pl. Admissions.

[6] In their motion to this Court, Plaintiffs claim it is "undisputed" that their attorneys never travelled to the Reservation. As the Band has repeatedly said in the CFRC, their self-serving assertion is disputed pending completion of discovery on the issue, and that the Band also believes that even if the attorneys did not enter the Reservation, other agents for the Law Firms did.

The Law Firms also, and foolishly, refused to answer any requests for admissions, instead submitting only a boilerplate bad faith litany of "objections" which are not even cognizable objections to requests for admission. Their primary objection was that because they disagreed with the CFRC's denial of their motion to dismiss, they would not answer requests for admission.

In June 2023, the Band filed two motions related to Plaintiffs' bad-faith discovery responses. The CFRC issued its decision on those motions on July 24, 2023. Most significantly, the CFRC held that the Law Firms had admitted all of the Band's requests for admission. The Law Firms prevailed on the other motion. The next day, the Law Firms filed their complaint and motion for TRO in this Court, a motion which they had apparently drafted months ago.

The Band anticipates filing for summary judgment in the CFRC once discovery is completed. If that is granted, it would constitute an appealable order within the CFRC system.

DISCUSSION OF FACTS

1. Prior to March 7, 2019, Plaintiffs entered into a consensual fiduciary attorney client relationship with the Band.

2. On or around March 7, 2019, Plaintiffs delivered their proposed written "Retainer for Legal Representation" (hereinafter the Retainer) to the Band. Dkt 8-1. At that time, Plaintiffs knew they were submitting the Retainer to a sovereign Indian Tribe on that Tribe's Reservation. Ex. 1, Federal Court Plaintiffs' (CFRC Defendants') Admission 6, 16-18 (hereinafter Pl. Admissions).[7]

3. In their proposed Retainer, Plaintiffs chose not to negotiate for, and they did not obtain, a waiver of the Band's sovereign immunity from suit or attorney liens. Dkt. 8-1.

[7] Exhibit 1 are the requests for admission which the Band submitted to the Law Firms in the CFRC. Both Law Firms admitted each of those requests because neither law firm submitted any good faith answer or response to any request. Ex. 3 (CFRC order on motion to confirm that requests were admitted).

4. After the Plaintiffs submitted their proposed retainer agreement, they met with the Band to discuss the terms of that proposed Retainer. Pls. Admission 9.

5. The Band's Executive Committee, knowing that the Retainer did not contain any waiver of the Tribe's sovereign immunity, approved the Retainer. That tribal governmental action was taken on the Band's Reservation. The Band's Chairwoman executed the Retainer in her official position as Chairwoman. She took that action on the Band's Reservation. Ex. 2 (Bear Aff, submitted in CFRC).

6. The Band returned the Retainer to Plaintiffs. Plaintiffs executed the Retainer and then returned it to the Band on the Reservation.[8]

7. Plaintiffs drafted that retainer agreement, and any ambiguity in the Retainer must be interpreted against Plaintiffs. Pl. Admission 8, 10.

8. At the time they submitted the Retainer, Plaintiffs knew the Band had sovereign immunity from unconsented suit by Plaintiffs and knew the Retainer did not waive the Band's sovereign immunity from suit. Pls. Admissions 13, 20; Dkt. 8-10, ¶¶8, 15-17, 21.

9. At the time they submitted the Retainer, Plaintiffs knew that *the Band's sovereign immunity barred Plaintiffs from asserting any attorney lien*. Pls. Admissions 15, 21.

10. Plaintiffs knew they had no legally enforceable claim for payment of legal services, and that if the chose not to perform their services to the Band's satisfaction, the Band would have the authority to rest on its sovereign immunity. Dkt. 8-10, ¶¶8, 15-17, 21.

[8] Under the current posture, the Band is not disputing Plaintiffs' assertion that they executed the Retainer after the Band executed it. The Band believes this may prove to be incorrect once discovery is completed in the CFRC.

11. Under the consensual attorney-client relationship, Plaintiffs were to handle litigation as the Band's attorney, under direction from the Band's governing body. They were therefore fiduciary agents to the Band, which is domiciled on the Band's Reservation. Dkt. 8-10, ¶¶7-10.

12. For the next two plus years, Plaintiffs engaged in substantial and regular contact with the Band under their consensual attorney-client relationship with the Band. Plaintiffs made numerous calls to the Band's officers on the Reservation, and communicated with the Band's government officers by phone and written communications directed to the Band's Reservation. Ex. 2, Bear Aff. ¶¶5-6 and attachments thereto; Admissions 15-18, 36.

13. While they were the Band's attorney, Plaintiffs were given access to vast quantities of the Band's property and other information. Ex. 2, Bear Aff. ¶¶5-6 and attachments thereto

14. Plaintiffs did not perform services to the Band's satisfaction. ____, ¶¶10-13.

15. As the Band's attorneys, Plaintiffs participated in a mediation. After that mediation, Plaintiffs submitted to the Band a proposed settlement agreement for the litigation with the bank. Plaintiffs asserted that the Band should approve their proposed settlement, *even though, as they now admit, the Settlement was not in the Band's best interest.* Pl. Admission 35.

16. Plaintiffs' proposed settlement agreement contained provisions that the Band found unacceptable, and the Band disapproved the proposed settlement. The unacceptable provisions included but were not limited to provision, solely for the benefit of the Plaintiffs and contrary to the interests of the Band. Those provisions would have held a substantial portion of the settlement funds hostage until the Plaintiffs received whatever amount of money Plaintiffs wanted from the settlement. Dkt 8-10 at 2. The Plaintiffs also attempted to slip into the agreement a waiver of the Band's sovereign immunity. Had the Band signed that proposed settlement, the Plaintiffs could have at least argued that it permitted them to assert or enforce a lien. ____*Id.* at 11.

17. When the Tribe disapproved the settlement, Plaintiffs ceased providing services.

18. Despite *knowing* the Band's' sovereign immunity barred an attorney lien against the Band, Plaintiffs wrongly filed attorney liens against the Band. Pl. Admission 24; Dkt. 8-10, ¶¶12-13.

19. The Band directed Plaintiffs to return all tribal government property. Plaintiffs admit they hold tribal governmental property and are refusing to comply with the tribal directive to return that property. Admissions 26-30; Dkt. 8-10 ¶11.

20. On or about December 1, 2021, the Band filed suit in the CFRC against Plaintiffs for a declaratory judgment to resolve a dispute regarding the terms of the consensual agreement between the Band and Plaintiffs.

DISCUSSION OF LAW

I. THIS COURT MUST DENY THE MOTION FOR PRELIMINARY INJUNCTION BECAUSE PLAINTIFFS HAVE NOT ALLEGED AND INDEPENDENTLY BECAUSE PLAINTIFFS CANNOT PROVE A WAIVER OF THE BAND'S SOVEREIGN IMMUNITY FROM THIS SUIT.

As discussed in the Band's motion to dismiss this case, this Court is required to dismiss the case because Plaintiffs have not met their burden to plead or to provide a waiver of the Tribe's sovereign immunity from suit.

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE PLAINTIFFS HAVE NOT EXHAUSTED TRIBAL COURT REMEDIES.

Plaintiffs devote less than two pages of their brief to the material "success on the merits" element: whether exhaustion of tribal court remedies is required. Their rudimentary discussion is without the slightest merit. Most of Plaintiffs' errors are obvious, but some require more background on the differences between "pre-exhaustion review" and "post-exhaustion review." Plaintiffs incorrectly intermingle these two standards. In the current case, the Court must apply the standard for pre-exhaustion review.

A. PLAINTIFFS HAVE NOT EXHAUSTED TRIBAL COURT REMEDIES.

Although this Court may not have had any prior case on tribal exhaustion, exhaustion of remedies is, of course, familiar to the Court, and the Court will have no difficulty concluding that Plaintiffs have not exhausted CFRC remedies. To exhaust tribal court remedies, a tribal court party must obtain a *final merits decision* from the Tribe's highest court.[9] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *Nat'l Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 857 (1985). The Bands' highest Court is the Court of Indian Appeals. That Court has not issued *any* merits decision on *any* issue, and therefore Plaintiffs have not exhausted CFRC remedies on any issue. The only decision the tribal appellate court issued was a decision that the Law Firms' appeal was premature because it was not based upon a final trial court decision.

Plaintiffs now make the frivolous assertion that because their premature appeal was dismissed, they have exhausted tribal court remedies. This would be akin to a party filing a FOIA request, filing an administrative appeal based upon the preliminary agency letter acknowledging receipt of the FOIA request, and then bringing suit in this Court, asserting that the order dismissing their administrative appeal as premature constituted exhaustion of administrative remedies. This Court would summarily reject the assertion that administrative remedies had been exhausted. *See Bonner v. Soc. Sec. Admin.*, 574 F. Supp. 2d 136, 137 (D.D.C. 2008). The fact that Plaintiffs' appeal was dismissed as premature and the case was remanded to the trial court, and the fact that proceedings in the CFRC are ongoing are each, *res ipsa loquitor,* proof that Plaintiffs have not exhausted tribal court remedies.

[9] Federal caselaw is inconsistent regarding whether a final merits decision by a tribal appellate court on jurisdiction constitutes exhaustion of tribal court remedies. That inconsistency is not material here because the C.F.R. Court appellate court has not, and cannot, issue any merits decision until the trial court issues its final order.

B. BECAUSE THERE IS AT LEAST A COLORABLE QUESTION OF TRIBAL COURT SUBJECT MATTER JURISDICTION, PLAINTIFFS ARE REQUIRED TO EXHAUST TRIBAL COURT REMEDIES.

The tribal exhaustion requirement was confirmed by the U.S. Supreme Court in *National Farmers Union Insurance,* 471 U.S. at 855–56. In *National Farmers Union Insurance*, a Crow Indian minor sued a school district in tribal court after being struck by a motorcycle in a school parking lot located on state-owned land within the exterior boundaries of the Crow Indian Reservation. The defendant school district filed an action in federal court challenging the jurisdiction of the tribal court. The Supreme Court acknowledged that the federal court challenge had serious implications relating to long-held sovereign interests of the tribe, stating that:

> 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.

Id. at 855-56.

The Supreme Court concluded that the Band must have the initial authority, exclusive of the federal courts, to reach a determination on such matters directly involving the jurisdiction and sovereign authority of the Band:

> 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 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. ….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.

In its analysis, the Supreme Court invoked not only the federal policy supporting tribal self-government, but also the related pragmatic consideration of allowing tribes the opportunity to use their expertise[10] in resolving matters that are of distinctly critical importance to them and produce a factual record that provides the facts that are to be used in any later federal court case. This dual basis for requiring tribal exhaustion was confirmed by the Supreme Court two years later in *Iowa Mutual Insurance*, 480 U.S. at 16, where the Court found that "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 support of this statement, the Court reasoned that "[a]djudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law." *Id*.

In pre-exhaustion review, this Court only asks whether there is a *"colorable question"* for tribal court subject matter jurisdiction. If there is a colorable question, the federal court *must* require exhaustion of tribal court remedies. *Stock West Corp. v. Taylor*, 964 F.2d 912, 920-21 (9th Cir. 1992). When determining whether there is a colorable question, the Court must assume the facts alleged in the tribal court complaint—not the facts in the tribal court' defendant's federal court complaint. *See §____, infra. E.g., Norton v. Ute Indian Tribe*, 862 F.3d 1236 (10th Cir. 2017), *cert. denied* 138 S.Ct. 1001 (2018) (holding that even though the defendant city police officer had been found not liable for an alleged wrongful death which occurred during an alleged trespass, the officer was required to exhaust tribal court remedies in a subsequent related trespass

[10] In the current case, the CFRC and the Court of Indian Appeals—federal courts which exclusively hears Indian law cases—will ultimately issue finds of fact, conclusions of law, and legal opinions on whether or not, on the merits, the CFRC has subject matter jurisdiction. This Court deals with an immensely wide variety of cases, but few Indian law cases. It should welcome the CFRC's expertise.

suit by the Tribe, because, in pre-exhaustion review, the district court is bound by the allegations in the tribal court complaint.

In their motion, Plaintiffs also incorrectly assume this Court can review any and all decisions of the CFRC. Yet again as a matter of basic federal Indian law, they are plainly wrong. This Court is not an appellate branch or a paternalistic overlord of the CFRC. This Court's review, both in pre-exhaustion and in post-exhaustion review, is narrowly and strictly limited to the question of whether the CFRC exceeded a *federally imposed limitation on CFRC subject matter jurisdiction*. *E.g., Iowa Mutual Ins. Co, 480 U.S. at 18*; *Nat'l Farmers Union Ins.*, 471 U.S. at 856. This Court cannot opine on any other part of a CFRC decision. Here, notable, that includes Plaintiffs' meritless, and now waived, assertion the CFRC lacks personal jurisdiction over them.

Applying these standards to the current case could hardly be any easier. There is plainly much more than a "colorable question" that the CFRC has subject matter jurisdiction. In fact, Plaintiffs do not even have a colorable argument that the CFRC lacks jurisdiction under the first exception in *Montana v. United States*, 450 U.S. 544, 564 (1981) (*Montana*) and there is at least a colorable question that the CFRC has jurisdiction under the second *Montana* exception.[11] The very fact that Plaintiffs' claim is dependent on facts asserted in affidavits to this Court, standing alone, establishes that this Court cannot enjoin the CFRC case—if, as Plaintiffs now argue, CFRC jurisdiction turns on factual allegations or evidence that was not before the CFRC or factual disputes that have not been resolved by the CFRC and the tribal appellate court, then, until the CFRC resolves those factual issues and all appeals are completed, there is at least a colorable

[11] The second *Montana* exception requires a fact-intensive inquiry into the harm which a Defendant's conduct will have on the Band. Here, the Band alleges jurisdiction under the second *Montana* exception, and the Band easily has a colorable claim that Plaintiffs' despicable conduct meets the standard for jurisdiction under the second *Montana* exception.

question of CFRC jurisdiction. Plaintiffs have shot themselves in the foot because they do not understand this basic federal Indian law.

Montana "is the pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). *Montana* mandates that tribes retain inherent sovereign power to regulate: (1) "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements" [the first *Montana* exception], and (2) the conduct of non-Indians that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe [the second *Montana* exception]." 450 U.S. 544, 565-66 (1981). While the Band only has alleged a colorable basis for one of these two exceptions, it has alleged a colorable basis for both.

First, it is undisputed that Plaintiffs entered into – and maintained for over two years – "consensual relationships" with the Band, which is headquartered on trust land on the Reservation. In its CFRC complaint, the Band alleges a consensual relationship, and a dispute regarding whether Plaintiffs knowingly chose not to bargain for or obtain any waiver of the Bands' sovereign immunity from suit. In their answer to the CFRC complaint, Plaintiffs denied that allegation, but they have now admitted the facts which support the Band's claim.

An attorney-client relationship of course constitutes the type of "consensual relationship" between nonmembers and the Band that the first *Montana* exception is intended to reach.[12] There is plainly, obviously, more than a colorable question that the CFRC has jurisdiction under the first

[12] It is immaterial whether the CFRC has exclusive jurisdiction or only concurrent jurisdiction, but the Band's position is that the CFRC has exclusive jurisdiction. *E.g., Williams v. Lee*, 358 U.S. 217 (Tribal Court has exclusive jurisdiction over a contract dispute between a tribal member and a non-Indian); *Ute Indian Tribe v. Lawrence*, 22 F.4th 892 (10th Cir. 2022) and *Becker v. Ute Indian Tribe*, 11 F.4th 1140 (10th Cir. 2021) (action on contract with a tribe had to be brought in tribal court and action in state court was barred).

Montana exception. In fact, the CFRC did the judicial equivalent of telling Plaintiffs this—it summarily denied their argument as without merit.

An alternative way to look at this, which also obviously leads to the same result is that the *Montana* cases equate a tribe's authority to adjudicate with its authority to regulate. *E.g.*, *Attys Process & Invest. v. Sac and Fox Tribe of the Mississippi in Iowa,* 609 F.3d 927, 938 (8th Cir. 2010). As is readily obvious, a sovereign has very broad power to regulate its *own attorneys*. For example, no one would even think to argue that a state cannot regulate the conduct of its own attorney, whether for actions in or outside of the state. Yet more obviously, there is at least a colorable question that the sovereign, here the Band, has the power to regulate its own attorneys.

Second, Plaintiffs seeks to infringe the Band's sovereign immunity by enforcing an alleged contract that plainly contains no waiver of immunity, and then by asserting that because they are knowingly and wrongfully claiming a right to a lien under that alleged contract, the Band would need to litigate any claim in New York. "Few aspects of the Band's political integrity and economic security are more important than its sovereign immunity from suit. For this reason, determining whether a tribe has waived its immunity from suit is precisely the type of question that should be determined by the Tribal Court." *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt. Inc.*, No. C-04-08-003, 2005 WL 6169140 (Grand Ronde Tribal Ct. Aug. 5, 2005). *See also Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999) ("[T]he Supreme Court has stated that the issue of a tribe's sovereign immunity is the very kind of question that is to be decided in the first instance by the tribal court itself.") (citing *National Farmers Union,* 471 U.S. at 855–56). Plaintiffs' assault on the Band's sovereign immunity is a threat to its political integrity and thus creates a second, independently sufficient basis for subject matter jurisdiction under the second *Montana* prong. As relevant here, there is at least a colorable claim for tribal

court subject matter jurisdiction under the second *Montana* exception, and therefore Plaintiffs are required to exhaust tribal court remedies because of both the first and second *Montana* exceptions.

C. NO EXCEPTION TO EXHAUSTION APPLIES.

There are narrow exceptions to exhaustion, but none of them apply here. In their brief, Plaintiffs mistakenly state they are claiming exhaustion is not required for "three reasons" described in *Crowe & Dunlevy*. In actuality, Plaintiffs are only alleging *two* reasons:[13] 1) the CFRC action is patently violative of express jurisdictional prohibitions; and 2) lack of adequate opportunity to challenge CFRC jurisdiction. They have no non-frivolous argument for either of the two exceptions.

Plaintiffs devote only one paragraph to their assertion that the CFRC's exercise of jurisdiction patently violates express federally imposed jurisdictional limitations. The case law discussing whether tribal court jurisdiction patently violates express jurisdictional limitations is merely an alternative wording—the flip side--of the standard discussed above. A suit is "patently violative" if there is no colorable claim of tribal jurisdiction. Therefore, Plaintiffs' undeveloped argument must be rejected for the reasons discussed above.

The premise of Plaintiffs' undeveloped argument that CFRC jurisdiction is patently violative of express jurisdictional limitations appears to simply pretend that the first *Montana* exception—the one that plainly applies here—does not exist. This can be seen from their attempt to equate this case to *Hornell Brewing. Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir.). Hornell Brewing produced a strong malt liquor and marketed it under the name "Crazy

[13] In *Crowe & Dunlevy*, the Tenth Circuit stated that "exhaustion is not required if it is clear that the tribal court lacks jurisdiction, *such that* the exhaustion requirement would serve no purpose other than delay." (emphasis added). This is the "patently violative" exception. Plaintiffs incorrectly attempt to turn "no purpose other than delay," into a new exception, unsupported by caselaw, and to use that new exception to swallow the general rule requiring exhaustion, directly contrary to the underlying rationale for the exhaustion rule.

Horse Malt Liquor." Descendants of Crazy Horse were offended for obvious reasons, and filed a tort suit in their tribal court. By the time the case reached the Eighth Circuit, the record established that Hornell Brewing did not produce, ship, or sell the product on the Reservation, and that other than its internet advertising for the product, which could be accessed on the internet on the Reservation, Hornell did not market or advertise the product on the Reservation. The tribal parties in the appeal did not even claim the first *Montana* exception applied. They solely argued that exhaustion should have been required under the second *Montana* exception.

The district court held that the case should be returned to the tribal court for further factual development related to the second *Montana* exception, but the Eighth Circuit held that was not necessary based upon the facts that had already been developed related to the second *Montana* exception.

Everything about *Hornell Brewing* is unlike the present case. In the present case, the Band alleges jurisdiction under both the first and second *Montana* exceptions. Its view is that it is bluntly obvious that there is CFRC jurisdiction under the first *Montana* exception because Plaintiffs entered into a consensual relationship with the Band, with Plaintiffs directing communications regarding that matter to the Band's governing body.

In *Hornell Brewing*, the facts regarding the second *Montana* exception had been developed. In the present suit, there has been no development at all of the facts, primarily because Plaintiffs refuse to provide any discovery.

In another part of their brief, Plaintiffs attempt to analogize the current case to *Attorneys Process and Investigative Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa*, 809 F. Supp. 916, 928 (N.D. Iowa 2011) (API). If they have any feet left to shoot, they have again shot themselves in a foot. Plaintiffs attempt to analogize this case to the tort claim of conversion of

funds in API. That conversion occurred when funds were sent from an off-Reservation location to another off-Reservation location. The alleged conversion was a tort, not a contract claim, where the tort wholly occurred off the Reservation.

But in other decisions in that same dispute, API claimed it had a valid contract with the Band which waived tribal sovereign immunity and consented to jurisdiction in a non-tribal forum. The Courts held, both in pre-exhaustion review and in post-exhaustion review, that those were issues solely for the tribal forum. *API*, 609 F.3d 927 (8th Cir. 2010). The API litigation also resulted in the first federal appellate court ratifying a final tribal court decision for jurisdiction under the second *Montana* exception. The Band agrees that this Court should rely on the API case. That case is fatal to Plaintiffs' arguments.

Plaintiffs also claim that this case fits within the narrow exception to exhaustion when there is no tribal forum which can decide a challenge to tribal subject matter jurisdiction. Plaintiffs have no basis for asserting that exception. The exception only applies if the *Band does not provide a forum*--if there is no forum, there is no need to exhaust. Plaintiffs admit the United States, in its trust role for the Band, provides a forum. They therefore have to exhaust in that forum. The fact that a party would rather have a different forum or would like to be able to appeal earlier in the tribal forum is immaterial. Here, the Band provides a trial court forum, and then an appellate forum after the Tribe's trial court issues a final decision. Plaintiffs do not provide a developed argument for their assertion that the Band does not provide a forum, and in any case, it is obvious the Band provides a forum.

Plaintiffs seem to suggest that they fit within that rarely applicable exception because the CFRC does not permit any interlocutory appeals. If that is their argument, it is without merit. Every forum, whether tribal, federal, or state, has unfettered authority to determine if and when to

permit interlocutory appeals. *Johnson v. Fankell*, 520 U.S. 911 (1997) in instructive. In *Johnson*, the Supreme Court had to determine whether the state courts were required to provide a right to appeal when a party is asserting qualified immunity to a federal civil rights action. Prior Supreme Court cases had repeatedly held that, because of the importance of qualified immunity, a defendant in a federal court would have a right to immediate appeal, and the defendant in *Johnson* asserted that the State had to provide a similar right in order to protect those same important interests.

Even under those facts, which are much more favorable to a defendant claiming a right to immediate appeal, the Supreme Court rejected the argument. It held that the State of Idaho (which only provided discretionary appellate review, not appeal of right) was not required to provide interlocutory appeals of denials of qualified immunity. In so holding, the Court made clear that the source of the right to an interlocutory appeal in federal court was not § 1983 but rather was 28 U.S.C.A. § 1291(a), a provision applicable by its terms only to federal court. Similarly, here, the federal law does not dictate whether the Band must provide for interlocutory appeal, and instead the federal CFRs (which do not permit interlocutory appeals in any case) control.

The general rule is that exhaustion is required. Plaintiffs have not shown, and in fact have no good faith basis for even arguing, they fit within the two exceptions to the general rule which they discuss in their motion. Their motion therefore must be denied.

III. UNDER THE CURRENT POSTURE, THE COURT IS REQUIRED TO ASSUME THE FACTS ALLEGED IN THE BAND'S CFRC COMPLAINT, TOGETHER WITH PLAINTIFFS' BINDING ADMISSION IN THAT COURT.

In the CFRC and now on this Court, Plaintiffs attempt to defeat CFRC jurisdiction based upon their purported disagreement with the allegations in the Band's CFRC complaint.

As a corollary to the exhaustion doctrine, this Court is bound by the allegations in the CFRC complaint until such time as there is a final CFRC decision on the facts and merits. When there then is a final CFRC decision, a federal court can only, at the very most, review CFRC

findings specific to the issue of subject matter jurisdiction (not personal jurisdiction or other any other issues) under the deferential "clearly erroneous' standard.

One of the key components of the federal law which requires exhaustion of tribal court remedies is the Supreme Court's holding that the tribal court is to create the factual record relevant to the first and second "*Montana* exceptions." *Montana v. United States*, 450 U.S. 544 (1981).

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "[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 and Tenth Circuits, 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*).

When a tribal court issues findings of fact relevant to the *Montana* inquiry, those findings are then reviewed under the deferential clearly erroneous standard if there is subsequent federal court review. *Duncan Energy*, 27 F.3d at 1300.

As noted above, the tribal court plainly has subject matter jurisdiction under the first *Montana* exception. But the Band cannot present the full record of Appellants' consensual agreement with the Band and Appellants' actions directed to the Reservation related to that consensual agreement, and the Trial Court cannot complete its responsibility under the Exhaustion Doctrine, until discovery is completed.

Similarly, the Band cannot create the record that the trial court must develop before it determines whether the second *Montana* exception applies until the parties complete discovery. The second *Montana* exception centers on the impacts a case has on the Band. That is a heavily

fact-intensive issue. Here, the Band's position is that the Trial Court has jurisdiction under both the first and the second *Montana* exception. The parties and the CFRC must create the record regarding the second *Montana* exception, which will then serve as the factual record in this Court.

Appellants want to avoid the Exhaustion Doctrine requirement that Trial Court must develop the record, and are using this Court to attempt to prevent the CFRC from developing that record. This Court must reject their premature attempt to obtain federal court review.

IV. THIS COURT MUST DENY THE MOTION FOR PRELIMINARY INJUNCTION BECAUSE PLAINTIFFS ARE NOT SUFFERING IRREPARABLE HARM, AND BECAUSE THE HARM TO THE BAND FROM A PRELIMINARY INJUNCTION GREATLY OUTWEIGH ANY HARM TO PLAINTIFFS.

A. BECAUSE PLAINTIFFS WILL NOT SUCCEED ON THE MERITS, THEY ARE NOT BEING IRREPARABLY INJURED.

Plaintiffs' assertion harm is *dependent upon*[14] their assertion that they are not required to exhaust tribal court remedies. As discussed above, Plaintiffs will not succeed on their assertion that they are not required to exhaust tribal court remedies. They therefore have no injury.

B. THE FACT THAT PLAINTIFFS LITIGATED IN THE CFRC FOR 20 MONTHS DEFEATS THEIR NEW-FOUND CLAIM OF IRREPARABLE INJURY.

The CFRC suit was filed on or around December 1, 2021—approximately 20 months ago. Their assertion that they are not required to exhaust tribal court remedies has exactly the same strength today as it had in December 2021. All of Plaintiffs' discussion of events after December 2021 are immaterial to the merits issue presented to this Court—whether Plaintiffs are required to exhaust tribal court remedies. The fact that they decided to litigate in that forum for 20 months, weighs strongly against their assertion that they have been being "irreparably injured" throughout those 20 months. *Atlanta Sundries, Inc. v. S.C. Johnson & Son, Inc.*, No. 1:93-CV-2000-HTW,

[14] If (as is in fact the case) federal law requires Plaintiffs to exhaust CFRC remedies before they can bring suit in a federal forum, their assertion that they are being injured by being wrongly required to litigate in that forum vanishes or those litigation costs.

1994 WL 398170, at *2 (N.D. Ga. Jan. 24, 1994) ("The plaintiff's own delay of almost a year in commencing this lawsuit has convinced this court that plaintiff is unlikely to suffer irreparable harm.") (denying Preliminary injunction based upon delay.)) *Cf. Removal Cases,* 100 U.S. 457, 473 (1879) (When Congress adopted a statute permitting removal from state court to federal courts, it "did not intend … to allow a party to experiment on his case in the State court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal."); 28 U.S.C. § 1346 (where removal to federal court is permitted, the party cannot experiment in state court before deciding whether to remove). The CFRC litigation was filed 20 months ago. Plaintiffs were actively litigating in the CFRC, but filed this suit the day after their bad faith refusal to answer requests for admission resulted in them admitting most of the important facts in the CFRC case—including admissions that establish that the CFRC had personal jurisdiction over them and facts which further confirm CFRC subject matter jurisdiction. They are attempting to use this Court to evade the consequences of their CFRC admissions. Their attempt to have this Court save them from their binding admission in the CFRC is simply not irreparable harm.

Even if Plaintiffs could have claimed some other later action triggers their basis for claiming irreparable injury, any such prior action is still far too long ago to support their motion for preliminary injunction. Plaintiffs' motion to dismiss was denied on August 15, 2022—almost one year ago. Plaintiffs' appeal was dismissed on non-merit grounds 4 months ago. Plaintiffs' due date for responding to written discovery requests was in April 2023. Plaintiffs submitted an answer to the complaint over two months ago, and submitted their preliminary list of witnesses and exhibits in June 2023. Their claimed injuries are not based upon those orders or events, but delay from any of those dates would also be fatal to their claim of irreparable injury. The only recent event in the CFRC is the order affirming that Plaintiffs admitted all of the Band's requests

for admission. That order is the next to last nail in the proverbial coffin for their naïve legal arguments on Indian law, but adding that nail cannot even plausibly be claimed to cause cognizable injury supporting a preliminary injunction.

C. PLAINTIFFS' CLAIM THAT THEY WILL BE IRREPARABLY INJURED BY A CFRC MONETARY JUDGMENT IS PLAINLY WRONG, BECAUSE THE BAND IS NOT SEEKING A MONETARY JUDGMENT IN THE CFRC.

In Section II of their brief, Plaintiffs assert that they will be irreparably injured if the CFRC issues a monetary judgment against them.

That is factually meritless. The Band is not seeking any monetary judgment in the CFRC!

It would also be meritless even if the Band were seeking a monetary judgment, as it is based upon conjectural possible future harm. That is per se insufficient to establish irreparable injury. Plaintiffs practically make the Band's argument on this point in Plaintiffs' own brief. They mistakenly cite a holding in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156–57 (10th Cir. 2011). The cited holding, under deferential review, affirmed a district court order "preliminarily enjoining [a tribal court judge] from ordering Crowe to return its fees to the Thlopthlocco pending resolution of the underlying litigation in tribal court."

In that context--a request to enjoin an existing tribal court order to return money that the law firm had in its bank account-- the Tenth Circuit held, and only under deferential review, and further dependent on the District Court's determination that Crowe & Dunleavy were likely to prevail on their federal court suit (whereas in the current case, Plaintiffs have no discernable chance of prevailing on the merits)—that the Court could enjoin the tribal court order that Crowe send

money to the Band.[15] In that context, and only that context, the Tenth Circuit noted that if the law firm had been forced to return the funds before the litigation was completed, it "may be without recourse" to get the money back because of tribal sovereign immunity.

D. LITIGATION COSTS ARE NOT IRREPARABLE INJURY.

Plaintiffs also arguably assert that litigation costs in the CFRC constitute "irreparable injury." Case law uniformly holds that litigation costs are not irreparable injury.

> It is, after all, established that the costs of litigation are not "irreparable injury." *Van Cauwenberghe v. Biard,* 486 U.S. 517 (1988); *FTC v. Standard Oil Co.,* 449 U.S. 232, 244 (1980); *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 24; *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209, 222 (1938).

Briggs & Stratton Corp. v. Loc. 232, Int'l Union, Allied Indus. Workers of Am. (AFL-CIO), 36 F.3d 712, 714 (7th Cir. 1994). "[M]ere litigation expense, even substantial and unrecoupable cost, does

[15] Plaintiffs also counterproductively cite three additional cases, each of which involved tribal court claims for substantial monetary damages for torts. As discussed above, tribal court jurisdiction over tort claims is much more limited, and Plaintiffs attempt to pretend the first Montana exception does not exist is not a viable legal argument. Analysis of tort claims is usually under the second *Montana* exception, whereas here, the CFRC plainly has jurisdiction under the first *Montana* exception AND also colorably has jurisdiction under the second *Montana* exception. The case cited by Plaintiffs were predicated upon a determination that the tribal court plainly lacked jurisdiction over the torts. Each of those cases is also plainly distinguishable for additional reasons. In *Kerr Mc-Gee Corp. v. Farley*, 88 F. Supp. 2d 1219 (D.N.M. 2000), most relevantly, the district court and the Tenth Circuit both held exhaustion of tribal court remedies was required on a claim against a non-Indian company for substantial monetary damages, even in a tort case; but the district court later modified its decision solely based upon an intervening U.S. Supreme Court decision that the Price Anderson Act, a federal statute, completely preempted tribal court jurisdiction. *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D.N.M. 1981) is a dated case which incorrectly held *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) applied in civil tort cases, and which further held that the federal court plaintiff established irreparable injury because of the expected large number of tribal court tort cases seeking tens of millions of dollars of damages caused by a large off-Reservation environmental accident. In *Chiwewe v. Burlington N. & Santa Fe. Ry. Co*., 2002 WL 31924768 (D.N.M. Aug 15, 2002), *plaintiffs* filed two tort suits for wrongful death against the same defendant. The first suit was filed in state court, and then removed to federal court. The plaintiffs then filed a parallel tribal court suit. The defendant asked in the two suits asked the federal court hearing the first filed suit to enjoin the *later-filed tribal court suit.* The district court granted that motion, in part based upon the potential for inconsistent or conflicting proceedings. That these are the best cases Plaintiffs could find speaks volumes.

not constitute irreparable injury." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

V. ENJOINING THE CFRC WOULD IRREPARABLY INJURY THE BAND, AND THE BALANCE OF HARMS STRONGLY FAVOR DENIAL OF THE PRELIMINARY INJUNCTION.

Plaintiffs have not been irreparably harmed for the past 20 months, and will not be irreparably harmed in the future. In fact, they have not suffered and will not suffer any legally cognizable "injury." But the Band and the CFRC would be irreparably injured if this Court were to grant the injunction. Enjoining the CFRC would violate the Band's sovereign governmental authority. Unlike the conjectured monetary damage that Plaintiffs claim, injury to tribal sovereign authority is irreparable injury. As then-Circuit Judge Gorsuch noted in *Ute Indian Tribe v. Utah,* injury to a tribe's sovereign rights is irreparable injury. 790 F.3d 1000, 1006 (2015); *Kewadin Casinos v. Draganchuk*, W.D. Mich. case 2:22-cv-00027, March 8, 2022, order (same). *Bowen v. Doyle*, 880 F. Supp. 99, 151 (W.D.N.Y. 1995) (enjoining a state court suit because it interfered with the tribal courts sovereign authority and holding the tribe would be irreparably injured if the state court suit was not enjoined); *Confederated Bands of Grand Ronde*, 2005 WL 6169140.

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