UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SICHENZIA ROSS FERENCE, LLP and WELTZ LAW P.C.,	:	Case No. 1:23-cv-06415-GHW
Plaintiffs,	:	
vs.	:	
SKULL VALLEY BAND OF GOSHUTE INDIANS OF UTAH,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW OF PLAINTIFFS SICHENZIA ROSS FERENCE LLP AND WELTZ LAW P.C. IN FURTHER SUPPORT OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Long on hyperbole but short on candor, facts and legal support, Defendant's opposing papers make clear that Defendant simply insists that the Tribal Court has broad authority over virtually all conduct by any non-member, off reservation, on non-Tribal lands, in effect, anywhere, simply because the Defendant had a contract for work to be done at its behest on the other side of the United States. Such unprecedented jurisdiction is plainly lacking, and to require Plaintiffs to exhaust tribal remedies would cause them irreparable harm. Accordingly, this Court should enjoin further prosecution or adjudication of the Tribal Action before the Tribal Court.

I. DEFENDANT BEARS THE BURDEN OF ESTABLISHING *MONTANA* EXCEPTIONS

Defendant submits that Plaintiffs must establish ***both*** subject matter jurisdiction and Defendant's purported "waiver of sovereign immunity" in connection with the narrow issue before this Court. (Def.'s Mot. Dismiss at 2-3, ECF No. 22.) Defendant is wrong. As to the former, Plaintiffs do not dispute that they are required to establish subject matter jurisdiction over their claims, and, indeed, they have established such jurisdiction pursuant to 28 U.S.C. Section 1331. (Compl., ¶¶ 5, 10, ECF No. 1 (*citing Nat'l. Farmer's Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985))); *see also MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1066 (10th Cir. 2007).[1]

As to the latter, Defendant does not cite to any legal authority which mandates that a plaintiff that was impermissibly hauled into a tribal court by an Indian tribe first establish a "waiver" of "sovereign immunity" in order to challenge the jurisdictional reach of the Tribal Court. To the contrary, *Montana v. United States*, 450 U.S. 544 (1981), and its progeny, pave the way for

[1] Defendant's cases do not advance its arguments. *See, e.g.*, *Rice v. Office of Servicemembers' Grp. Life Ins.*, 260 F.3d 1240, 1245 (10th Cir. 2001) (noting that a plaintiff failed to allege subject matter where it failed to set forth the citizenship of defendant or the amount in controversy); *APWU v. Potter*, 343 F.3d 619, 625 (2d Cir. 2003) (upholding dismissal of claims for lack of subject matter jurisdiction where a federal statute expressly divested federal courts of jurisdiction).

any such aggrieved plaintiff to seek redress from the Federal district courts, and the case law is clear that, "[t]he burden rests *on the tribe* to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." (emphasis supplied). *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (*citing Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654-55, 57).

Indeed, a contrary result could not follow as it would empower any tribe to sidestep *Montana*'s safeguards by improperly commencing suit in a tribal court and, thereafter, claim that it is absolved from even having to establish one of the two narrow exceptions in *Montana* based on sovereign immunity.[2] *See, e.g.*, *Stifel, Nicolaus & Co., Inc. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015) ("The actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty."). Defendant itself recognizes this folly by simultaneously claiming it is a "necessary defendant" here. (*See* Def.'s Mot. at 5 ("The Band is a necessary defendant in this suit and is the sole named defendant.").) Not surprisingly, neither party has cited to any cases that have facts analogous to the egregious circumstances of this case. To accept Defendant's absurd position would deprive Plaintiffs of any due process, let alone adequate process, and turn *Montana* on its head.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Exhaustion Is Not Required Because It Is Uncontroverted that the Alleged Conduct Did Not Occur on Tribal Land

"[E]xhaustion of tribal court remedies is not required when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no purpose other than

[2] Defendant is also incorrect in its assertion that sovereign immunity need not be raised as a "defense." (Def.'s Mot. at 7.) Indeed, and putting aside that the protections afforded to states under the Eleventh Amendment are broader than those afforded to Indian tribes, states are required to invoke sovereign immunity as a defense in a suit. *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 382 (1998).

delay." *See Lanphere v. Wright*, 387 Fed. Appx. 766, 767 (9th Cir. 2010). "To be sure, the tribal exhaustion doctrine does not apply mechanistically to every claim brought by or against an Indian tribe." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000).

Defendant does not dispute the pertinent facts. Indeed, Defendant does not contest that (i) Plaintiffs' business operations are located in the State of New York, (ii) Plaintiffs never entered Tribal land, (iii) the underlying conduct does not concern activity on Tribal land, or (iv) the voluminous authority in the moving papers recognizing that a tribal court lacks jurisdiction over non-Indians, such as Plaintiffs, outside Indian country.[3] Instead, in a breathtaking lack of candor, Defendant's opposition rests on snippets and parentheticals from a litany of cases that Defendant insists require exhaustion or evidence, by contrast, that exhaustion has not been satisfied in this instance, without also informing the Court that every case cited—without exception—involved conduct that had occurred *on* Tribal land.[4] The omission is material and intentional.

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[3] "Supreme Court precedent clearly limits the regulatory authority of tribes—at least that which is derived solely from their inherent sovereignty—to the reservation's borders." *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1071 (10th Cir. 2007); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) ("In order to determine whether the Tribes have jurisdiction we must … look to whether the land in question is Indian country."); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540-41 (10th Cir. 1995) ("[B]oth the Supreme Court and this court have concluded § 1151 defines Indian country for both civil and criminal jurisdiction purposes.") (abrogated on other grounds); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993).

[4] Def.'s Opp'n to Pls. Order to Show Cause for TRO and Prelim. Inj. at 10-15, ECF No. 23 (hereinafter "Opp.") (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987) (suit in Tribal Court for compensation for personal injuries sustained on Tribal land); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1987) (Tribal Court action for personal injuries sustained in a school district located on Tribal land); *Stock W. Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (action against reservation attorney for legal malpractice and misrepresentation in connection with opinion letter to secure loan for construction of sawmill to be constructed and managed by corporation on Tribal land); *Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236 (10th Cir. 2017), *cert. denied* 138 S.Ct. 1001 (2018) (wrongful death action for killing of Tribal member on Tribal land); *Williams v. Lee*, 358 U.S. 217 (1959) (action to collect

Undeterred, Defendant submits three groundless arguments to depart from settled law. First, again displaying Defendant's disdain for candor, the opposing papers falsely suggest that Plaintiffs have admitted, in the Tribal Action, that the Tribal Court has personal jurisdiction over them. (*See* Opp. at 3, 5, 6, 22, § III.). This is false. As curated by Defendant, the Tribal Court "held that [Plaintiffs] had admitted all of the [SVB Tribe's] requests for admission." (*Id.* at 6). Defendant omits to mention that the Tribal Court's decision was based on it not knowing that Defendant had consented to extend Plaintiffs' time to respond, and Plaintiffs' responses were timely. Defendant also omits to mention that its application to the Tribal Court had not raised any timeliness argument; rather, Defendant had challenged only the appropriateness of Plaintiffs' timely responses and objections to the solicited admissions.[5] Somehow, the opposing papers also fail to mention that, on August 4, 2023, Plaintiffs filed a motion for reconsideration of the Tribal Court's incorrect decision.[6]

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for goods sold on credit at general store on Tribal land); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892 (10th Cir. 2022) (contract dispute between Indian Tribe and non-Indian concerning Tribe's mineral resources located on Tribal land); *Becker v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 11 F.4th 1140 (10th Cir. 2021) (dispute over independent contractor agreement between Indian Tribe and non-Indian concerning Tribe's oil and gas interests on Tribal land); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927 (8th Cir. 2010) (tort action by Indian Tribe against security and consulting company concerning property damage and torts occurring on Indian casino located on Tribal land); *In re Confederated Tribes of Grand Ronde v. Strategic Wealth Mgt., Inc.*, 6 Am. Tribal Law 126, 2005 WL 6169140 (Grand Ronde Tribal Ct. Aug. 5, 2005) (contract dispute between Indian Tribe and consulting company regarding consulting services provided to Tribe on Tribal land); and *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990 (8th Cir. 1999) (employment-labor dispute brought by member of Indian Tribe against Tribe for alleged employment violations occurring on Tribal land).

[5] Defendant could not represent to the Tribal Court that Plaintiffs' responses and objections were untimely, as Plaintiffs served their discovery responses on the date so stipulated by the parties. (*See* Irwin Weltz, Esq. Decl. in Support of Pls. Reply at ¶ 3 (hereinafter, "Weltz Reply Decl.").)

[6] Plaintiffs' motion for reconsideration in the Tribal Action as well as Mr. Rasmussen's e-mail confirming the extension is annexed as Exhibit A to the Weltz Reply Decl.

Fearful that it would be unable to use the contrived "admission" argument to bolster its legally infirm exhaustion argument, Defendant also omits to mention that Defendant moved for an extension of time to respond to the motion for reconsideration until a date—August 25, 2023—*after* Defendant's opposition papers were due to this Court.[7] At first blush, Defendant had successfully gamed competing litigation calendars and passed off its obligation to make an honest argument to any court about the purported "admissions." The truth, supported by the actual record, is Plaintiffs have never admitted the Tribal Court's jurisdiction over Plaintiffs.

Second, Defendant argues that its fiduciary relationship with Plaintiffs, arising from the attorney-client association, itself conferred civil jurisdiction to the Tribal Court over Plaintiffs. (*See* Opp. at 4, 14). The opposing papers, however, have failed to proffer any meaningful explanation or legal authority to support this argument.[8]

Third, although conceding that Defendant had approved and executed the Retainer Agreement, Defendant seeks to contain the legal effect of those actions and the controlling law and forum terms in the contract, by over-emphasizing limited and unhelpful assertions that: (i) Defendant's former Chairwoman, Candace Bear, had purportedly executed the Retainer Agreement while *she* was purportedly on Tribal land; (ii) Plaintiffs had emailed their executed version back to an email address of hers (*see* Opp. at 7); and (iii) Plaintiffs made phone calls from outside of the Tribal land to Defendant's officers who were purportedly on Tribal land at the very same time. (*Id.* at 8). Defendant's bad-faith strain to manufacture an on-reservation dispute could not be any clearer.

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[7] Defendant's motion for an extension of time to respond is annexed as Exhibit B to the Weltz Reply Decl.

[8] As discussed below, in Section II.B., *infra*, such a relationship is insufficient for Tribal Court jurisdiction over Plaintiffs.

Defendant does not contest that Plaintiffs never entered Tribal land in connection with their representation of Defendant, in the Tribal Action or otherwise. (*See* Michael H. Ference, Esq. Decl. in Support of Pls. Order to Show Cause for TRO and Prelim. Inj. at ¶ 2, ECF No. 8, (hereinafter, the "Ference Decl."); Irwin Weltz, Esq. Decl. in Support of Pls. Order to Show Cause for TRO and Prelim. Inj. at ¶ 3, ECF No. 10 (hereinafter, the "Welz Decl.").) Further, the opposing papers do not address the legal authority that treat Defendant's few "jurisdictional facts" as irrelevant, because the dispositive fact is that Plaintiffs have never entered Tribal land and this is an off-reservation dispute.[9] Thus, because the activity at issue occurred off Tribal land, exhaustion is not required.

B. Exhaustion Is Not Required Because Defendant Cannot Establish Either of the *Montana* Exceptions

Defendant has failed to establish the applicability of either *Montana* exception. Thus, Defendant has not and cannot demonstrate that the alleged conduct threatens "tribal self-government" or its ability "to control internal relations." *Montana*, 450 U.S. at 564.

Defendant's sole argument concerns the first *Montana* exception,[10] contending it applies because of a purported "consensual relationship" between the parties based on the "attorney-client relationship" and a dispute regarding the Retainer Agreement. (Opp. at 14). Tellingly, Defendant omits any legal authority (because there is none) in support. If this Court were to

[9] *See Montana v. United States.*, 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *see also Plains Commerce Bank*, 554 U.S. at 333 ("Tellingly, with only one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*.") (*emphasis in original*); and *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) ("In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country.").

[10] Hardly a model of clarity, the opposing papers opine without further elucidation that "there is at least a colorable question that the CFRC has jurisdiction under the second *Montana* exception." (Opp. at 13.)

accept Defendant's unsupported position, the exception would swallow the rule. Indeed, in *Plains Commerce Bank*, 554 U.S. at 337, the Court emphasized that, with regard to the first *Montana* exception, a Tribal government's "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *See also EXC Inc. v. Jensen*, 588 Fed. Appx. 720 (9th Cir. 2014) (finding first *Montana* exception inapplicable because underlying contract at issue—permit agreement—"did not provide sufficient notice that [non-member] would be subject to tribal court jurisdiction").

Here, Plaintiffs never entered Tribal land, and their sole relationship with Defendant pertains to Plaintiffs' handling of a breach of contract case involving securities in the State of New York that have no nexus to Tribal land. The Tribal Action also does not relate to a purported "consensual relationship" between Plaintiffs and Defendant. Quite the opposite, it is an attempt by Defendant to evade its financial obligations to Plaintiffs. Accordingly, the *Montana* exceptions do not apply, and, therefore, the exhaustion requirement does not apply.

III. THE COURT SHOULD NOT ASSUME FACTS IN TRIBAL COMPLAINT

Defendant contends that "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." Opp. at 19. Not surprisingly, Defendant fails to provide **any** authority in support. Defendant also argues that this Court has no authority until discovery in the Tribal Action has been completed because Defendant purportedly cannot create a record on the *Montana* exceptions. Opp. at 20-21. As discussed, however, *Montana* does not even come into play because this case is an "off reservation" case.[11]

[11] Defendant incorrectly maintains that *Montana* holds that the Tribal Court is to create the factual record relevant to the *Montana* exceptions without page citation and there is no such holding in

Nor do the other cases cited by Defendant provide any support. The decision in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), "presents the question of the extent of power Indian tribes have *over non-Indians acting on fee land located within the confines of a reservation.*" *Id.* at 1312. (emphasis supplied). *FMC* is not only factually inapposite, but it also offers no support for Defendant's legal argument that a jurisdictional challenge by a non-Indian can only be made in Federal district court after a trial on the merits in Tribal Court in order to satisfy any exhaustion requirement. Again, Defendant relies only on on-reservation fact patterns that have no relevance to this dispute. Likewise, *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Rsrv.*, 27 F.3d 1294 (8th Cir. 1994), is also inapposite. *Duncan Energy* involves a non-member's operation of an oil and gas well *on Indian land*. *Id.* at 1296.[12] *See Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014) ("The question of a tribal court's *subject matter jurisdiction* over a nonmember, however, is tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land.*").

IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

The opposing papers raise no serious challenge to the irreparable harm that Plaintiffs will incur absent injunctive relief if they are required to litigate the merits in Tribal Court and proceed through Tribal appellate review. Defendant takes a different approach, arguing (i) Plaintiffs will not succeed on the merits, (ii) the Tribal Action has been litigated for twenty months, (iii) insofar

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Montana. Instead, *Montana* reiterates that that the Indian tribes have lost any "right of governing every person within their limits except themselves" (*Id*. at 565) and "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations.*" (450 U.S. at 565) (emphasis supplied). Plaintiffs never entered the reservation.

[12] Similarly, *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1383 (10th Cir. 1996) involves "whether the Cheyenne-Arapaho Tribes of Oklahoma ("the Tribes") may impose a severance tax on oil and gas production on allotted lands held in trust for their members." On-reservation conduct is always the controlling event in the cases cited in opposition.

as Defendant does not seek money damages in the Tribal Action, there can be no harm to Plaintiff, and (iv) litigation costs do not constitute irreparable injury. (*See* Opp. at 21-25). The law, however, disagrees with Defendant.

First, as noted, Plaintiffs have a high likelihood of succeeding on the merits, because, in sum, Defendant has not—and cannot—establish either *Montana* exception applies. Second, the duration of time that has elapsed is irrelevant.[13] A cursory review of the Ference and Weltz Decls. makes clear there was no delay by Plaintiffs; rather, Plaintiffs unsuccessfully attempted to appeal the denial of their motion to dismiss in the Tribal Action (*see* Ference Decl. at ¶¶ 22-30) and Plaintiffs answered Defendant's First Amended Complaint on or about May 25, 2023—just two months prior to filing this action. (*Id.* at ¶ 37). Accordingly, if candor prevails, the actual record (again) does not support Defendant's argument.

Third, it is plainly immaterial to this action that Defendant does not seek money damages in the Tribal Action. The fact that Plaintiffs have been dragged into a foreign Tribal Court that plainly lacks jurisdiction over Plaintiffs itself constitutes irreparable harm. Finally, in cases, as here, where a tribal court clearly lacks jurisdiction, Federal district courts have found a litigant's time and expense to defend itself may constitute irreparable harm.[14]

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[13] Defendant's reliance on an unreported decision from the Northern District of Georgia and a Supreme Court case from 1879 to bolster this argument fails because the cited cases are plainly inapposite. *See Atlanta Sundries, Inc. v. S.C. Johnson & Son, Inc.*, 1994 WL 398170 (N.D. Ga. Jan. 24, 1994) (trademark infringement action based on use of a trade name); *Meyer v. Del. R. Const. Co.*, 100 U.S. 457, 473 (1879) (involving petitions to remove various cases from state courts). (Opp. at 22).

[14] *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (irreparable harm where "significant risk that [plaintiff] will be forced to expend unnecessary time, money, and effort litigation the issue of their fees in [Tribal court]—a court which likely does not have jurisdiction over it."); *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000) (irreparable damage "as demonstrated by the expense and time involved in litigating this case in tribal court" that lacked jurisdiction); *UNC Res. v. Benally*, 518 F. Supp. 1046, 1053 (D. Ariz. 1981).

Finally, for completeness, Defendant's mere insistence that it will be irreparably harmed if the Tribal Action is enjoined is contrary to the legal standard for injunctive relief and misses the mark. Defendant is the non-movant that seeks to keep non-members litigating off-reservation activities in Tribal Court. There is no analysis to be done of its purported "harm." Importantly, the Supreme Court has warned against the very end result that Defendant seeks. "[N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." Plains Commerce, 554 U.S. at 337. Not surprisingly, all the cases Defendant cites in support are inapplicable here.[15]

CONCLUSION

For all of the reasons set forth in Plaintiffs' submissions, the Court should grant the relief requested by Plaintiffs.

Respectfully submitted,

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[15] *See Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (preliminary junction filed by an Indian tribe); *Kewadin Casinos Gaming Auth. v. Draganchuk*, 584 F. Supp.3d 468 (W.D. Mich. 2022) (*same*); and *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) (*same*). In each case, the court analyzed irreparable harm as to the Indian tribes because they were the *moving party*. Equally unavailing is Defendant's citation to *In re Confederated Tribes of Grand Ronde*, 2005 WL 6169140 (Tribal court action in which an Indian Tribe sought to vacate or modify an arbitration award).