UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SICHENZIA ROSS FERENCE, LLP and WELTZ LAW P.C.,	:	Case No. 1:23-cv-6415
Plaintiffs,	:	
vs.	:	
SKULL VALLEY BAND OF GOSHUTE INDIANS OF UTAH,	:	
Defendant.	:	

MEMORANDUM OF LAW OF PLAINTIFFS SICHENZIA ROSS FERENCE LLP AND WELTZ LAW P.C. FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs Sichenzia Ross Ference LLP ("SRF") and Weltz Law P.C. ("Weltz Law") (collectively, "Plaintiffs") hereby move pursuant to Federal Rule of Civil Procedure 65 for a temporary restraining order and preliminary injunction enjoining Defendant Skull Valley Band of Goshute Indians of Utah ("Defendant") and the Court of Indian Offenses for the Western Region in Phoenix, Arizona ("Tribal Court") from taking any action in the matter styled *Skull Valley Band of Goshute Indians of Utah v. Sichenzia Ross Ference LLP and Weltz Law P.C.*, Case No. CIV-21-WR13 currently pending in the Court of Indian Offenses for the Western Region in Phoenix, Arizona (the "Tribal Action").

Plaintiffs are New York law firms that previously represented Defendant (and various entities, collectively for convenience purposes as the "SVB Tribe") in connection with a breach of contract action in the Supreme Court of the State of New York, County of New York, against U.S. Bank National Association. Once the New York litigation had been commenced, Weltz Kakos Gerbi Wolinetz Volynsky LLP ("Weltz Law") would co-counsel with SRF. Weltz Law would ultimately secure a substantial settlement for the SVB Tribe, but shortly thereafter the SVB Tribe backed away from that settlement and engaged in various acts and conduct requiring Weltz Law to withdraw from representation (and SRF had previously ceased representation) and both New York law firms filed charging liens.

While the New York litigation was still pending, the SVB Tribe commenced the Tribal Action against Plaintiffs ultimately seeking to nullify Plaintiffs contingency Retainer Agreement with Defendant for the New York litigation even though Plaintiffs never explicitly or implicitly agreed to litigate disputes in a Tribal court and there is no jurisdiction over Plaintiffs in the Tribal Court. Indeed, Defendant expressly agreed in the Retainer Agreement to litigate any dispute with

Plaintiffs in New York County and the New York law firms are not Tribal entities, their representatives never set foot in Tribal lands and the subject matter of the New York litigation involved a breach of various agreements concerning securities held by the SVB Tribe.

Indeed, the U.S. Department of the Interior, Indian Affairs, states "Courts of Indian Offences (CFR Courts) operate *where Tribes retain jurisdiction over American Indians* that is exclusive of state jurisdiction, but where Tribal courts have not been established to fully exercise that jurisdiction." (emphasis supplied).[1] Further, the CFR Courts "Civil Jurisdictions" is described as—"The CFR Court can hear many different types of civil cases involving Indian or non-Indian *arising in 'Indian country,' where Tribal members are defendants*. Cases involving Indian and/or non-Indian or non-Tribal member are also *permitted by consent of the defendant to the personal jurisdiction of the court*." (emphasis supplied).[2]

Plaintiffs moved to dismiss the Tribal Action based upon a lack of personal and subject matter jurisdiction, but that application was denied by the Tribal Court and an appellate Tribal court in the Tribal Action. Plaintiffs have been ordered to proceed with discovery and a trial in the Tribal Action.

There is no possible basis for jurisdiction over Plaintiffs in the Tribal Court in the Tribal Action, and Defendant has commenced and prosecuted the Tribal Action in the utmost bad faith and solely to harass Plaintiffs and as part of Defendant's improper efforts to avoid paying the contingency fee owed for legal services. The New York litigation recently settled, and it appears that notwithstanding the charging liens settlement funds have been illegally disbursed in violation of the charging liens.

[1] https://www.bia.gov/CFRCourts

[2] https://www.bia.gov/CFRCourts/tribal-justice-support-directorate

This application should be granted for the following reasons:

First, the Tribal Court lacks jurisdiction over Plaintiffs because the non-member conduct did not occur within Indian country. Therefore, because Defendant and the Tribal Court lack jurisdiction over non-Indians outside of Indian country, the Court need not even consider whether either of the two exceptions to the presumption against Tribal court jurisdiction described in *Montana v. United States*, 450 U.S. 544 (1981) applies.

Second, even if the alleged conduct had occurred on Tribal land, which it did not, the Tribal Court would still lack jurisdiction over the non-member conduct under the *Montana* test. Thus, the Tribal Action is not predicated on (1) efforts to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" that are "necessary to protect tribal self-government and to control internal relations"; nor is it (2) a proper attempt to exercise authority over conduct on fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329-30, 332 (2008).

Defendant cannot satisfy the "consensual relationship" exception because it cannot show it is protecting any interest that is necessary for its self-government. Nor can Defendant satisfy the second exception, since there is no basis to suggest that the challenged conduct imperils the subsistence or survival of Defendant or that Tribal court jurisdiction is "needed to preserve the [Tribe's] right to make its own laws and be governed by them." *MacArthur v. San Juan County*, 497 F.3d 1057, 1075 (10th Cir. 2007); *Plains Commerce Bank*, 554 U.S. at 329-30, 332.

Third, contrary to the unexplained determination of the Tribal Court, there are no facts supporting personal jurisdiction over Plaintiffs in the Tribal Court because Plaintiffs have no contacts with Arizona (or Nevada).

Fourth, pursuant to the parties' Retainer Agreement, Defendant expressly and unequivocally agreed to litigate all disputes in New York County.

Finally, this Court may grant a temporary restraining order and preliminary injunction if the moving party demonstrates: (1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quotation omitted). Here, all of these factors support temporary relief to preserve the status quo and to prevent movants from being forced to litigate a case in a Tribal CFR Court in the State of Arizona, despite that it has no jurisdiction over Plaintiffs SRF and Weltz Law. The entry of a temporary restraining order would serve to immediately stop Defendant from benefiting from its misuse and perversion of a claim for a declaratory judgment to invalidate the parties' retainer agreement and Plaintiffs' charging liens, by forcing Plaintiffs to litigate in a forum to which it is foreign and in contravention of a retainer agreement between the parties that placed the correct forum in New York County, New York.

Accordingly, the Court should therefore (1) declare that the Tribal Court in the Tribal Action lacks jurisdiction over Plaintiffs to adjudicate the Tribal Action; (2) enjoin the Tribal Court from adjudicating the Tribal Action any further against Plaintiffs; and (3) enjoin Defendant from litigating the Tribal Action any further against Plaintiffs.

SUMMARY

Plaintiffs are law firms located in New York that were retained by Defendant on a contingency basis in March 2019 to represent the SVB Tribe in a lawsuit against U.S. Bank National Association ("U.S. Bank") concerning certain residual securities held by the SVB Tribe. The Retainer Agreement provides, in relevant part, that the venue for disputes "shall exclusively be in New York County, New York."

Thereafter, SRF and Weltz Law commenced and prosecuted the action styled *Skull Valley Band of Goshute Indians of Utah, et al. v. U.S. Bank National Association*, Index No. 650640/2020 (Supreme Court, NY County) (the "State Action"). After engaging in substantial discovery and successfully defeating a motion by U.S. Bank to remove the State Action to Federal court (via a remand), Weltz Law would secure a substantial settlement for the SVB Tribe. Over the months that followed, however, the SVB Tribe would ultimately decline the significant settlement. Plaintiffs ceased representation of the SVB Tribe in the State Action. SRF and Weltz Law each filed charging liens. Recently, on June 7, 2023, the State Action was discontinued after the SVB Tribe accepted a settlement with U.S. Bank, the details of which the SVB Tribe and U.S. Bank refuse to disclose.

Before settling the State Action, in or about December 2021, the SVB Tribe sued Plaintiffs in the Tribal Action. In the Tribal Action, Defendant is seeking a declaration and judgement that the Plaintiffs' Retainer Agreement for the State Action should be found unenforceable against Defendant purportedly based upon sovereign immunity.

Defendant commenced the Tribal Action solely to harass Plaintiffs and force them to litigate across the United States in a foreign Tribal Court that has no personal or subject matter

over them in the hope of frustrating Plaintiffs' will to enforce their lawful charging liens and to steal all of the contingency proceeds from the recovery which are owed to Plaintiffs.

Plaintiffs never implicitly or explicitly agreed to be hailed into Tribal Court in Arizona (or any Tribal court), nor was it reasonably foreseeable that such could be the case. To the contrary, the parties expressly agreed in the Retainer Agreement to litigate disputes in New York County.

In the Tribal Action, Plaintiffs moved to dismiss Defendant's First Amended Complaint (and initial complaint) for lack of jurisdiction, as there is not even a colorable claim that jurisdiction exists there. Yet, the trial Tribal Court improperly denied the application with effectively no analysis to support the jurisdictional ruling, upheld on appeal, and the Tribal Court has ordered the case to proceed with discovery and a trial. At all times, Plaintiffs have not waived, and fully preserved, their continuing jurisdictional objection.

This Court should issue a declaratory judgment and enjoin Defendant and Tribal Court from exercising jurisdiction they plainly lack in the Tribal Action. This Court has jurisdiction over this declaratory judgment action because Defendant's and Tribal Court's attempt to prosecute and adjudicate the Tribal Action presents a federal question under 28 U.S.C. § 1331.

Defendant and Tribal Court plainly lack jurisdiction over the conduct alleged in the Tribal Action. Plaintiffs are not tribal members or tribal corporations. Further, none of Plaintiffs' conduct at issue occurred in Indian country or Tribal lands. In fact, it is undisputed that Plaintiffs have never entered Tribal lands or Indian country and the subject of the State Action does not involve Tribal lands, Tribal governance, or internal Tribal relations. Further, Plaintiffs do not have even minimum contacts with Arizona, the location of the Tribal Court. In addition, Defendant agreed to litigate disputes in New York County. That should be the end of the jurisdictional inquiry. More broadly, there are no facts that Defendant can point to for purposes of arguing that any

conduct threatens either tribal governance or internal relations among Tribe members, as required for either of the exceptions to the rule barring tribal regulation of non-Indians to apply. Both exceptions are also inapplicable for other reasons discussed below.

Under the circumstances, exhaustion of tribal remedies is not and should not be required because, among other things, jurisdiction over the non-Indian Plaintiffs for their alleged conduct is so clearly lacking that exhaustion would serve no purpose but delay. The Court should declare that Defendant and Tribal Court in the Tribal Action are without jurisdiction to prosecute or adjudicate the Tribal Action and should enter an injunction against same.

FACTUAL BACKGROUND[3]

Plaintiffs here are the defendants in the Tribal Action. SRF is a law firm located in New York County, New York. Weltz Law is a law firm located in Nassau County, New York. Plaintiffs are not tribal members or tribal corporations. Plaintiffs have never entered Tribal lands of Defendant. No communications between Plaintiffs and Defendant occurred in, to or from Arizona, where the Tribal Court is located. Defendant is alleged to be a federally recognized native American tribe located in Utah. (Complaint, at ¶ 8).

In 2018, Defendant's long-time lawyer, Danny Quintana, Esq. ("Quintana"), was introduced to Irwin Weltz, Esq. ("Weltz"), then a lawyer with SRF, to review a potential matter involving Defendant. Quintana would solicit Weltz's assistance. The potential matter did not involve Tribal lands, Tribal governance, or internal Tribal relations. Instead, it related to certain residual securities held by the SVB Tribe. (*Id.*, at ¶ 17).

Weltz spoke to Quintana and reviewed various background materials. Initially, Weltz was not all that interested in the potential matter. Over time there were further discussions and

[3] *See* the Declarations of Michael H. Ference and Irwin Weltz submitted concurrently herewith.

communications and ultimately in October 2018 Weltz would travel with his then law partner at SRF, Michael H. Ference, Esq. ("Ference"), to Utah to meet in person with Quintana (and his other firm lawyers) and Candace Bear, the Tribal Chairperson, and Sheila Urias, the Tribal Secretary. The meeting took place in Quintana's law offices in Salt Lake City, Utah, and neither Weltz nor Ference entered any Tribal lands. In fact, it is undisputed that at no time ever would anyone from SRF or Weltz Law enter any Tribal lands or Indian country. (*Id.*, at ¶ 18).

Ultimately, in March 2019, Defendant would retain Plaintiffs to commence and prosecute the State Action against U.S. Bank and Candace Bear, Defendant's Chairperson, signed Plaintiffs' Retainer Agreement. That Retainer Agreement provides that any disputes would be litigated in New York County. Plaintiffs and Defendant determined to file suit in the Supreme Court of the State of New York, New York County, primarily because there were to prior favorable decisions from the First Department on the subject matter. (*Id.*, at ¶ 19).

On January 28, 2020, Plaintiffs filed the State Action in the Supreme Court of the State of New York, New York County. The basis for the State Action was U.S. Bank's alleged breach of various real estate mortgage investment conduit ("REMIC") agreements and their corresponding trust agreements, of which the SVB Tribe were the residual holders and beneficiaries, and of which U.S. Bank was the trustee. (*Id.*, at ¶ 20).

On February 26, 2020, U.S. Bank removed the State Action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1331, 1441, and 1446. On or about May 27, 2020, the SVB Tribe moved for an order pursuant to 28 U.S.C. § 1447(c) to remand the State Action back to the Supreme Court of the State of New York, County of New York. The parties in the State Action actively litigated the case and engaged in substantial discovery in the SDNY while the remand motion was pending. (*Id.*, at ¶¶ 21-22).

On or about November 7, 2020, SRF's engagement with the SVB Tribe was terminated and on or about December 21, 2020, SRF filed a Motion to Withdraw as counsel. SRF concurrently filed a Notice of Charging Lien. (*Id.*, at ¶ 23).

On or about December 21, 2020, the court granted the motion to remand and ordered that the case be remanded back to the Supreme Court of the State of New York, County of New York. During this period of time prior to remand, the State Action was actively litigated in this venue, and substantial discovery took place. (*Id.*, at ¶¶ 24-25).

On or about December 28, 2020, the parties to the State Action participated in a mediation with a JAMS mediator. Although the parties seemingly reached a significant settlement during the mediation, the SVB Tribe ultimately refused to execute the settlement agreement over the months that followed. (*Id.*, at ¶ 26).

The relationship between Weltz Law and the SVB Tribe would thereafter deteriorate and in February and March 2021, Weltz Law advised the SVB Tribe that it should retain new counsel to substitute in for Weltz Law in view of the complete breakdown in the relationship caused by the SVB Tribe's various acts and conduct. In May 2021, the SVB Tribe retained new counsel and Weltz Law substituted out of the case and filed a charging lien. On or about June 7, 2023, the parties to the State Action reached a settlement, the terms of which have been kept confidential, and discontinued the State Action. (*Id.*, at ¶ 27).

Prior to that settlement, in or about December 2021, the SVB Tribe commenced the Tribal Action. Plaintiffs in the Tribal Action would thereafter amend their complaint to remove the entities and certain claims. The remaining claims in Defendant's First Amended Complaint seeks a declaration that the Retainer Agreement is unenforceable based upon sovereign immunity. (*Id.*, at ¶ 28).

Plaintiffs here, defendants in the Tribal Action, moved to dismiss the First Amended Complaint (and initial Complaint) for lack of personal and subject matter jurisdiction. The Tribal Court denied the motion and Plaintiffs' appeal was dismissed. The Tribal Court has ordered the parties in the Tribal Action to proceed with discovery and trial. (*Id.*, at ¶ 29).

Defendant has not specifically averred that any of the activities it alleges in its First Amended Complaint in the Tribal Action occurred within the boundaries of an Indian reservation or other area of Indian country or Tribal lands, nor could it. Rather, Defendant seemingly contends that email communications with a purported Tribal email address (from Utah) suffices to subject Plaintiffs to the foreign Tribal Court's jurisdiction in Arizona, a forum that has no personal jurisdiction over Plaintiffs, New York law firms. Defendant's vague allegations are intentional. It is well aware that Plaintiffs never once set foot on Tribal lands or Indian country, nor do they claim Plaintiffs did. (*Id.*, at ¶ 30).

LEGAL STANDARD

In the Second Circuit, the "standard[s] for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure are identical." *Tang Capital Partners, L.P. v. Cell Therapeutics, Inc.*, 591 F. Supp. 2d 666, 669 (S.D.N.Y. 2008). To obtain either form of relief, a plaintiff must establish: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Glob. Mkts., Inc*, 598 F.3d at 35 (quotation omitted); *see also New York Bay Capital, LLC v. Cobalt Holdings, Inc.*, 2020 WL 1989485, *4 (S.D.N.Y. Apr. 27, 2020); *Polymer Technology Corp. v. Mimran*, 37 F.3d 74 (2nd Cir. 1994); *Roberts v. Atlantic Recording Corp.*, 892 F. Supp. 83 (S.D.N.Y. 1985).

The party seeking the injunction carries the burden of persuasion to demonstrate "by a clear showing" that the necessary elements are satisfied. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (alterations omitted). Where a party seeks a mandatory injunction, a plaintiff must show a clear or substantial likelihood of success or that extreme or very serious damage will result from a denial of the relief requested. *See Jordan v. New York City Board of Elections*, 2020 WL 3168509, *1 (2d Cir. June 15, 2020).

For the reasons set forth below, Plaintiffs SRF and Weltz Law satisfy the standard for obtaining a temporary restraining order and preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. The Alleged Conduct Did Not Occur in Indian Country.

It is well established that Tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). As domestic dependent quasi-sovereign nations, the jurisdiction of Indian tribes over non-Indians is strictly limited. A tribe's adjudicative jurisdiction over non-members cannot exceed its legislative jurisdiction and may not even go that far. *Hicks*, 533 U.S. at 357-58; *see also id*. at 358 n.2 ("we have never held that a tribal court had jurisdiction over a nonmember defendant").

The "sovereignty that the Indian tribes" enjoy "is of a unique and limited character… center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316, 327 (2008) (quotations omitted). Thus, except where a tribe is regulating Indians, "tribal jurisdiction is… cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip*

Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 937-38 (9th Cir. 2009) (*citing Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n. 12 (2001)).[4]

Tribal jurisdiction over non-members does not extend past land that constitutes "Indian country" as defined by 18 U.S.C. § 1151: (a) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of- way running through the same." *See DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 427, n. 2 (1975) (recognizing that Section 1151 generally applies to questions of civil jurisdiction).

In the instant case, the alleged conduct is indisputably non-Indian conduct occurring outside of Indian country. Accordingly, the Tribal Court in the Tribal Action plainly lacks any jurisdiction over the non-member Plaintiffs here for conduct that occurred at Plaintiffs' New York offices and only in New York Courts. *See Plains Commerce Bank*, 554 U.S. at 327; *Philip Morris*, 569 F.3d at 937-38*; see also*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782, 786 (7th Cir. 2014) ("no colorable claim that the courts of the [tribe] can exercise jurisdiction over the Plaintiffs" where "the Plaintiffs have not engaged in any activities inside the reservation" (emphasis omitted)); *Atty's Process & Investig. Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 809 F.

[4] *See, e.g.*, *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975) (recognizing that 18 U.S.C. § 1151 generally applies to questions of civil jurisdiction); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Ct.*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (holding tribal court plainly had no jurisdiction where alleged conduct did not occur within reservation); *Progressive Specialty Ins. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("Indian tribes are not permitted to exercise jurisdiction over the activities or conduct of non-Indians occurring outside the reservation."); *Yankton Sioux Tribe Head Start Concerned Parents v. Longview Farms, LLP*, 2009 WL 891866, at *3 (D.S.D. Mar. 31, 2009) ("The Tribe does not have regulatory authority over the construction of the farrowing facility by Defendant, a non-Indian entity, because such facility is located on land which is not within reservation boundaries.").

Supp. 2d 916, 928 (N.D. Iowa 2011) ("[T]ribal jurisdiction is lacking where the nonmember conduct at issue did not occur on the tribe's reservation.").

Despite these restrictions on tribal jurisdiction, the Tribal Court in the Tribal Action purports to possess broad, general jurisdiction against the non-members SRF and Weltz Law. Although Plaintiffs have objected and asserted defenses to the Tribal Court's exercise of jurisdiction over them in the Tribal Action, the Tribal Action is still pending, with discovery having ensued, as ordered by the Tribal Court, and a trial looming. On May 15, 2023, the Tribal Court ordered SRF and Weltz Law to interpose an Answer to the First Amended Complaint by May 29, 2023, and set forth a discovery, pre-trial and trial schedule for the Tribal Action. Thus, without the immediate relief requested by Plaintiffs, Plaintiffs will be required to litigate the Tribal Action before the Tribal Court despite the fact that it has no jurisdiction over Plaintiffs.

Where, as here, a tribe attempts to assert jurisdiction over non-Indians based on conduct that occurred outside of Indian country, courts regularly find tribal court jurisdiction plainly lacking. *See, e.g.*, *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091-93 (8th Cir. 1998) (finding it "plain" that claims concerning off-reservation manufacturing, distribution, and sale of malt liquor—which allegedly harmed the tribe's health and welfare—are outside tribe's inherent sovereign authority and not subject to tribal jurisdiction). This Court should reach a similar conclusion.

Thus, because the alleged conduct did not occur in Indian country or Tribal lands, Defendant and the Tribal Court plainly lack jurisdiction over Plaintiffs, and Plaintiffs have shown a likelihood of success on the merits. *See Hornell*, 133 F.3d at 1091 (where the alleged conduct occurred outside of Indian country, jurisdiction cannot be conferred under *Montana*, which does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians

occurring *outside their reservations*"); *MacArthur v. San Juan County*, 2000 WL 35439199, at *3 (D. Utah Dec. 13, 2000) ("It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders."). The Court need proceed no further with its analysis and should enter a restraining order and an injunction barring the suit against Plaintiffs in Tribal Court in the Tribal Action.

B. Even if the Conduct Had Occurred Within Indian Country (It Did Not), the SVB Tribe Could Not Overcome the Presumption Against Jurisdiction.

Even if the alleged conduct occurred within Indian country (it did not), tribal jurisdiction over non-member conduct within such territory is strictly limited. "In *Montana v. United States*, 450 U.S. 544[, 565] (1981), the Supreme Court laid down [the] general rule that '*the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*.'" *MacArthur v. San Juan County*, 497 F.3d 1057, 1068 (10th Cir. 2007) (emphasis added). The general rule is rooted in the fact that "the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing…person[s] within their limits *except themselves*.'" *Plains Commerce Bank*, 554 U.S. at 328 (alternations in original) (emphasis added) (*quoting Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)).

Defendant can overcome the general rule only if it can establish the applicability of one of the two narrow *Montana* exceptions, as to which it bears the burden of proof:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565–66 (citations omitted) (emphasis added). Defendant cannot carry its burden as to either exception. *See Hornell Brewing Co. v. Rosebud Sioux* Tribal *Court*, 133 F.3d 1087, 1091-92 (8th Cir. 1998) ("The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create a jurisdiction of a tribal court under its powers of limited inherent sovereignty. The analysis of *Montana*, and the cases the *Montana* Court discussed, expressly or implicitly recognize tribes' limited authority over activity occurring within the reservation and tribes' lack of authority to determine their external relations."); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014) (holding that tribe cannot exercise jurisdiction over the plaintiffs, because the present dispute "does not arise from the actions of non-members on reservation land and does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources"); *Philip Morris*, 569 F.3d at 937-38 (finding that the tribal court lacked colorable jurisdiction over tribal action based on the *Montana* rule); *see also Plains Commerce Bank*, 554 U.S. at 327 (summarizing *Montana* rule and its narrow exceptions). Here, there can be no doubt that all of the Plaintiffs' alleged conduct occurred entirely outside of Indian country, and the Court need not even reach the applicability of the *Montana* exceptions.

Importantly, both *Montana* exceptions are limited to regulation of tribal governance or internal relations. *See Plains Commerce Bank*, 554 U.S. at 335 (explaining first *Montana* exception as reflecting tribes' authority to "regulate nonmember behavior that implicates tribal governance and internal relations"); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (explaining that "[k]ey" to second *Montana* exception is Court's recognition that "'[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations'" (alteration in original) (quoting *Montana*, 450 U.S. at 564)).

Neither *Montana* exception applies in this instance. The Tribal Court's exercise of tribal jurisdiction over the claims against Plaintiffs is not necessary to protect tribal governance or internal relations. The Tribal Action has nothing to do with determinations of tribal membership, intrusions on the privacy of communications among tribal leaders, voting by tribe members in tribal elections, inheritance by tribe members, or other matters central to tribal governance or internal relations. Indeed, the very nature of the Tribal Action demonstrates that Defendant cannot establish the applicability of either *Montana* exception.

Even if any of Plaintiffs' alleged conduct occurred in Tribal lands—and, again, it did not—tribal jurisdiction would still be lacking under *Montana*. *Montana* makes clear that even where non-Indian conduct occurs within Indian country (unlike in this case), tribal jurisdiction over such conduct is *strictly limited*. Efforts by a tribe "to regulate nonmembers, especially on non-Indian fee land [within an Indian reservation] are presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks omitted). The "sovereignty that the Indian tribes" enjoy, which provides authority to regulate such conduct, "is of a unique and limited character… center[ed] on the land held by the tribe and on tribal members within the reservation. *Id.* at 327 (quotations omitted). In particular, a tribe presumptively lacks jurisdiction over the activities of non-Indians even within Indian country, unless the tribe can satisfy one of the two very narrow exceptions under *Montana v. United States*, 450 U.S. 544, 565 (1981).

As noted, the burden rests on Defendant to establish one of the exceptions to *Montana*'s general rule. *Atkinson Trading Co.*, 532 U.S. at 644. These exceptions are limited ones and cannot be construed in a manner that would swallow the rule, or severely shrink it. *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co*., 532 U.S. at 654-55, 57, and *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)).

The Supreme Court has made clear that *Montana*'s consensual relationship exception only applies to conduct that intrudes on the internal relations of a tribe or threatens tribal self-rule. *Plains Commerce Bank*, 554 U.S. at 334-35. No such conduct is or could be alleged in the Tribal Action. Further, even when there is a consensual relationship, there must be a nexus, a direct connection, between that relationship and the conduct the tribe seeks to regulate or adjudicate. *MacArthur*, 309 F.3d at 1223; *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011). No such connection exists here.

The second *Montana* exception in some circumstances allows a tribe to exercise "civil authority over [1] the conduct of non-Indians on fee lands within the reservation [2] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 554 U.S. at 329-30 (internal quotation marks omitted). This exception is plainly not inapplicable to the Tribal Action.

Under the second exception, "the challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 341); *accord Strate*, 520 U.S. at 458 (even alleged conduct that "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members" does not fall under *Montana*'s second exception because "if *Montana*'s second exception requires no more, the exception would severely shrink the rule"). The conduct alleged in the Tribal Action does not come close to rising to that level.

Defendant also cannot satisfy the second *Montana* exception because it has not alleged facts indicating that the challenged conduct imperils the subsistence or survival of the tribe or that the exercise of jurisdiction "is needed to preserve the [tribe's] right to make their own laws and be governed by them." *MacArthur*, 497 F.3d at 1075; *Plains*, 554 U.S. at 341 ("The conduct must do

more than injure the tribe, it must 'imperil the subsistence' of the tribal community."). The activities alleged in the First Amended Complaint in the Tribal Action also do not threaten the political integrity, economic security, or health or welfare of Defendant so as to permit the assertion of jurisdiction over activities of non-Indians on non-Indian land.

In addition, there is no possible basis for the Tribal Court to assert personal jurisdiction over Plaintiffs in Court of Indian Offenses for the Western Region located in Arizona since Plaintiffs have no contacts with Arizona. Also, the parties agreed in the Retainer Agreement to litigate any disputes in New York County.

Accordingly, even if this case involved alleged conduct in Indian country, which it does not, the *Montana* exceptions still do not apply here and do not permit the assertion of jurisdiction over Plaintiffs in the Tribal Action.

C. The Exhaustion Remedy Does Not Apply

Plaintiffs have already exhausted their jurisdictional challenges in Tribal Court in the Tribal Action. Even had they not, there are multiple exceptions to exhaustion supporting this Court's authority to permit this action to proceed without delay.

Plaintiffs need not litigate this issue to exhaustion in Tribal Court before this Court grants relief. Because exhaustion is "a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy*, 640 F.3d at 1150. Three exceptions apply here: (1) it is "otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay"; (2) "the tribal court action is patently violative of express jurisdictional prohibitions"; and (3) "exhaustion would be futile because of the lack of [] adequate opportunity to challenge…[T]ribal court's jurisdiction." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (alterations and internal quotation marks omitted).

First, the Tribal Court clearly lacks jurisdiction, and the exhaustion requirement would serve no purpose other than delay. Federal courts have found that the exhaustion requirement does not apply to attempts like this one to assert jurisdiction outside of a reservation because it was "plain that…conduct outside the…Reservation does not fall within the Tribe's inherent sovereign authority." *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1093 (8th Cir. 1998). In *Crowe & Dunlevy*, the Tenth Circuit found that this exception was satisfied as to a tribal defendant who was "not an Indian entity" in light of the "presumption against tribal civil jurisdiction over non-Indians" and the limitation of "tribal power beyond what is necessary to protect tribal self government or to control internal relations." 640 F.3d at 1150 (internal quotation marks omitted). "[T]he exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction in this case." *Id.* at 1153.

Second, exhaustion is not required because Defendant's and the Tribal Court's assertion of jurisdiction violates express jurisdictional prohibitions. Thus, there is plainly no subject matter jurisdiction over SRF and Weltz Law and there is also no personal jurisdiction over Plaintiffs in the Tribal Action since Plaintiffs (and Defendant) have no connection with the forum state of the Tribal Action in the State of Arizona.

Third, exhaustion would be futile. This is true for all the reasons set forth above, and particularly where, as here, a tribal court, and an appellate tribal court, have already asserted and affirmed jurisdiction over the activities of non-members outside Tribal land in contravention of settled law. *See, e.g.*, *Hornell Brewing Co.*, 133 F.3d at 1091 (exhaustion not required where conduct did not occur on Tribal land); *accord Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014) (*same*); *Philip Morris USA, Inc. v. King Mountain Tobacco Co*., 569 F.3d 932, 945

(9th Cir. 2009) (concluding that exhaustion "would serve no purpose beyond delay" where conduct did not occur on Tribal land). Indeed, contrary to the law and facts, the Tribal Court has improperly found that it has jurisdiction over Plaintiffs and has ordered Plaintiffs to proceed with the litigation and issued a pre-trial order.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF THE INJUNCTION IS DENIED.

Absent temporary and preliminary relief, Plaintiffs "will be forced to expend unnecessary time, money, and effort litigating…[in] a court which likely does not have jurisdiction." *Crowe & Dunlevy*, 640 F.3d at 1157 (internal quotation marks omitted). While "economic loss is usually insufficient to constitute irreparable harm," it is relevant when sovereign immunity may prevent future remedy. *Id.* ("[T]he imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." (alteration and internal quotation marks omitted)). Because Plaintiffs may be "without recourse" to recover any award from "a sovereign entity" like the Defendant, a preliminary injunction against Defendant is warranted. *Id.* This is especially true where Plaintiffs would be forced to litigate in Tribal Court, which lacks jurisdiction over them. *See, e.g., UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 363 (D.M.N. 1981):

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial. Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

accord Kerr-McGee Corp. v. Farley, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000) ("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768, at *2 (D.N.M. Aug. 15, 2002) (finding non-tribal defendants were likely to succeed on the merits of their jurisdictional challenge in action brought by tribe, and that they would suffer irreparable harm if tribe was not enjoined from proceeding with their action in tribal court). The same determination is warranted here.

In addition, the threatened injury to Plaintiffs outweighs any potential inconvenience to Defendant should temporary and preliminary relief be granted. As the Court of Appeals held in *Crowe & Dunlevy*, where a tribal court lacks jurisdiction to regulate non-Indians, there is no offense to "the authority of…tribal courts" that could constitute harm. 640 F.3d at 1158. *Cf. Chiwewe*, 2002 WL 31924768, at *3 ("The Defendants have shown that they would suffer more harm from litigating in tribal court than the Plaintiffs would suffer from [] litigating in federal court only."); *Benally*, 518 F. Supp. at 1053 ("[I]t appears that the balance of hardships tips in favor of UNC since the defendants' injuries may be redressed in a federal or state court of competent jurisdiction.").

Moreover, Defendant retains its ability to file its false claims in Federal court. *See County of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (en banc) (second *Montana* exception did not apply because tribal jurisdiction over claims was "not necessary to protect Indian tribes or their members who may pursue their causes of action in state or federal court"); *accord Strate*, 520 U.S. at 459 ("Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring [non-Indian defendants] to defend against this commonplace state

highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [tribe].'" (citation and footnote omitted)). For all of the foregoing reasons, irreparable injury is decidedly in favor of Plaintiffs—not the Defendant.

Finally, the public interest supports an injunction of the Tribal Action, as courts have repeatedly recognized, the public interest is served by preventing tribal courts from proceeding where they lack jurisdiction. *Crowe & Dunlevy*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over…a non-consenting, nonmember, is in the public's interest."); *Benally*, 514 F. Supp. at 363 ("Nor will the public interest be harmed by an injunction preventing the defendants from participating in an unlawful exercise of tribal power.").

To allow this dispute arising from the Retainer Agreement and the New York litigation to proceed in Tribal Court is particularly against the public interest because "[t]he Bill of Rights does not apply to Indian tribes." *Plains Commerce Bank*, 554 U.S. at 337 (citing *Hicks*, 533 U.S. at 383 (Souter, J., concurring)). The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1302, provides some procedural safeguards, but "the guarantees are not identical, and there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow[] U.S. Supreme Court precedents jot-for-jot." *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (alteration, citation, internal quotation marks, and footnote omitted).

The Supreme Court has explained the dangers of extending tribal authority, noting that "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337 (citing *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)).

In sum, this is not a case as to which tribal jurisdiction applies. A tribe'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." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added) (citing *Montana*, 450 U.S. at 564). The public interest is therefore in preventing Defendant from over-extending its reach and adjudicating claims where it has no jurisdiction.

III. BECAUSE THE INJUNCTIVE RELIEF SOUGHT CARRIES NO RISK OF MONETARY LOSS, A SECURITY BOND SHOULD NOT BE REQUIRED.

The Court should grant the Plaintiffs' requested temporary and preliminary relief without requiring Plaintiffs to post a security bond. "It is well-settled that a district court has 'wide discretion in the matter of security and it has been held proper for the court to require no bond where there has been no proof of likelihood of harm.'" *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 345 (S.D.N.Y. 2010) (quoting *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996)); *see* Fed. R. Civ. P. 65(c). Moreover, "[i]n fixing the amount of security required, a court is not required to order security in respect of claimed economic damages that are no more than speculative…[and] the burden is on the party seeking security to establish a rational basis for the amount of the proposed bond." *AB Electrolux v. Bermil Indus. Corp.*, 481 F. Supp. 2d 325 (S.D.N.Y. 2007).

Moreover, within this circuit, district courts have declined to require any security where there was no likelihood of harm to the enjoined party. *See City of New York v. Venkataram*, 2011 WL 2899092, at *6 n. 9 (S.D.N.Y. July 13, 2011); *see also Eastman Kodak Co. v. Collins Ink Corp.*, 821 F. Supp. 2d 582, 590 (W.D.N.Y. 2011); *Lurgi, Inc. v. Northeast Biofuels, LP*, 2009 WL 910042, at *7 n. 10 (N.D.N.Y. Apr. 2, 2009). As discussed above, the temporary and preliminary

relief sought herein carries no risk of loss to Defendant. *See Crowe & Dunlevy*, 640 F.3d at 1158 (holding that where a tribal court lacks jurisdiction to regulate non-Indians, there is no offense to "the authority of…tribal courts" that could constitute harm).

Accordingly, the Court should not require Plaintiffs to post a security bond.

CONCLUSION

For the foregoing reasons, Plaintiffs request that their motion be granted and that the Court enter a temporary restraining order and a preliminary injunction enjoining Defendant and the Tribal Court, their agents, employees, successors, and assigns from taking any action or any step in the matter styled *Skull Valley Band of Goshute Indians of Utah v. Sichenzia Ross Ference LLP and Weltz Law P.C.*, Case No. CIV-21-WR13 currently pending in the Court of Indian Offenses for the Western Region.