IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (Northern (Jackson))

HOWARD BROWN and BRANDON SIBLEY,	)	
Plaintiffs,	)	
V.	)	**Civil Action No. 3:23-cv-127-DPJ-FKB**
CHOCTAW RESORT DEVELOPMENT ENTERPRISE, ET AL.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO EXHAUST TRIBAL REMEDIES

I. INTRODUCTION

Plaintiffs have sued Defendants alleging various federal statutory and Constitutional and common law tort claims arising from the Mississippi Band of Choctaw Indians' (the "Tribe" or "MBCI") enactment of and the other Tribal Defendants' implementation and enforcement of a tribal mask mandate (adopted as an emergency tribal public health measure by the MBCI) at one of its on-reservation gaming facilities operated by the Tribe d/b/a the Choctaw Resort Development Enterprise ("CRDE"). This dispute was triggered by Plaintiffs' refusal to wear masks as they attempted to register for hotel rooms at the Tribe's Golden Moon Casino and Hotel based on a hotel reservation Plaintiffs had made for a stay at that facility. (Compl., ¶s 25, 26, 27-79). That facility is owned and operated by the Tribe and located on Choctaw Reservation lands. This is confirmed by the Choctaw Gaming Commission license issued for the Golden Moon Hotel and Casino issued to the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise for that facility "located at Choctaw Indian Reservation." (Exhibit 5 to

Motion). The Exhibits filed in support of the Motion here addressed are properly before the Court. Documents referenced in the Complaint (or which are otherwise matters of public record) are considered a part of the Complaint for purposes of Rules 12(b)(1) and 12(b)(6) motions even if those documents are not attached to the Complaint; and, taking those into account in ruling on the subject Motion does not convert a Rule 12(b)(6) Motion into a Summary Judgment Motion. *Causey v. Sewell Cadillac-Chevrolet,* 394 F.3d 285, 288 (5th Cir. 2004) (Court may consider documents attached to 12(b)(6) motion as "part of the pleadings if they are referred to in the Plaintiff's complaint and are central to [the] claim"); *Funk v. Stryker Corporation*, 631 F.3d 777, 783 (5th Cir. 2011) (District Court's consideration of public records in other proceedings not referenced in the Complaint by Judicial Notice did not convert Rule 12(b)(6) motion into summary judgment motion); *Norris v. Heart Trust,* 500 F.3d 454, 461 and n.9 (5th Cir. 2007) ("… it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record"). This empowers this Court to consider the documents attached to this Motion as Exhibits 2, 3, 4, 5, 6 and 7.

Local law—in this case tribal law, some of which is and some of which is not referenced in the Complaint—is also judicially noticeable. This Court may take judicial notice of this "local" law per F.R.Evid. 201(b)(2) where (as here) the promulgation and content of that law is readily ascertainable. The current version of the Choctaw Constitution is publicly available at www.choctaw.org. This empowers the Court to consider the documents attached to the Motion as Exhibits 2, 3, 4, 5 and 6. *See, J.M. Blythe Motion Lines Corporation v. Blalock*, 310 F.2d 77, 78-79 (5th Cir. 1962).

Finally, this Court is entitled to consider information outside the face of a Complaint when a factual attack is made on this Court's jurisdiction per Rule 12(b)(1). *Williamson v.*

Tucker, 645 F.2d 404, 413 (5th Cir. 1981 ("Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."); *accord*, *Clark v. Tarrant County, Texas*, 798 F.2d 736, 741 (5th Cir. 1986). This empowers the Court to consider all the documents attached as Exhibits to the Motion.

The present suit seeks relief against the same parties based on the same cause of action at issue in a prior suit: *Brown, Et al. v. Choctaw Resort Development Enterprise, Et al.*, No. 3:22-CV-00256-DPJ-FKB (hereinafter, the "prior suit"). This Court dismissed that suit for Plaintiffs' failure to exhaust tribal remedies on their claims by Order entered November 7, 2022 (Docs. 50 and 51) in the prior suit.

The institutional Defendants named in the Complaint are identified as the "Choctaw Resort Development Enterprise" (Compl., in the caption and at ¶ 18) and as the "Mississippi Band of Choctaw Indians" (Compl., in the caption and at ¶s 5, 19, and 20), the same institutional Defendants named in Plaintiffs' prior suit against the same Defendants and based on the same cause of action.[1]

The MBCI's status as a federally recognized Indian Tribe has been expressly recognized by the United States in the Official List of "Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs" published at 88 Federal Register 2112, 2113 (January 12, 2023) (Exhibit 1 to Motion), of which this Court may take judicial notice per 44 U.S.C. § 1507; and, by the U.S. Supreme Court's rulings in *U.S. v. John*, 437 U.S. 634, 646 (1978) (holding *inter alia* that the MBCI is a federally recognized Indian

[1] Plaintiffs' prior suit pled some additional grounds for relief not repled here, but all the grounds for relief pled in their new Complaint were also pled in their prior suit. *Compare* page 2 of the Complaint pled in their prior suit (Doc. 1) with ¶ 5 of their Complaint in the instant suit (Doc. 1).

Tribe) *and Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (again, recognizing that the MBCI is a federally recognized Indian Tribe). This is also confirmed by the Tribe's Constitution cited at ¶s 20 and 102 of the Complaint, a true and correct copy of which is attached to the Motion as Exhibit 2.

This Court previously recognized in the prior suit that the Choctaw Resort Development Enterprise ("CRDE") is just a d/b/a name for this unincorporated tribal enterprise. Hence, is the Tribe itself. *See also, Payne v. Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise, et al.*, 159 F.Supp. 724 (S.D. Miss. 2015) (CRDE is the same legal entity as the MBCI and the MBCI's status as a federally recognized Indian Tribe destroys complete diversity); *accord, Michelle Dawn Copeland v. Mississippi Band of Choctaw Indians d/b/a Silverstar Resort*, 2010 WL 2667359 (S.D. Miss. 2010).

This is also confirmed by the plain text of Choctaw Tribal Council Resolution CHO 00-010 and Choctaw Ordinance 56 (Exhibits 3 and 4 to the Motion). The Resolution provides inter alia that "1. A new tribal business enterprise is hereby established which shall be known as the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise;" and "5. All other organizational requirements and procedures for this new business enterprise shall be governed by Tribal Ordinance 56." Ordinance 56 provides inter alia in the third "Whereas" that:

> WHEREAS, it is now and has always been the intent of the Tribal Council that these wholly owned Tribal business enterprises should operate as and be legally classified as unincorporated enterprises of the Mississippi Band of Choctaw Indians, d/b/a the particular Tribal enterprise, rather than as separate Tribally-chartered corporations; and,

and, at Section 9(a) that:

> All new wholly-owned enterprises which will operate under separate boards shall be authorized and established pursuant to this general Ordinance rather than by separate Ordinance. All new Tribal business enterprises shall operate under the taxpayer identification number/employer identification number of the Mississippi

> Band of Choctaw Indians, to wit: 64-0345731 and all new wholly-owned Tribal business enterprises shall operate as and be classified as unincorporated enterprises of the Tribe, and shall operate from the Tribal Business Enterprise Division of the Executive Branch pursuant to this ordinance. (Emphasis added).
>
> The individual Defendants in this suit are identified as:
>
> (1) "Chief Cyrus Ben … Chief of the Mississippi Band of Choctaw Indians" (Compl., at ¶ 21);
>
> (2) "William Sonny Johnson … Chief Executive Officer for Choctaw Resort Development Enterprise" (Compl., at ¶ 22);
>
> (3) Some John Doe parties referenced as "security officers and armed man … employed by the Choctaw Resort Development Enterprise" (Compl., at ¶ 20, 23, 108, 109, 110).

Thus, the Defendants named in this action are the Tribe itself, the Tribal Chief and CEO of CRDE and various tribal security guards, the same Defendants as sued in the prior suit.

As this Court has previously ruled in Plaintiffs' prior suit involving the same cause of action (Doc. 50, Civil Action No. 3:22-cv-256-DPJ-FKB, p. 6), Defendants' reservation booking for rooms at the Golden Moon Casino Hotel constitutes a private, voluntary commercial consensual relationship which triggers *Montana* jurisdiction in the Choctaw Tribal Courts even in the absence of any separate written contracts between the parties. *Cardin v. DeLa Cruz,* 671 F.2d 363 (9th Cir. 1982) (non-Indian purchases of goods at a tribally-operated grocery store on Indian reservation constituted a "consensual relationship" under *Montana v. U.S.,* 450 U.S. 544 (1981)). Moreover, the Court in *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians,* 746 F.3d 167 (5th Cir. 2014), *aff'd* by an evenly divided court *sub nom Dollar General Corporation v. Mississippi Band of Choctaw Indians,* 136 S.Ct. 2159 (2016), found that a verbal agreement of a non-Indian corporation's employee to have the local Dollar General store participate in a tribal work experience training program constituted a consensual relationship which anchored tribal court jurisdiction over tort claims against the corporation arising from that

relationship. Here, as admitted in ¶s 25 and 26 of Plaintiffs' prior suit, when they entered the lobby of the Golden Moon, they sought to register per a confirmed hotel reservation (*see.* New Compl., ¶ 26). Those admissions are non-hearsay "party admissions" of the Plaintiffs, admissible against them per Rule 801(d)(2), Federal Rules of Evidence. *Continental Insurance Company of New York v. Sherman*, 439 F.3d 1294, 1298 (5th Cir. 1971) ("As a general rule the pleading of a party made in another action … are admissible as admissions of the pleading party to the facts alleged therein …"), cited with approval in *Hardy v. Johns-Manville Sales Corporation*, 851 F.2d 742, 745 (5th Cir. 1988) for the proposition that "… there is a well-established rule that factual allegations in the trial court pleadings of a party in one case may be admissible as evidentiary admissions in a different case. …" It is well-settled that a hotel reservation constitutes a form of contract. *Wells v. Holiday Inns, Inc.*, 522 F.Supp. 1023 (W.D. Missouri 1982) (hotel reservation booked through third party was enforceable contract); *Dold v. Outrigger Hotel*, 501 P.2d 368 (Hw. 1972) (hotel reservation booked through third party agent of hotel company is an enforceable contract); *Brown v. Hilton Hotels Corp.*, 211 SE.2d 125 (Ga. 1974) (guaranteed hotel reservation was an enforceable contract); *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, 2008 WL 649024 (App. N.J. 2008) (guaranteed hotel reservation was an enforceable contract).

Perhaps Plaintiffs' think that not mentioning in their new Complaint the hotel reservation they admitted to in their prior Complaint will undermine Defendants' "consensual relationship" based argument that the Tribal Court has colorable jurisdiction over the claims pled in their new suit. If so, Plaintiffs are mistaken. The facts giving rise to their attempt to register at the Tribe's Golden Moon Hotel and Casino on October 16, 2021 based on their hotel reservation did not

change. Not mentioning their hotel reservation in their new Complaint does not overcome their prior admission at pages 6 and 7 of their prior Complaint that:

> Plaintiff Howard Brown on the 16th day of October 2021, had secured a hotel reservation through David Malbrough, a former Golden Moon and Casino employee.
>
> Plaintiffs were scheduled to enjoy the local food, culture, and shops while staying two nights at the Golden Moon Hotel and Casino.
>
> On the 16th day of October 2021, Plaintiffs entered the lobby of Golden Moon Hotel and Casino at Pearl River Resorts around the time of 4:30 pm, with a hotel reservation.

This Court may take judicial notice of this party admission as pled in the Complaint they filed in their prior suit which Complaint is "a matter of public record," the contents of which "can be accurately and reasonably determined from sources whose accuracy cannot reasonably be questioned" under Fed. Rule of Evid. 201(a) and (b)(2). *Funk v. Stryker Corporation, supra* (district courts can properly take judicial notice of matters of public record); *Hall v. Hodgkins,* 305 Fed. Appx. 224 (5th Cir. 2008) (district court properly took judicial notice of factual admissions in pleadings filed in prior suits filed in same district court).

Further, since Plaintiffs, the non-Indian parties in this dispute, are *Plaintiffs*, it is clear that the Choctaw Tribal Courts are the appropriate forum for adjudication of this dispute under *Williams v. Lee*, 358 U.S. 217 (1959); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 22 F.4th 892(10th Cir. 2022) (Utah State Courts have no jurisdiction over and Ute Tribal Court had jurisdiction over non-Indians' claims against tribe arising on Ute Reservation); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1204-1205 (10th Cir. 2018) (reaffirming *Williams v. Lee* rule that absent Congressional authorization tribal courts rather than state courts have jurisdiction to adjudicate suits filed by non-Indians against Indian parties regarding disputes arising from the Indian parties' conduct within their Indian Country).

Tribal Court jurisdiction exists under *Williams v. Lee* and its progeny independent of the other test established under *Montana v. United States, supra*; which only applies when the non-Indian parties would be *defendants* in a tribal court suit. *Fine Consulting, et al. v. George Rivera,* 915 F.Supp.2d 1212 (D.N.M. 2013) (since tribal court had colorable jurisdiction under *Williams v. Lee* and *Montana* tests, suit involving dispute by non-Indian party against tribal defendants involving contracts to be performed by non-Indian on the reservation must be dismissed due to plaintiff failure to exhaust tribal remedies); *accord, Bryan v. Itasca County* (absent federal statute changing jurisdictional rules set out in *Williams v. Lee,* tribal courts rather than state courts retain jurisdiction to adjudicate claims by non-Indians *v.* Indians). Again, the *Montana* test is only applicable when the non-Indian party in such a dispute is or would be a tribal court *defendant*. It is also clear, however, that if *Montana* were otherwise applicable, that the exercise of tribal jurisdiction over this dispute would also be appropriate under that test, and this Court found that the Choctaw Tribal Court had colorable jurisdiction to adjudicate Plaintiffs' claims under *Montana,* hence Plaintiffs had to exhaust their tribal remedies before seeking relief on these same claims in this Court. *See,* pp. 4-7, Doc. 50 in the prior suit.

II. THIS COURT IS REQUIRED TO DISMISS OR STAY PLAINTIFFS' SUIT DUE TO THEIR FAILURE TO EXHAUST TRIBAL REMEDIES

A.

National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante,* 480 U.S. 9 (1987) hold (except for certain exceptions not here relevant except as noted in fn.3)[2] that where a party seeks to secure a federal court ruling on a

[2] *National Farmers Union* at 856. n.21 ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' *cf. Juidice v. Vail,* 430 US 327, 338, 51 L Ed 2d 376, 98 S Ct 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."); *See, El Paso Natural Gas Company v.*

civil cause of action arising on lands constituting a federally recognized Tribe's Indian Country based on voluntary transactions or other consensual relationships between a non-Indian party to the dispute and a tribal member, tribe or tribal entity of that tribe, the federal court must dismiss (or stay) the federal suit until plaintiff has exhausted its tribal remedies—so long as there exist colorable tribal court jurisdiction over the claims pled under *Montana v. United States,* 450 U.S. 544 (1981) and/or *Williams v. Lee,* 358 U.S. 217 (1959). In this case (as in the prior suit), the tribal entity sued is the Mississippi Band of Choctaw Indians itself and the various tribal officials and employees referenced in the caption, which triggers tribal court jurisdiction under *Williams v. Lee*.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645 (2001), the Court reaffirmed the exhaustion of tribal remedies requirements of *National Farmers Union* and *Iowa Mutual* where there exists at least a colorable claim that the federal requirements for exercise of tribal jurisdiction over a non-Indian party—either as plaintiff or as defendant—are met. This exhaustion requirement has been reaffirmed many times. *Bank One, N.A. v. Lewis*, 144 F.Supp.2d 640 (S.D. Miss. 2001) (exhaustion of tribal remedies required on non-Indian creditor's effort to compel arbitration on claims of fraud filed in Choctaw Court in connection with installment sales contracts executed on Choctaw Indian Reservation); *aff'd sub nom Bank One, N.A. v. Shumake,* 281 F.3d 507 (5th Cir. 2002), *r'hrg and r'hrg en banc den'd,* 34 Fed. Appx. 965 (5th Cir. 2002), *cert. den'd.*, 537 U.S. 818 (2002); *accord, Graham v. Applied Geo Technologies, Inc.*, 593 F.Supp.2d 915 (S.D. Miss. 2008)

Neztsosie, 526 U.S. 473 (1999) (exhaustion of tribal remedies not required where the Congress has clearly expressed an intent that a particular federal claim be heard only in a federal forum); *Nevada v. Hicks,* 533 U.S. 353, 369 (exhaustion of tribal remedies is not required where there is not even a colorable basis for exercise of tribal jurisdiction; held: since tribal court had no jurisdiction to adjudicate tort and § 1983 claims against state officers, exhaustion of tribal remedies was not required as to suit pleading such claims). None of those exceptions apply here.

(requiring exhaustion of tribal remedies on former employee's civil suit against tribally-owned, tribally chartered corporation and various Indian and non-Indian officers and employees thereof); *accord, Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773 (S.D. Miss. 2001); *TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (exhaustion of tribal remedies required on tribe's claim that contract with non-Indian was void under 25 U.S.C. § 81); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) ("The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims."). *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300-1301(8th Cir. 1994) *cert. denied*, 513 U.S. 1103 (1995); (reaffirming 8th Circuit's previous interpretation that "*National Farmers Union* and *Iowa Mutual* ... require exhaustion of tribal court remedies before a case may be considered by a federal district court"); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (*Iowa Mutual* and *National Farmers Union* establish "an inflexible bar to considering the merits ... when it appears that there has been a failure to exhaust tribal remedies"); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory. If deference is called for, the district court may not relieve the parties from exhausting tribal remedies"), *cert. denied*, 502 U.S. 1096 (1992); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61,66 (2nd Cir. 1997) ("As long as a tribal forum is arguably in existence, as a general matter, we are bound by *National Farmer's* to defer to it"); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 (11th Cir. 1993) ("Under 28 U.S.C. § 1331, the district court only had subject matter jurisdiction to hear

challenges to the tribal court's jurisdiction after a full opportunity for tribal court determination of jurisdictional questions", citing *National Farmer's Union* at 471 U.S. at 856-857); *Norton v. Ute Indian Tribe of the Unitah and Ouray Reservation,* 862 F.3d 1236 (10th Cir. 2017) (District Court erred in failing to enforce plaintiff's duty to exhaust tribal remedies in suit against tribal officers and tribal business committee re dispute over role of county officers on reservation lands); *Crowe & Dunlevy, P.C., v. Stidham,* 640 F.3d 1140, 1149 (10th Cir. 2011) (absent exceptional circumstances, federal courts are to abstain from hearing cases that challenge tribal court authority until tribal remedies, including tribal appellate review, are exhausted); *Smith v. Moffett,* 947 F.3d 442, 446 (10th Cir.1991) (order dismissing civil suit against various tribal officials to the extent the claims pled arose on the Navajo Indian Reservation and reiterating that the duty to exhaust tribal remedies in such cases is mandatory)*; Stock West Corporation v. Michael Taylor,* 964 F.2d 912, 920 (9th Cir. 1992) (*en banc*) (affirming dismissal for failure to exhaust tribal remedies); *Fine Consulting, et al. v. George Rivera,* 915 F.Supp.2d 1212 (D.N.M. 2013) (dismissing plaintiff's suit seeking relief regarding tort and contract claims asserted by a non-Indian plaintiff based on a contract to be performed for a tribal party in its Indian Country for failure to exhaust tribal remedies); *World Fuel Services, Inc. v. Nambe Pueblo Development Corporation,* 362 F.Supp. 3d 1021 (D.N.M. 2019) (dismissing non-Indian plaintiff's suit against tribal entity for failure to exhaust tribal remedies).

B.

Satisfying the duty to exhaust tribal remedies requires the plaintiff to seek adjudication of all the legal and factual questions bearing on the claims pled in the Complaint in the Choctaw

Courts (including appeals to the Choctaw Supreme Court),[3] *Iowa Mutual Insurance Company v. LaPlante, supra* at 17 ("Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claims and federal courts should not intervene"). Plaintiffs have not exhausted their tribal remedies as to any of their claims, and the Choctaw Tribal Courts have colorable jurisdiction over those claims. Hence, this new suit must also be dismissed (or stayed) until the Choctaw Courts have been given the opportunity to rule on these and any other issues and defenses that may be germane to the dispute.

Although this Court has previously ruled in the prior suit that Plaintiffs were required to exhaust their tribal remedies before seeking relief in this Court on those claims (Docs. 50 and 51 in the prior suit), Plaintiffs have not sought any relief on any of their claims in the Choctaw Tribal Court since entry of this Court's order and Final Judgment (Docs. 50 and 51) in the prior suit; and, this Court's Final Judgment in the prior suit is *res judicata* on the question whether exhaustion of tribal remedies is required on Plaintiff's claims. *Test Masters Educ. Srvs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005):

> The test for res judicata has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Id.* (citations omitted). In order to determine whether both suits involve the same cause of action, this Court uses the transactional test. *Id.* Under the transactional test, a prior judgment's preclusive effect extends to all rights of the plaintiff with respect to all or any part of the transaction, or series of connected transactions, out of which the original action arose. *Id.* at 395-96 (quotation marks and citations omitted). … The critical issue is whether the two actions are based on the "same nucleus of operative facts."

[3] Creation of the Supreme Court of the Mississippi Band of Choctaw Indians was authorized by Tribal Ordinance 16-111 (July 25, 2000) codified at § Title VII, Choctaw Tribal Code. The Tribal Code is posted on and available at www.choctaw.org. *See*, fn.4.

Here, all of these elements are met. Plaintiffs' new suit involves the same parties, a prior judgment on the merits (Doc. 51) was entered in the prior suit by a court of competent jurisdiction and all the claims pled in the new suit were pled in the prior suit. Entry of a Final Judgment dismissing all parties' claims per F.R. Civ. P. 12(b)(6) (as occurred in the prior suit) is a "judgment on the merits" for *res judicata* purposes. *Fernandez-Montes v. Allied Pilots Ass'n.*, 987 F.2d 278, 284, n.8 (5th Cir. 1993).

Plaintiffs did file a Choctaw Tort Claims Act Notice on December 19, 2022 (Exhibit 7 to Motion), which was denied by the Choctaw Attorney General's office on December 21, 2022 as not timely filed per § 25-1-6 of that Act (Exhibit A to Plaintiffs' new Complaint, referenced therein at ¶ 15, and n.4); but, Plaintiffs did not thereafter seek any judicial relief in the Choctaw Tribal Court to challenge that denial on a tolling or any other theory regarding the Choctaw Attorney General's rejection of their tort claim. *See,* Exhibit 9 to the Motion (the Tribal Court Administrator's Affidavit).

Also, the Choctaw Tort Claims Act only applies to certain common law tort claims. *Mississippi Band of Choctaw Indians v. Peeples,* SC-2008-05, pp.4-6 (Choctaw Supreme Court, October 14, 2009) (the sovereign immunity waiver and claims process established by the Choctaw Tort Claims Act only applies to common law torts, not to contractual, statutory or constitutional claims), a true and correct copy of which ruling can be found on the Tribe's website at www.choctaw.org/government/services/attorney.html, by clicking on "Office of the Attorney General" and then on "Tribal Supreme Court opinions" and scrolling down to the opinions of that court issued for cases filed in 2008. That Act does not apply to any form of federal statutory or constitutional claims;[4] and, as confirmed by Exhibit 9 to the Motion,

[4] As to Plaintiffs' other claims, the Choctaw Courts routinely adjudicate cases based on constitutional asserting claims, or claims arising under the Indian Civil Right Act, 25 U.S.C. § 1301, or other federal

Plaintiffs have also not filed any suit in the Choctaw Tribal Court seeking any relief on their federal statutory or constitutional claims, or their common law tort claims. This Affidavit is admissible evidence confirming the "[a]bsence of a Public Record" admissible per Fed. Rule of Evid. 803(10)(A) that there exist no record of any tribal court filing of any suit by Plaintiffs and is evidence establishing that no such court filing has ever occurred**.** *United States v. Harris,* 551 F.2d 621 (5th Cir. 1977).

Thus, Plaintiffs have clearly failed to exhaust their tribal remedies as to any of the claims pled in their new suit or in their prior suit.

C.

Even though one of the Defendants herein is non-Indian, all the individual defendants are officers or employees of the MBCI sued for decisions they made or actions they are alleged to have taken in implementing or enforcing the tribal mask mandate at the Tribe's casino and hotel facilities on the Mississippi Choctaw Indian Reservation in the course and scope of their employment for the Tribe. As such, the claims against them are also subject to the duty to exhaust tribal remedies. *Graham v. Applied Geo Technologies, supra* (requiring exhaustion of tribal remedies even though some non-Indian defendants (AGT employees) were involved)*; Stock West Corporation v. Michael Taylor,* 964 F.2d 912 (9th Cir. 1992) (*en banc*) (non-Indian

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statutes. *See, Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (tribal courts available to vindicate federal rights). *See, Graham v. Applied Geo Technologies, supra* (requiring exhaustion of tribal remedies on Plaintiffs' claim based on 42 U.S.C. § 1981 and 42 U.S.C. § 2000e); *Cotton v. Beneficial Financial Corporation, et al.,* No. SC-2005-1 (Choctaw Sup. Ct., Feb. 17, 2010) (addressing defendant's Federal Arbitration Act defense); *Henry v. Henry,* No. SC-2015-01 (Choctaw Sup. Ct., May 3, 2018) (addressing claims and defenses based on federal qualified domestic relation order rules and the Federal Employment Retirement system); *Mississippi Band of Choctaw Indians v. Milstead,* Choctaw Sup. Ct. Dec. 18, 2017 No. SC 2016-04 (ruling on questions arising from 25 U.S.C. § 1153); *Sharp v. Mississippi Band of Choctaw Indians,* No. SC 2002-02 (Choctaw Sup. Ct., Sept. 3, 2004) (ruling on claims arising from 25 U.S.C. § 1301 *et seq,). TTEA, supra* (affirming that exhaustion of tribal remedies was required for plaintiffs' claims seeking relief based on 25 U.S.C. § 81).

plaintiff's claim against non-Indian tribal attorney arising from legal representation of tribally chartered business corporations and resultant on-reservation dispute involving validity of plaintiff's contract with those tribal entities was subject to dismissal for failure to exhaust tribal remedies because non-Indian tribal attorney's conduct was undertaken on the reservation on behalf of the tribal entities); *Toledo v. United States, et al.,* 2006 WL 8443330 (D. N.M. 2006) (dismissing plaintiff's tort claims against non-Indian law firm for failure to exhaust tribal remedies based on conduct of firm occurring both on and off-reservation as counsel to Indian tribe in connection with the claims sued upon where underlying cause of action occurred on Jemez Pueblo Reservation lands). *Basil Cook Enterprises, Inv. v. St. Regis Mohawk Tribe,* 117 F.3d 61 (2nd Cir. 1997) (exhaustion required as to non-Indian parties' claims filed against tribal officials and Indian and non-Indian tribal employees); *Fine Consulting, et al. v. George Rivera, et al.,* 915 F.Supp. 2d 1212 (D. N.M. 2019) (requiring exhaustion of tribal remedies even as to non-Indian plaintiff's claims against non-Indian tribal employees).

III. THE CHOCTAW TRIBAL COURTS CLEARLY HAVE COLORABLE SUBJECT MATTER JURISDICTION TO ADJUDICATE ALL OF PLAINTIFFS' CLAIMS AS HERE PLED

As this Court has already ruled in the prior suit (Doc. 50, pp. 1-2), the tribal headquarters for the Defendant Tribe and tribal officials employees and the Golden Moon facility are all located on Choctaw Reservation lands and, as pled, all Defendants' actions complained of by the Plaintiffs occurred, if at all, on Choctaw Reservation lands at the Golden Moon Casino and Hotel. (Compl., ¶ 25, 26, 27-79). (Exhibit 5 to the Motion).

A. The Choctaw Tribal Code And Constitution Confer Subject Matter Jurisdiction On The Choctaw Tribal Court to Adjudicate This Case

The Tribe's Constitution and Bylaws confer subject matter jurisdiction on the Choctaw Court to adjudicate this case.[5]

Article II – JURISDICTION of the Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians provides *inter alia*:

> The jurisdiction of the Mississippi Band of Choctaw Indians shall extend to all lands now held or which may hereafter be acquired by or for or which may be used under proper authority by the Mississippi Band of Choctaw Indians. …

Article VIII – POWERS AND DUTIES OF THE TRIBAL COUNCIL, §§ 1(k) and (m) provide *inter alia*:

> (k) To promote and protect the health, peace, morals, education, and general welfare of the tribe and its members.
>
> (m) To establish and enforce ordinances governing the conduct of tribal members; providing for the maintenance of law, order and the administration of justice; regulating wholesale, retail, commercial, or industrial activities on tribal lands; establishing a tribal court; and defining the powers and duties of that court; subject to the approval of the Secretary of the Interior where such approval is required by Federal law. (Emphasis added).

These Articles extend the Tribe's governmental jurisdiction over all of its lands, including the jurisdiction to regulate "commercial … activities on tribal lands."

Section 1-2-1—Tribal Policy, Choctaw Tribal Code ("CTC") confers subject matter jurisdiction on the Choctaw Courts to adjudicate civil disputes arising from any party's (whether Indian or non-Indian) "presence, business dealings, or contracts, or actions or failure to act, or other significant minimum contacts on or with the Reservation [by which] the party defendant

[5] The Tribal Constitutional provisions, the Tribal Code provisions and the Choctaw Supreme Court decisions referenced here are all posted and available online at www.choctaw.org, accessible by clicking on "Government" then on "Government Services Division" then on "Court Services" then on "Tribal Constitution" and then on "Tribal Code." The Choctaw Supreme Court decisions referenced herein are available on the same website. *See,* fn.5.

has incurred civil obligations to persons or entities [under] the Tribe's protection. [Emphasis and bracketed inserts added).

Section 1-2-1 Tribal Policy, CTC further clarifies that the Choctaw Court's subject matter jurisdiction extends over "all persons and entities within the territorial jurisdiction of the Tribe...."

Section 1-2-2 Territorial and Extraterritorial Jurisdiction, CTC further recognizes that "(3) The Tribal Court shall have such extra-territorial effect and application as may be permitted by federal law and as may be necessary and appropriate to execute the provisions hereof."

Section 1-2-5 General Subject Matter Jurisdiction and Limitations, CTC then confers subject matter jurisdiction on the Choctaw Courts (1) "over all civil actions … occurring within the jurisdiction defined by the Tribal Code," (emphasis added) provided that the Court shall not assert such jurisdiction (2) "over any civil … which does not involve the Tribe [or others not here relevant]. (Bracketed insert added). Of course, this suit does involve the Tribe directly as the Defendant.

All of these code provisions (and the Tribe's long arm statute at § 1-2-3 CTC discussed in more detail *infra* at II.A.) must be construed together. *Tunica Cty. v. Hampton Co. Nat'l Sur. LLC*, 27 So.3d 1128, 1133 (¶ 14) (Miss. 2009) ("[i]t is a well-settled rule of statutory construction that when two statutes pertain to the same subject, they must be read together in light of legislative intent."); *Martin v. State*, 501 So.2d 1124, 1127 (Miss. 1987) ("In construing statutes in pari materia … all of the relevant statutes must be taken into consideration, and a determination of legislative intent must be made from the statutes as a whole."); *Accord, In Re B.A.H. and K.M.B., Minors v. Jackson County Department of Human Services*, 225 So.3d 1220, 1237 (App. Miss. 2016).

This approach was used by the Choctaw Supreme Court in *Williams v. Parke-Davis*, Civ. 1142-01, 1141-01 (Choctaw Sup. Ct. 2003)[6] in interpreting these same constitutional and code provisions. There the Court affirmed the exercise of tribal court subject matter jurisdiction to adjudicate civil claims against an off-reservation drug company based on Rezulin sales to the Tribe's health center (then prescribed to tribal member patients) solicited by visits of an agent of the drug company to the reservation for the express purpose of inducing those sales and affirmed the Tribal Court's personal jurisdiction over the drug company via the Tribe's long arm statute (§ 1-2-3, CTC) holding that:

> There is no doubt that the [drug company]—through its sales agent—purposely availed itself of conducting activities within the forum, such that the defendant could have reasonably foreseen being hauled into court there. *See, e.g., Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

The Choctaw Supreme Court subsequently reaffirmed the Parke-Davis interpretation of these constitutional and code provisions in *Doe v. Dollar General Corporation*, CV-01-05 (Choctaw Supreme Court 2007):

> In *Parke-Davis*, this Court found *both* as a matter of federal and Tribal law that the Tribal court had subject matter jurisdiction over a tort lawsuit brought by a Tribal member against a non-resident corporate entity, whose representative came onto the Reservation, and convinced Tribal officials to distribute the drug Rezulin at the Tribal pharmacy located on trust land.
>
> The central facts in the case at bar are analogous to those in *Parke-Davis.* In both cases, the defendant specifically wanted to do business on the Mississippi Band of Choctaw Indians Reservation and made targeted efforts to do so. In both cases, the defendants were successful in such efforts. In *Parke-Davis,* Rezulin was distributed at the Tribal pharmacy. In the instant case, Dollar General obtained a written commercial lease to engage in business on leased Tribal land within the Reservation. In both cases, an alleged tort resulted from interaction between Tribal members and the business enterprise or its product. The result in *Parke-Davis* requires an affirmation of Tribal court jurisdiction in the case at bar.

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[6] Copies of Choctaw Supreme Court decisions are accessible on the Tribe's website: http: www.choctaw.org. Click on "Government," then on "Government Services Division." Then on "Office of the Attorney General." Then scroll down to "Tribal Supreme Court Opinions."

As noted in Parke-Davis,

> Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the state and federal sovereign but *against* the Tribal sovereign.
> *Parke-Davis at 8.*

These rulings remain the controlling law on the proper interpretation of these Choctaw Constitution and code provisions and clearly validate the Choctaw Court's subject matter jurisdiction to hear and decide Plaintiffs' claims if refiled there.

B.

In *Williams v. Lee,* 358 U.S. 217 (1959) the Court barred the exercise of state court jurisdiction over causes of action arising on Indian reservations in which non-Indians sought to sue Indians for such causes of action, ruling that tribal courts were the proper forum for hearing those cases. In this regard, the Court stated at pp. 220, 223:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there... The cases in this court have consistently guarded the authority of Indian governments over their reservations. (Citations omitted).

Likewise, in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-72 (1978), the Court ruled that "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."

Under *Williams v. Lee*, where a cause of action arises on lands constituting a tribe's Indian country and involves a non-member plaintiff suing a tribal defendant, based on alleged civil wrongs committed by the Indian defendant on the reservation in derogation of the rights of

the non-Indian plaintiff, the propriety of tribal court jurisdiction to adjudicate such claim under federal law is well-settled. *Ute Indian Tribe, supra; Navajo Nation v. Dalley, supra; Diepenbrock v. Merkel,* 97 P.3d 1063 (App.KS 2004) (tribal court had exclusive subject matter jurisdiction to adjudicate claims against the tribe and its employees arising from events occurring on tribal property).

These kind of claims do not require analysis of the more rigorous sort required under *Montana* when the tribal court plaintiff is Indian and the tribal court defendant is non-Indian as in *Dolgencorp, supra,* and *Bank One, supra; see, Montana v. United States*, 450 U.S. 544, 565-566 (1981) (listing *Williams v. Lee* as example of case where tribal jurisdiction was clearly appropriate under consensual relations exception to Main Rule); *see, Strate v. A-1 Contractors,* 520 U.S. 438, 457 (1997) (construing *Montana's* reference to *Williams v. Lee* as "declaring tribal jurisdiction exclusive over a lawsuit arising out of an on-reservation sales transaction between non-member plaintiff and member defendants"). *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138 (1984) makes clear that the same jurisdictional rule applies to tribal entity defendants as to tribal members.

Plains Commerce Bank v. Long Family Land & Cattle Company, Inc. 554 U.S. 316, 128 S.Ct. 2709 (2008) did not alter the rules requiring exhaustion of tribal remedies. There the Court held that the Cheyenne River Sioux Tribal Courts could not (under *Montana*) adjudicate claims seeking to stop a bank from reselling certain non-Indian fee lands located within the reservation which had come into the bank's possession as the result of various prior loan deals gone bad. The Court left the pre-*Plains Commerce* law of *Montana* and *Williams v. Lee* and their progeny (as to tribal court jurisdiction) and *National Farmers Union* and *Iowa Mutual* (as to exhaustion of tribal court remedies) unchanged as to cases involving Indian tribal court defendants and non-Indian

tribal court plaintiffs. *Philip Morris USA, Inc. v. King Mountain Tobacco Company, Inc.*, 469 F.3d 932, 940 (9th Cir. 2009) (reiterating that *Plains Commerce* left intact the rule of *Williams v. Lee* under which "tribal courts have exclusive jurisdiction over suits against tribal members on claims arising on the reservation").

C.

Independent of the *Williams v. Lee* argument set out in Part B, *supra*, the parties' Golden Moon reservation transaction constitutes a private voluntary consensual relationship which would otherwise anchor tribal court jurisdiction over disputes arising on the reservation from that relationship under the *Montana* test, even in the absence of any binding written contract, and even if the Plaintiffs were defendants in that suit. *Montana v. U.S., supra* at 565; *Strate v. A-1 Contractors, supra* at 445-447; *Atkinson Trading Co. v. Shirley, supra* at 655-666. *Cardin v. Dela Cruz, supra; Dolgencorp, supra.*

There is an obvious logical nexus between that consensual relationship and the claims here pled, as required by *Atkinson Trading Company, Inc. v. Shirley, supra* at 123 S.Ct. at 1833 (requiring that the cause of action pled must have some logical connection ("nexus") to the underlying consensual relationships to anchor *Montana* jurisdiction); *MacArthur v. San Juan County*, 309 F.3d 1216, 1223 (10th Cir. 2002) (the *Montana* nexus requirement is not met where there is no logical connection between the plaintiff's cause of action and the underlying consensual relationships). This *Montana* nexus requirement is satisfied here because Plaintiffs' claim the Defendants wrongfully deprived them of their opportunity to "enjoy the local food, culture and shops while staying two nights at the Golden Moon Hotel and Casino." (Compl., ¶ 26).

In these circumstances, the Choctaw Tribal Courts clearly have colorable subject matter jurisdiction[7] to adjudicate Plaintiffs' claims both under *Williams v. Lee* (because the non-Indian parties here involved are the Plaintiffs) and *Montana* (because even if the non-Indian party involved were defendants), the *Montana* test is satisfied and this Court has previously so ruled in the prior suit against the same Defendants involving the same cause of action.

CONCLUSION

For the reasons set out above and based on this Court's previous ruling at Doc. 50 in the prior suit, under *National Farmers Union, supra, Iowa Mutual, supra,* Plaintiffs are required to pursue all of their claims in the Choctaw Trial and Appellate Courts, thereby exhausting their tribal remedies and this Court is required to dismiss or stay Plaintiffs' action as to those claims in this Court. Dismissal is warranted and is here requested.

Respectfully submitted,

VanAMBERG, ROGERS, YEPA, ABEITA
GOMEZ & WILKINSON, LLP

By: /s/ C. Bryant Rogers
C. BRYANT ROGERS
Post Office Box 1447
Santa Fe, NM 87504-1447
Phone: (505) 988-8979
Fax: (505) 983-7508
E-mail: cbrogers@nmlawgroup.com

[7] For the same reasons that the Choctaw Courts would have subject matter jurisdiction to adjudicate the Plaintiffs' claims, the Choctaw Courts may properly exercise personal jurisdiction over these claims. *See, Smith v. Salish Kootenai Community College,* 434 F.3d 1127 (9th Cir. 2006) *(en banc)* (the test for determining whether tribal courts have subject matter jurisdiction over claims against non-Indians under the *Montana* test is essentially the same as for determining whether a court can exercise personal jurisdiction over an absent party based on long arm jurisdiction).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the Plaintiffs by United States Mail, postage prepaid, on March 14, 2022, at the addresses listed with the Clerk of the Court.

/s/ C. BRYANT ROGERS
C. BRYANT ROGERS

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