UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHR SOLUTIONS, INC.

Plaintiff,

v.

GILA RIVER TELECOMMUNICATIONS, INC.,

Defendant.

Civil Action No. 4:23-cv-1901

Hon. Magistrate Christina A. Bryan

SPECIALLY-APPEARING DEFENDANT GILA RIVER TELECOMMUNICATIONS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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Specially-Appearing Defendant, Gila River Telecommunications, Inc. ("GRTI"), a wholly-owned and operated entity of the Gila River Indian Community, a federally-recognized Indian tribe ("Community"), respectfully submits this reply in support of its Motion to Dismiss ("Motion") Plaintiff CHR Solutions, Inc.'s ("Plaintiff" or "CHR") Complaint.

Plaintiff's Memorandum of Law in Opposition to GRTI's Motion ("Opposition," Dkt. No. 24) fails to establish how this Court can exercise subject matter jurisdiction over Plaintiff's Complaint in the face of three compelling jurisdictional defects detailed in GRTI's Motion. Indeed, Plaintiff's Opposition fails to demonstrate how it has met its requisite burden and fails to rebut any of the evidence that GRTI has submitted on the record in support of its arguments. Instead, Plaintiff devotes the majority of its Opposition to inapposite case law and inflammatory factual allegations that are both unsupported and irrelevant to the arguments before the Court. These distraction attempts are unavailing and should be ignored.

First, as Plaintiff has acknowledged, GRTI is "a corporation organized and existing under the laws of the Gila River Indian Community" (Complaint ¶ 9)—making it a governmental entity beyond the reach of 28 U.S.C. § 1332, and not "the equivalent of a corporation" created under state law, as Plaintiff's Opposition now nonsensically suggests. Opposition at 11. Moreover, even if the elements of diversity jurisdiction were satisfied, GRTI would still be immune from unconsented suit, and CHR has failed to establish that either the Community has waived GRTI's immunity to allow this case to proceed, or that Congress has abrogated GRTI's immunity. GRTI qualifies as an arm of the Community under relevant case law and its immunity has not been waived. To the extent CHR attempts

to argue otherwise, CHR's position relies on an incorrect and incomplete application of the immunity doctrine, misconstrues GRTI's relationship vis-à-vis the Community, and grossly misinterprets the contractual documents at issue. Finally, CHR has failed to exhaust its remedies in Community Court as plainly required under Supreme Court (and Fifth Circuit) precedent. CHR's opposition to the jurisdiction of Community Court is made irrelevant by its own business license, only obtained through CHR's consent to the jurisdiction of Community Court, and is grounded in a derogatory view of tribal courts in general. CHR's arguments on all of these points should be squarely rejected.

Finally, this Court should reject CHR's "alternative" and procedurally improper request to seek jurisdictional discovery or leave to file an amended complaint. As to the former, GRTI's arm-of-the-Community status has been proven with overwhelming evidence, and it would be improper for this Court to authorize a fishing expedition that would do nothing more than impose an unjustified burden on the Community. And as to the latter, no amendment of CHR's Complaint could cure its core jurisdictional defects, making amendment futile.

For all of these reasons, the Complaint should be dismissed with prejudice.

ARGUMENT

I. CHR Has Failed to Meet its Burden of Establishing Subject Matter Jurisdiction in this Action

CHR begins with improperly characterizing the burden of proof in this action, claiming that "[a] party opposing a dispute resolution provision has the burden of proof to establish the provision does not apply." *See* Opposition at 8. In doing so, CHR misconstrues the procedural posture of this case and frames the issues in an entirely inaccurate context.

It is well-established that the federal courts are "courts of limited jurisdiction," and therefore may exercise "only that power authorized by Constitution and statute." *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). By virtue of their limited jurisdiction, federal courts must always "presume that a suit lies outside this limited jurisdiction." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). In this framework, the Supreme Court and this Circuit have explicitly recognized that "the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Id.*; *see also Kokkonen*, 511 U.S. at 377.

Here, CHR has filed a complaint seeking to invoke this Court's subject matter jurisdiction and GRTI has responded with a Rule 12(b)(1) motion, raising a legitimate jurisdictional challenge. Faced with the challenge to subject matter jurisdiction under Rule 12(b)(1), and in light of the presumption *against* federal court jurisdiction, CHR bears the burden of proving that such jurisdiction exists. *See Howery*, 243 F.3d at 916.

CHR attempts to flip this jurisdictional burden of proof on its head, with the assertion that "[a] party opposing a dispute resolution provision has the burden of proof to establish that provision does not apply." Opposition at 8 (citing *Phoenix Network Techs. (Europe) Ltd. v. Neon Systems, Inc.*, 177 S.W.3d 605 (Ct. App. Tex. 2005)). This proposition has no relevance to the present dispute. As noted in *Phoenix Network*, this burden-allocation rule applies only in the context of challenging a forum-selection clause. It has no relevance to the burden of proving *subject matter jurisdiction*; after all, the underlying case in *Phoenix Network* was brought in *state court*—a forum that is not bound by Article III's jurisdictional limitations.

Putting aside for the moment CHR's misguided linguistic interpretation of the "dispute resolution provision" at issue here, consider the implications of CHR's position. By CHR's logic, whenever parties enter into an agreement with a forum-selection provision stating that disputes should be brought in federal court, the exercise of federal subject matter jurisdiction would have to be considered "prima facie valid." *See id.* at 611. This cannot be the case, as it is axiomatic that federal subject matter jurisdiction cannot be created by the mere "consent" of the parties. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996).

Moreover, CHR wholly ignores the authority set forth in GRTI's Motion which provides that a "factual" attack on subject matter jurisdiction – supported by evidentiary material submitted by the defendant – shifts the burden to a plaintiff to prove subject matter jurisdiction "by a preponderance of the evidence." *In re IntraMTA Switched Access Charges Litigation*, 158 F. Supp. 3d 571, 574 (N.D. Tex. 2015). Instead, CHR misstates the burden of proof in this Circuit by relying on irrelevant state court cases that have not been relied upon or referenced by any court in this Circuit. Setting aside that this Court is not (and should not be) bound to follow these cherry-picked state court rulings, CHR's random case sampling does not establish uniformity, as multiple courts have held precisely the opposite—that *the plaintiff* bears the "burden of proving that tribal entities are not entitled to immunity by a preponderance of the evidence." *See, e.g., Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1113 (Colo. 2010).

More fundamentally though, as stated above, CHR fails to acknowledge, even assuming *arguendo* that the burden initially lies with the tribal entity seeking the protections of immunity, that once the tribal entity produces evidence to support its arm-of-the-tribe status, the burden shifts back to the non-tribal party to establish that immunity has been

waived or abrogated. *See People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357, 369 (Cal. 2016) (party opposing tribal sovereign immunity conceding that the burden shifts). Thus, no matter which party *initially* bore the burden for proving arm-of-the-tribe status, now that GRTI has produced evidence to support its immunity, the burden is firmly on CHR's side to prove otherwise. For all of the reasons stated herein, CHR has failed to carry that burden, and therefore, GRTI's Motion should be granted.

A. CHR Cannot Allege a Statutory Basis For Subject Matter Jurisdiction.

CHR has failed to establish diversity jurisdiction under 28 U.S.C. § 1332, and thus has failed to provide any basis for this Court to exercise subject matter jurisdiction.[1] In its Opposition, CHR cites to a slew of out-of-circuit cases to try and prop up its argument that any tribal company is necessarily eligible to be a citizen of a "state" under § 1332. However, such feeble attempts must fail as this view does not cohere with basic tenets of federal Indian law. The Court should reject CHR's argument, recognize that GRTI is not a citizen of any state, and hold that jurisdiction under § 1332 is lacking.

CHR's argument begins with a false legal premise. CHR argues that this Court should employ a "traditional corporate citizenship analysis" to GRTI on the theory that tribal corporations are "the equivalent of a corporation created under state and federal law for diversity purposes." *See* Opposition at 10. This is not the case. Tribal corporations are unique as compared to state and federally-formed counterparts, as nearly all courts have previously recognized. CHR's oversimplified approach would denigrate longstanding principles of tribal sovereignty.

[1] CHR appears to have abandoned its alternative position that subject matter jurisdiction can be established pursuant to 28 U.S.C. § 1330 (jurisdiction against a foreign state), as its Opposition fails to address GRTI's argument regarding § 1330 entirely. *See* Compl. at ¶ 12. As such, this Court should confirm that subject matter jurisdiction is lacking under § 1330.

The proper analysis requires a more holistic view. As the Eighth Circuit has made clear, "a tribal corporation's citizenship cannot be established under Section 1332(c) by simply looking to a tribal corporation's principal place of business." *Shingobee Builders, Inc. v. N. Segment Alliance*, 350 F. Supp. 3d 887, 893 (D.N.D. 2018) (relying on *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986)). Indeed, "the operative inquiry considers a tribal corporation's manner of formation and purpose. If a tribal corporation is established by a tribal council pursuant to its powers of self-government, then it must be treated as a tribal agency with no state citizenship rather than a separate corporate entity created by the tribe." *Id.* at 894 (citing *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998)) (cleaned up). For instance, in *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, even though a tribal housing authority was technically "a corporation," the court nonetheless refused to exercise jurisdiction under § 1332 because the housing authority was "formed by the Tribe for the purpose of pursuing functions intimately related to tribal self-government." 816 F.2d 1273, 1276–77 (8th Cir. 1987),

Here, as explained in its Motion, GRTI bears no resemblance to a run-of-the-mill corporation, and it would therefore be gravely mistaken to apply "traditional corporate citizenship analysis." Opposition at 10. GRTI was established under Community law to provide necessary telecommunications services within the Reservation. *See* Declaration of Anthony Villareal, Sr., ("Villareal Dec.," Dkt. No. 19) at ¶ 8. It is governed by a Board of Directors comprised of five members, all appointed by the Community's governing body, its Council. *Id.* at ¶ 9. Much like a tribal housing authority, GRTI provides a service that is "intimately related to tribal self-government," specifically, telecommunications services.

Indeed, for all intents and purposes, GRTI is a public utility. *See United States ex rel. Kishell*, 816 F.2d at 1276–77. As such, it should not be considered the citizen of *any* state under § 1332, and therefore, subject matter jurisdiction under that statute is lacking.[2]

II. GRTI is An Arm of the Community and Entitled to Sovereign Immunity

CHR has failed to rebut GRTI's sovereign immunity against unconsented suit. As set forth in GRTI's Motion, federal authority clearly establishes that tribal entities like GRTI enjoy sovereign immunity against unconsented suit. *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006). CHR's suggestions that immunity should be limited to tribal governments and their "sui generis" casinos is entirely unfounded and ignores a plethora of case authority recognizing that tribal governments have been exercising other forms of economic development for decades. Equally unfounded is CHR's proposition that tribal sovereign immunity applies only when "a judgment against the entity would reach the tribe's assets." *Id.* at 17. By any objective measure, GRTI must be considered an arm of the Community, and must be afforded the protections of tribal sovereign immunity.

A. GRTI Easily Satisfies the Arm-of-the-Tribe Standard

GRTI is clearly an arm of the Community and CHR has failed to establish any basis for finding otherwise. Although the arm-of-the-tribe test has not been addressed in the Fifth Circuit, the contours of the test are generally uniform throughout the federal judiciary. No matter how the test is formulated, immunity is *not*—as CHR suggests—limited to the tribal

[2] Contrary to CHR's assertions, it is immaterial if GRTI engages in "commercial" activities. It is the manner of formation, governance, and the overall purpose of the entity that establish the relevant framework under the citizenship analysis—not whether the activities seem "commercial." Indeed, even a tribal casino—which is equally if not more "commercial" as an entity that provides on-reservation telecommunications services—has been held to be beyond the reach of the diversity statute. *See Abdo v. Ft. Randall Casino*, 957 F. Supp. 1111, 1112 (D.S.D. 1997).

government itself.[3] Opposition at 16. To the contrary, immunity is available to any kind of tribal economic or political subdivision so long as the entity meets the arm-of-the-tribe standard. *See, e.g.*, *Mestek v. Lac Courte Oreilles Community Health Center*, 72 F.4th 255 (7th Cir. 2023). Here, GRTI easily meets the standard, and thus must be found to be immune from unconsented suit.

In determining whether an entity is an arm of a federally recognized tribe, courts engage in an analysis of multiple interrelated factors. The most common formulation comes from the Tenth Circuit's decision in *Breakthrough Management Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). *See also*, *IntraMTA*, 158 F. Supp.3d at 576. Under the *Breakthrough* framework, courts consider six factors: (1) the method of creation of the entity; (2) the entity's purpose; (3) its structure, ownership and management, including the tribe's control over the entity; (4) whether the tribe intended for the entity to be immune from suit; (5) the financial relationship between the entity and the tribe; and (6) whether the purposes of tribal sovereign immunity would be served by recognizing the entity as immune. *Id.* at 1181; *see also Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (adopting a similar standard).

1. <u>Method of Creation: GRTI was Created Pursuant to Tribal Law</u>

As to the first factor—method of creation—as set forth in GRTI's Motion, GRTI was undisputedly established pursuant to Community law. *See* Villareal Dec. at ¶ 8. CHR's own complaint acknowledges—correctly—that GRTI was "organized . . . under the laws of [the

[3] Moreover, the cases upon which CHR relies in support of its position are inapposite. For example, *Somerlott v. Cherokee Nation Distributors, Inc.*, involved an entity organized under the laws of the state of Oklahoma, not that of an Indian tribe. 666 F.3d 1144, 1151 (10th Cir. 2012). This is not the case here as the record is clear and CHR has acknowledged that GRTI was chartered under the laws of the Community. Compl. ¶ 9. Moreover, *People v. Miami Nation Enterprises*, involved an action against multiple tribally-affiliated payday lenders, with allegations that outside entities and individuals were actually operating their business operations and retaining the bulk of their profits. 386 P.3d 357 (2016). No such allegations are relevant to Plaintiff's claims in the Complaint.

Community]." *See* Complaint ¶ 9. This factor therefore plainly weighs in favor of finding that GRTI is an arm of the Community.[4]

2. Purpose: GRTI's Purpose is to Provide for the Community

The second factor—the purpose of the entity—likewise weighs in GRTI's favor. Analysis of this factor focuses on whether the purpose of the entity "relates to broader goals of tribal self-governance." *Williams*, 929 F.3d at 178. This could entail the direct provision of services on-reservation, the development of the tribe's economy, financial support for tribal social services, the creation of jobs for tribal members, or any combination thereof. *See Breakthrough*, 629 F.3d at 1192. Here, as attested to by GRTI Chairman Anthony Villareal, Sr., GRTI was established "to provide necessary public services to Community members living within the boundaries of the Reservation." *See* Villareal Dec. ¶ 8. Specifically, GRTI provides "direct benefits to Community members through its discounted broadband and telecommunications services." *Id.* at ¶ 18. Additionally, every quarter, GRTI issues a monetary dividend to the Community for funding important governmental programs such as "workforce development, housing, infrastructure construction, improved connectivity and social services." *Id.* at ¶ 19.

CHR argues that GRTI's purpose does not weigh in its favor for a number of reasons, all of which should be rejected. CHR first argues that "at establishment" GRTI was formed as a "for-profit business." *See* Opposition at 22. Yet, to the extent CHR implies that GRTI operates for the profit of private shareholders, the premise is patently false. As noted in

[4] Notwithstanding its clear acknowledgement in the Complaint of GRTI's tribal status (which the Court is required to accept as true), CHR attempts to further a convoluted and purely speculative theory that GRTI is somehow a state, and not a tribally-chartered corporation. *See* Opposition at 20-21. The sworn declaration and evidence submitted in support of GRTI's motion directly rebuts this conjecture, none of which this Court should consider in its deliberations. *See also*, *In re IntraMTA*, 158 F. Supp.3d at 576 (finding GRTI to be an entity "organized, operated, and wholly owned by [the Community]"). Moreover, sole parties to the contracts at issue in this case were CHR and GRTI only; therefore, baseless speculation as to the purported status of any other entity is irrelevant.

GRTI's Motion, all profits generated by GRTI inure to the benefit of the Community—the sole shareholder of GRTI. *See* Villareal Dec. at ¶¶ 8, 13.

Additionally, CHR argues that GRTI should somehow be ineligible for arm-of-the-Community status merely because GRTI operates in the telecommunications business, an industry that necessarily involves "interstate transmissions." *See* Opposition at 23. Such a far-fetched and unsupported notion has already been squarely rejected in *IntraMTA*, with the Northern District of Texas recognizing the importance of tribal telecommunications businesses in "upgrad[ing] and improv[ing] telecommunications services on the reservations," thus furthering tribal self-determination. 158 F. Supp. 3d at 576.

CHR's similar erroneous contention that a tribal entity's arm-of-the-tribe status should be limited to tribal casinos should likewise be rejected. Opposition at 17. Indeed, this short-sighted view of tribal government sophistication in economic development and diversification ignores the great body of case law recognizing non-gaming tribal business entities as arms of their respective tribes, and thus covered by tribal sovereign immunity. *See, e.g.*, *Mestek,* 72 F.4th 255 (tribal medical center recognized as an arm of the tribe); *Williams*, *supra*, 929 F.3d 170 (same, tribal entity engaged in financial services); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (same, tribal repatriation committee); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) (same, tribal administrator of self-insurance risk pool).

In short, by providing direct utility services to Community members, and by providing a quarterly dividend to fund governmental programs, GRTI clearly fulfills the purpose of furthering tribal self-governance. As such, GRTI's purpose supports a finding that GRTI is an arm of the Community.

3. Control: GRTI is Controlled by the Community

The third factor—structure, ownership, management, and control—also supports a finding that GRTI is an arm of the Community. GRTI is wholly-owned by the Community, with the Community owning 100% of the entity's outstanding shares. Villareal Dec. at ¶¶ 8, 13, Exh. B. GRTI is also managed and overseen by the Community. Operations are overseen by a Board of Directors comprised of five persons that are appointed by the Community's governing body (the Council) and removable at any time. *Id.* at ¶ 9. Additionally, all current members of the GRTI Board of Directors are elected members of the Council and enrolled members of the Community. *Id.* at ¶ 9. Moreover, as detailed in the Motion, GRTI has regular reporting obligations to the Community, submitting annual reports to the Community Council, and meeting with the Community Council and its designated Committees on a quarterly basis to report on operational and budgetary issues. *Id.* at ¶ 11-12. As GRTI's sole shareholder, the Community Council has the ability to audit GRTI's business records and access GRTI's accounting records at any time. Bylaws, Art. XIV Sec. 4-5; Villareal Decl. ⁋ 9; Exh. C. Through complete ownership and oversight through a Community-appointed Board of Directors, it is clear that the third *Breakthrough* factor weighs in favor of immunity.

In its Opposition, CHR appears to advocate for a categorical threshold requirement that an entity can be deemed an arm of the tribe only if "a judgment against the entity would reach the tribe's assets" or if the entity otherwise has the power "to bind the tribe's assets or obligate tribal funds." *See* Opposition at 17-18. In doing so, CHR relies mainly on three non-binding and outlier state-court cases: *Sue/Perior Concrete & Paving, Inc. v. Lewiston*

Golf Course Corp., 24 N.Y.3d 538 (2014); *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 427 (Alaska 2004); and *Dixon v Picopa Construction Co.*, 160 Ariz. 251 (1989).

At the outset, no federal court has adhered to or otherwise adopted the reasoning of these select cases, despite having an opportunity to do so. *See IntraMTA*, 158 F. Supp.3d at 575-75. That is because these cases are inconsistent with the clear weight of authority. For instance, in *Miami Nation*, 386 P.3d 357 (2016), after canvassing essentially every then-existing framework used by various jurisdictions, the Supreme Court of California properly acknowledged that "direct tribal liability for the entity's actions is neither a threshold requirement for immunity nor a predominant factor in the overall analysis, and we disagree with those courts that have held as much." *Id.* at 247 (disagreeing with *Sue/Perior*, *Runyon*, and *Dixon*). The Supreme Court of California also correctly noted that of all federal cases that have addressed the issue, the Tenth Circuit's decision in *Breakthrough* is "most influential." *Id.* at 238. Indeed, almost every jurisdiction to have addressed an arm-of-the-tribe inquiry has refused to treat direct tribal liability as a threshold requirement. *See also Great Plains Lending LLC v. Conn. Dept. of Banking*, 339 Conn. 112, 127 (2021) (noting that "[t]he *Breakthrough* test has been implemented by a majority of the federal courts that have considered this issue"). Therefore, CHR's attempts to distract from well-established federal authority on this issue must be rejected.

Even worse, CHR goes so far as to cite precedent that was flatly reversed a year later by a higher court. Specifically, CHR cites the Washington Court of Appeals case of *Wright v. Colville Tribal Enterprise Corporation*, 127 Wash. App. 644 (2005) (*Wright I*), for the proposition that a tribally owned entity could not be protected by tribal sovereign immunity when its charter had provisions that "insulat[ed] the tribe" from liability. *See* Opposition at

17-18. In *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108 (2006) (*Wright II*), the Washington Supreme Court reversed the Court of Appeals' ruling relied upon in Plaintiff's Opposition, and recognized that a limited liability structure (such as incorporation under tribal law) does not preclude an entity from being an arm of the tribe, holding that the same exact entities from *Wright I* were immune from suit. *See id.* at 113 ("Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws."). CHR's reliance on isolated, non-binding, and overturned authority is contrary to fundamental precepts of federal Indian law and should therefore be rejected.

4. Intent: The Community Intended to Share its Immunity with GRTI

The fourth factor—intent for the entity to be immune from suit—also weighs in GRTI's favor. The Community's intent to vest GRTI with the protection of tribal sovereign immunity is abundantly clear. Perhaps the most obvious indication of the Community's intent to vest GRTI with immunity is found in the Resolution Approving the Amended and Restated Articles of Incorporation, Resolution GR-10-99. Through that Resolution, the Community removed the "sue and be sued" language from Article II of GRTI's Articles of Incorporation with the stated intent to "enhance [GRTI's] sovereign immunity." *See* Villareal Dec. at ¶ 14, Exh. B. Moreover, the Community has made clear through codified law that all Community corporations are vested with the Community's sovereign immunity from suit. Community Code, § 4.403(c), Villareal Dec, ¶ 15, Exh. D. The Community's intent to vest GRTI with immunity could not be any clearer. As such, the fourth *Breakthrough* factor weighs in favor of immunity.

5. Financial Relationship: GRTI Provides the Community with Revenue for Essential Services

The fifth factor—the financial relationship between the entity and the tribe—weighs in GRTI's favor as well. As explained above, the Community is GRTI's sole shareholder, entitling it to 100% of any economic returns earned by GRTI. *Id.* at ¶¶ 8, 13, Exh. B. Indeed, GRTI makes quarterly monetary distributions to the Community, and those funds are used to support important Community programs such as "workforce development, housing, infrastructure construction, improved connectivity and social services." *Id.* at ¶ 19.

The unrefuted evidence on the record plainly demonstrates that revenues from GRTI are an important source of financial support for Community governmental programs. *See* Villareal Dec. at ¶ 19. Therefore, contrary to CHR's assertions, a judgment against GRTI would plainly damage the Community's economic well-being. *See Breakthrough*, 629 F.3d at 1195 (holding that a casino was an arm of the tribe and recognizing that "any reduction in the Casino's revenue that could result from an adverse judgment against it would therefore reduce the Tribe's income"). The financial relationship between GRTI and the Community is clear and it supports a finding of immunity.

6. Extending Immunity to GRTI Serves the Purposes of Tribal Sovereign Immunity

And finally, the sixth factor—the purposes of tribal sovereign immunity—also supports a finding that GRTI is immune from suit. The core purpose of tribal sovereign immunity, as recognized by the Supreme Court, is protection of tribal self-determination. *See, e.g.*, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (citation omitted) (describing tribal sovereign immunity as "a necessary corollary to Indian sovereignty and self-governance"). Tribal self-determination, as also widely recognized

within the federal judiciary, is inextricably intertwined with tribal economic development. *See Breakthrough*, 629 F.3d at 1195 (finding that a tribal casino "plainly promote[d] and fund[ed] the Tribe's self-determination and the funding of diversified economic development"); *see also Bay Mills*, 572 U.S. at 809-11 (Sotomayor, J., concurring) (explaining the link between tribal sovereign immunity and economic development). In creating GRTI to improve telecommunications services on the Reservation and generate revenue for much-needed governmental services within the Community, the Community has acted with the primary goal of self-determination and bettering the lives of its members. A finding of immunity for GRTI would clearly fulfil its intended purpose.

B. A Texas Federal Court Has Firmly Recognized GRTI's Immunity

The evidence furnished on the record in support of GRTI's Motion clearly establishes that GRTI is an arm of the Community and thus entitled to the Community's sovereign immunity from suit. As discussed in GRTI's Motion, a sister district—the Northern District of Texas—has already made this exact finding in the context of a nationally consequential multidistrict litigation. *IntraMTA*, 158 F. Supp. 3d 571 (N.D. Tex. 2015). There is no reason to depart from the Northern District's analysis here.

IntraMTA involved lawsuits brought by two interexchange carriers, MCI and Verizon, against various local exchange carriers ("LECs"), alleging that the LECs charged improper "access" fees. The cases were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to Judge Fitzwater of the Northern District of Texas. *See IntraMTA*, 67 F. Supp. 3d 1378, 1380 (JPML 2014). Upon transfer, three of the LECs moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that they were arms of federally recognized tribes and therefore immune from suit. One of those LECs was GRTI.

The Northern District squarely held that GRTI (and two other tribal defendants) was an arm of its parent tribe, the Community. Applying the traditional arm-of-the-tribe standard, the court noted, *inter alia*, that GRTI was owned by the Community, created under Community law, intended to improve telecommunications services on-reservation, regulated by the Community, and economically benefitted the Community. *See* 158 F. Supp. 3d at 576–77. As such, the court found that "there can be little doubt" that GRTI functioned as an arm of the Community. *Id.* at 577.

Plaintiff provides no reason whatsoever for this Court to disturb *IntraMTA*'s conclusion that GRTI is an arm of the Community. In fact, in an effort to avoid this decision, Plaintiff only mentions *IntraMTA* once in its entire brief, in a two-sentence footnote. *See* Opposition at 15 n.6. And rather than addressing or attempting to distinguish *IntraMTA*'s reasoning, CHR merely suggests that "[t]here is evidence that GRTI and its related entities are subject to federal and [Arizona Corporation Commission] regulation." *See* Opposition at 15. Of course, Plaintiff does not describe what this "evidence" might be, but in any event, nothing in *IntraMTA* relied upon the scope of GRTI's regulatory obligations.

Put simply, this Court should adopt the analysis of the Northern District and likewise hold that GRTI is an arm of the Community, immune from suit.

III. GRTI's Immunity Remains Intact, Precluding the Exercise of Subject Matter Jurisdiction

As set forth in GRTI's Motion, given GRTI's status as a tribally-chartered entity retaining immunity from suit, CHR can maintain this action only if GRTI's immunity has been waived by the Community or abrogated by federal law. As explained below, CHR fails to demonstrate that there has been a clear and unequivocal waiver of GRTI's immunity from suit,

or a congressional abrogation of this immunity. As such, GRTI's immunity remains fully intact and this action cannot proceed.

A. Neither GRTI Nor the Community Have Waived GRTI's Immunity

Waivers of tribal sovereign immunity are strictly construed in favor of the sovereign. *See Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir.1982). Indeed, the U.S. Supreme Court has repeatedly held that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), *quoting United States v. Testan,* 424 U.S. 392, 399 (1976). In other words, the waiver must "expressly indicate[ ] the [tribe]'s consent" to suit. *Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418 (9th Cir. 1989). In addition, "if a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'" *Mo. River Servs., Inc. v. Omaha Tribe of Neb.,* 267 F.3d 848, 852 (8th Cir. 2001), (quoting *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.,* 517 F.2d 508, 509 (8th Cir. 1975)). CHR has failed to identify any language in the Agreement that could be found to meet this unequivocal waiver standard in relation to GRTI's immunity, and even if it had, the Community has not authorized such a waiver as required under Community law.

1. No Language in the Agreement Constitutes a Clear and Unequivocal Waiver of GRTI's Immunity From Suit.

CHR relies solely on the "Applicable Law" section of the Agreement to argue that GRTI has waived its immunity from suit. Yet, even undertaking a systematic breakdown of the provision, it is impossible to discern any clear and unequivocal waiver of GRTI's immunity. And when read in conjunction with CHR's expressly agreed upon legal obligations – i.e., its license to do business within the Community—there is simply no way to

conclude that the Applicable Law provision clearly and unequivocally waives GRTI's immunity.

In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), the Supreme Court recognized that any waiver or abrogation of tribal sovereign immunity must be expressed in "clear" and "unequivocal" terms. In doing so, the Court found that a specifically-worded arbitration clause contained in a construction contract constituted a "clear" waiver of a tribe's sovereign immunity under exceedingly narrow circumstances, namely, when the suit was limited to judicial enforcement of an arbitration award. Under those specific conditions, the Supreme Court noted, the waiver satisfied the "requisite clarity" for finding a waiver of tribal sovereign immunity. *See id.* at 418.

Here, the verbiage identified by CHR is in no way clear and unequivocal. To the contrary, the Applicable Law provision referenced by CHR is ambiguous and internally inconsistent. In its opening sentence, the Applicable Law provision first provides that the Agreement "shall be interpreted in accordance with the laws of the State of Texas, exclusive of its conflict of laws provisions." Agreement, § 10(d). Of course, identifying the applicable law has nothing to do with waiving sovereign immunity. At the very most, it merely establishes that any substantive dispute between CHR and GRTI shall be governed by Texas law. In the context of this dispute, for instance, under Texas law, recovery under quantum meruit is normally not allowed when there is an express contract in place. *See Truly v. Austin*, 744 S.W.2d 934 (Tex. 1988). CHR cannot point to any authority to support that this governing law provision, in and of itself, could constitute a waiver of GRTI's sovereign immunity.

The Applicable Law provision next states that "[t]he laws of the State of Texas shall apply to any mediation, arbitration, or litigation arising under this MSA and any mediation or arbitration shall be controlled by the rules of the American Arbitration Association." Agreement, § 10(d). Although this provision at first glance may appear similar to the narrow set of facts present in *C & L*, the only tangible similarity is that both the Applicable Law provision and the clause in *C & L* both make reference to arbitration. Proper analysis of the language—in its full context—shows that *C & L* is inapposite.

Indeed, in the subsequent sentence, the Applicable Law provision distances itself from any arbitral forum, and in doing so, distances itself from any waiver theory under *C & L*. In stark contrast to the preceding sentence relating to arbitration, the Applicable Law provision next states that "[t]he exclusive jurisdiction for all disputes arising between the Parties in connection with this MSA shall be the state and federal courts located in Harris County, Texas, and each Party hereby submits itself to the exclusive jurisdiction of such courts subject to the foregoing restrictions." Agreement, § 10(d).

Trying to piece it all together, there is simply no way to characterize this jumbled and internally inconsistent provision as a "clear" and "unequivocal" waiver of tribal sovereign immunity. It does not mention sovereign immunity; nor does it explicitly commit jurisdiction to any specific forum. That is, while it portends to say that the state and federal courts in Harris County are the "exclusive jurisdiction(s)" for disputes, it also contains a vague arbitration clause, making it plainly evident that the Applicable Law provision was not drafted with any clear or unequivocal mutual intent between the contracting parties. *See Evans Energy Partners, LLC v. Seminole Tribe of Florida, Inc.,* 561 F.Supp.3d 1171 (M.D.

FL 2021) (finding arbitration provision in parties' contract to be too ambiguous to constitute a waiver of tribal sovereign immunity).

Equally important, the Applicable Law provision does not exist in a vacuum. By applying for a license to do business on-reservation,[5] CHR explicitly agreed to be bound by ***all*** regulations and ordinances of the Community. *See* Villareal Dec. at ¶ 27. This includes consent to the jurisdiction of the courts of the Community "over any civil matter in which one of the parties . . . does business within the Reservation or which arises from an event which has occurred within the Reservation." *See* Community Code, § 4.301, Villareal Dec. ¶ 27, Exh. D. Given these facts and the absence of any waiver of sovereign immunity by GRTI or the Community, CHR's argument that GRTI waived sovereign immunity must fail.

2. <u>The Community Has Not Authorized a Waiver of GRTI's Immunity, as Required Under Community Law</u>.

In addition to the foregoing, the Community law to which CHR expressly agreed to be bound also makes clear that the Community Council must expressly preauthorize any waiver of Community-owned business entity's sovereign immunity. *See* Community Code § 4.204; Villareal Dec. at ¶ 15-16, Exh. D. Because no such waiver has ever been authorized for GRTI, the Applicable Law provision in the Agreement simply cannot be construed as a waiver of GRTI's immunity. Villareal Dec. at ¶ 31.

CHR attempts to minimize these clear legal requirements by labeling them "procedural formalities," in one of its many attempts to demean the sovereign functions of tribal governments (*see* infra IV(B)). However, contrary to CHR's unsupported proposition, the application of federal Indian law, necessarily entails adherence to and respect for the laws

[5] It is undisputed that CHR sold software to a tribal utility located on tribal land, obtained a license to do business within the reservation, and was fully aware that the software solution to be delivered by CHR was for accounting and billing activates occurring within the Community. Villareal Dec. at ¶ 27.

of Indian tribes. *See, e.g., Santa Clara Pueblo*, 436 U.S. 49; *Memphis Biofuels. LLC v. Chickasaw Nation Industries, Inc.,* 585 F.3d 917, 921-22 (6th Cir. 2009) (where corporate charter required board resolution to waive tribal immunity, immunity was not waived without such a resolution even though the corporation's contract with the plaintiff expressly waived all immunities); *World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y.2000) (despite contractual language explicitly waiving immunity, the court concluded the tribe retained its immunity from suit because its Constitution required an express waiver of sovereign immunity by the Tribal Council and the Council had neither expressly waived its immunity nor authorized the vice president to do so).

3. CHR's Equitable Theories Have No Place in an Immunity Determination

CHR's attempts to further two unsupported equitable arguments – based on "actual authority" and "estoppel" – fail to establish that GRTI's immunity has somehow been waived. These arguments are likewise unavailing, unsupported by legal authority, and should be rejected. First, as set forth above, the Agreement contains no provisions waiving or purporting to waive GRTI's immunity from suit. Even assuming *arguendo*, that the Agreement contained such a provision, federal courts have routinely held that unauthorized actions of tribal officials and employees "are insufficient to waive tribal sovereign immunity." *Memphis Biofuels,* 585 F.3d 917 (6th Cir. 2009) (citing *Native Am. Distrib. v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1295 (10th Cir. 2008) (holding that tribal entity was not equitably estopped from asserting immunity because "misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit"); *Sanderlin v. Seminole Tribe of Fla.,* 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal representative had actual or apparent authority to waive immunity because "[s]uch a finding would be directly contrary to the explicit provisions

of the Tribal Constitution"); *World Touch Gaming,* 117 F. Supp. 2d at 276 (N.D.N.Y. 2000) (holding that a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity because that right was reserved exclusively to the tribal council); *Danka Funding Co. v. Sky City Casino,* 329 N.J.Super. 357, 747 A.2d 837, 841–42, 844 (1999) (holding that a controller's signature on a contract containing a forum selection clause was insufficient to waive sovereign immunity, in part, because the right to waive immunity was reserved to the tribal council)); *see also, MM&A Productions, LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 65 (2014) (finding that "it would be inconsistent with United States Supreme Court precedent to apply equitable principles such as apparent authority to defeat a sovereign's immunity from suit."). Moreover, nothing in GRTI's governing documents or Community law attempts to vest any corporate officer or employee of GRTI with such authority. CHR's "kitchen sink" approach to tribal waiver considerations must be rejected as they have no basis in the law.

CHR's "estoppel" argument based on contract performance, similarly has no basis in law and must be rejected. The defense of sovereign immunity is not akin to arguing that the contract was "invalid," and it is therefore irrelevant if GRTI's partial performance can be seen as "recogniz[ing] the validity of the contract." *See id.* at 14. The U.S. Supreme Court has made it clear that tribes possess sovereign immunity in breach of contract actions and performance (or lack thereof) has never once been factored as part of this analysis. *See Kiowa Tibe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (holding that tribes "enjoy sovereign immunity from civil suits on contracts, whether those involve governmental or commercial activities and whether they were made on or off a reservation.").

Reading the vague and incoherent Applicable Law provision in conjunction with Community law—which was made part of the Agreement through CHR's business license—there was no clear and unequivocal waiver of GRTI's sovereign immunity.

B. Federal Law Does Not Abrogate GRTI's Immunity

Apart from the misplaced contention that GRTI has waived its immunity, CHR separately argues that GRTI's immunity has been abrogated by federal law. This is certainly not the case as this action does not even raise claims under federal law.

CHR does not develop its argument in detail, but generally appears to suggest that GRTI's immunity has been abrogated under federal telecommunications law. *See* Opposition at 15. As noted above, nothing in the Complaint purports to allege a claim arising under federal law. The Complaint sounds in state common law, not in any federal statute. Thus, even if Plaintiff had referenced every federal telecommunications statute in existence in hopes that one might contain a congressional waiver of tribal sovereign immunity for certain actions, *this* action would not be covered.[6] And as set forth in GRTI's Motion, any such congressional abrogation of sovereign immunity must be "unequivocally expressed." *See Santa Clara Pueblo*, 436 U.S. at 58

IV. The Community Court Has Jurisdiction Over This Matter

CHR next argues—incorrectly—that it "did not consent" to the jurisdiction of the Community Court. Under Supreme Court and Fifth Circuit precedent, CHR's actions plainly constitute consent to Community Court jurisdiction.

[6] The fact that the Communications Act of 1934 defines "common carrier" as including entities that are involved in "foreign" communications is irrelevant. *Cf.* 47 U.S.C. § 153(11). This statute makes no reference to tribes whatsoever, and regardless, even taking CHR's unfounded proposition at face value, the sole case that they cite, *Krystal Energy Co. v. Navajo Nation*, expressly states that "Indian tribes are *domestic* governments," not foreign ones. 357 F.3d 1055, 1058 (9th Cir. 2004) (emphasis added).

A. CHR Plainly Consented to Community Court Jurisdiction

Although non-Indians (and non-Indian companies) are sometimes beyond the jurisdiction of tribal courts, there are two important exceptions, as set forth in the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). The first exception, relating to consent, squarely encompasses this situation. As described in *Montana*, a tribe may exercise jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 566. The Fifth Circuit has elaborated upon this exception, stating that *Montana*'s consensual relationship exception allows a tribe to regulate non-member conduct via the judicial process, so long as the exercise of jurisdiction has a "nexus to the consensual relationship itself." *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014).

Here, CHR has clearly consented to the jurisdiction of Community Court by applying for and obtaining a business license with the Community. As explained in GRTI's Motion, CHR expressly agreed to abide by the Community's laws and regulations as a condition of doing business within the Community. Villareal Dec. ¶ 27; Exh. G, H. The laws of the Community expressly subject any person that "does business within the Reservation" to the jurisdiction of Community Courts. *See* Community Code, § 4.301, Villareal Dec., ¶ 26, Exh. D. CHR admits that it was provided with Title 13; Title 13 unequivocally provides that the entirety of Community law applies to licensees; and Title 4 of the Community law unequivocally subjects CHR to Community Court jurisdiction. As such, CHR has consented to the jurisdiction of the Community Courts. Furthermore, because the dispute at issue here

is directly related to the business relationship between the parties, the Community Court may properly exercise jurisdiction over CHR pursuant to *Montana* and *Dolgencorp.*

Additionally, even assuming *arguendo* that CHR's ignorance of Title 4 was relevant whatsoever, Title 13 itself makes it clear that business licensees are subject to the jurisdiction of the Community Court. For example, under § 13.416, licensees are subject to actions brought by the Community Treasurer in Community Court for recovery of an erroneous tax refund. *See* Villareal Dec., Exh. F. Under § 13.422(B), tax protests by a licensee are to be adjudicated in Community Court. *Id.* And under § 13.424, the Community has the right to enforce taxes against licensees by bringing an action in Community Court. *Id.* These are just a few of the multiple examples throughout Title 13 making it clear that business licensees are consenting to Community Court jurisdiction.

B. CHR's Purported Fairness Concerns Are Prejudicial and Unfounded

CHR's complaints about "due process concerns," (*see* Opposition at 25), have no factual basis and appear to rest on little more than a facial attack on the competence of tribal courts in general. The U.S. Supreme Court has soundly rejected similar arguments as contrary to federal policy. *See Iowa Mut. Ins. Co. v. LaPlante.*, 480 U.S. 9, 19 (1987). And it has consistently recognized tribal courts "as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *See, e.g., Santa Clara Pueblo*, 436 U.S. at 65.

CHR has failed to identify anything about the Community Courts that makes them "unfair," nor could it. Title 4, Chapters 2 and 3 of the Community Code sets forth detailed processes and procedures for full and fair civil proceedings before the courts of the Community – including at the appellate level. *See* Villareal Dec., Exh. D. Notwithstanding

these detailed and thorough legal protections and procedures, CHR derides the sophistication and sound structure of the Community's judicial system by claiming, without basis, that "the Community Court does not have the ability to determine its own jurisdiction…[as] the decision instead will be made by the Community Council." Opposition at 26. Such an outlandish proposition flies in the face of federal law and policy, and for this reason, is hurled in CHR's Opposition, without any legal or factual basis whatsoever.

In short, CHR has consented to Community Court jurisdiction, and CHR cannot escape its obligation to exhaust Community Court remedies before filing an action in federal court.

V. This Court Should Reject CHR's Request for Jurisdictional Discovery or Leave to Amend

CHR's alternative requests for jurisdictional discovery or leave to amend its complaint should be rejected. As set forth herein, jurisdictional discovery is unwarranted and leave to amend would be futile.

The doctrine of sovereign immunity is not merely intended to protect sovereigns against judgments, but also to protect against the burden of the judicial process itself. As the Fifth Circuit has recognized, "sovereign immunity is an immunity from the burdens of becoming involved in any part of the litigation process, from pre-trial wrangling to trial itself." *United States v. Moat*, 961 F.2d 1198, 1203 (5th Cir. 1992). This is especially so with tribal immunity, because discovery would "deprive the [Tribe] of the very immunity to which it is entitled." *Simmons v. Corizon Health*, 122 F. Supp. 3d 255, 272 (M.D.N.C. 2015); *see also Bonnet v. Harvest (U.S.) Holdings*, 741 F.3d 1155, 1160 (10th Cir. 2014) (immunity exists to shield tribes from the burdens of discovery); *Arriba Ltd. v. Petroleos Mexicanos* , 962 F.2d 528, 534 (5th Cir. 1992) (noting the inherent "tension between permitting discovery [] and protecting

a sovereign agency's legitimate claim to immunity from discovery"); *Everette v. Mitchem*, 146 F. Supp. 3d 720, 723 (D. Md. 2015) (discovery "undermine[s] the purposes of the sovereign immunity doctrine"). Indeed, jurisdictional discovery that targets government entities is "peculiarly disruptive to effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982); *see also Williamson v. U.S. Department of Agriculture*, 815 F.2d 368, 383 (5th Cir. 1987) (noting the "harassment and the substantial distractions" that government officials must endure when subjected to the discovery process).

Jurisdictional discovery is also unwarranted here where "the record shows that the requested discovery is not likely to produce the facts needed to withstand a Rule 12(b)(1) motion." *Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009). Just as the Northern District has already held, GRTI clearly satisfies all of the elements of the arm-of-the-tribe standard. *See IntraMTA*, 158 F. Supp.3d at 576. The undisputed evidence on the record clearly demonstrates that GRTI was created by the Community pursuant to Community law; that GRTI's purpose as a tribal utility serves the important goal of Community self-determination; that GRTI is wholly owned, operated, and controlled by the Community; that the Community intended for GRTI to be immune from suit; that GRTI revenues inure to the direct benefit of the Community; and that protection of GRTI's revenue stream supports the purposes of tribal sovereign immunity. *See generally,* Villareal Dec. Plaintiff fails to provide any detail whatsoever as to how discovery could assist in the immunity determination or what specific documents would be requested. Instead, "the conclusory assertion that jurisdictional discovery [is] necessary seems almost like an attempt to use discovery as a fishing expedition rather than to obtain needed documents to defeat the tribal immunity claim." *Breakthrough*, 629 F.3d at 1190. The Court should not entertain such a baseless request.

Similarly, there is no justification for allowing CHR leave to amend its complaint. Although federal courts will often grant leave to amend, leave should not be allowed when it would be futile. *See Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). Here, nothing can be amended in the complaint that would negate the fact that GRTI is an arm of the Community, and hence, amendment would be futile.

Notwithstanding the foregoing, CHR's "alternative" request to the Court is also procedurally improper. To the extent that CHR is seeking affirmative relief from this Court, it must do so through a motion, which GRTI would surely oppose. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion"); *see also Grosvenor v. Quest* Corp., 733 F.3d 990, 997 (10th Cir. 2013) ("Arguments asserted in response to a motion are generally not considered requests for an order."). CHR's requests for leave made haphazardly within its Opposition to GRTI's Motion are procedurally improper and should be rejected.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint must be dismissed with prejudice and CHR's alternative requests for jurisdictional discovery or leave to amend should be denied.

DATED: September 5, 2023

Respectfully submitted,

ROSETTE, LLP

By: /s/ *Saba Bazzazieh*

Saba Bazzazieh, DC No. 1013472
(admitted *pro hac vice*) (attorney-in-charge)
Wyatt Rosette, OK No. 33604 (admitted *pro hac vice*)
1100 H Street NW, Suite 820
Washington, D.C. 20005
Telephone: (202) 652-0579
Facsimile: (202) 525-5261
sbazzazieh@rosettelaw.com
wrosette@rosettelaw.com

Attorneys for Specially-Appearing Defendant Gila River Telecommunications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ *Mary Nielsen*
Mary Nielsen
Paralegal
Rosette LLP
1100 H Street NW Suite 820
Washington DC 20005
Telephone: (202) 652-0579
Facsimile: (202) 525-2261