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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PHILIP MORRIS USA INC.,

Plaintiff,

v.

KING MOUNTAIN TOBACCO COMPANY, INC.; MOUNTAIN TOBACCO; DELBERT L. WHEELER, SR., AND RICHARD "KIP" RAMSEY,

Defendants.

No. CV-06-3073-RHW

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR STAY AND RESPONSE TO PLAINTIFF'S MOTION FOR ADDITIONAL INJUNCTIVE RELIEF

Date: 11/14/06
Time: 2:00 p.m.
Place: Yakima, WA

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Philip Morris's suit against Yakama Indian Nation tribal members and a tribally chartered business for activities taking place almost entirely on tribal reservation lands should be dismissed or stayed subject to the tribal court exhaustion doctrine. For the same reasons, Philip Morris's motion for additional injunctive relief should be denied.

II. STATEMENT OF RELEVANT FACTS

Defendants Delbert L. Wheeler and Richard "Kip" Ramsey are enrolled members of the Yakama Indian Nation. *See* Declaration of Delbert L. Wheeler ("Wheeler Decl.") ¶ 2;[1] Declaration of Richard "Kip" Ramsey ("Ramsey Decl.") ¶ 2. Wheeler and Ramsey own defendant Mountain Tobacco Co. d/b/a King Mountain Tobacco Company, Inc. ("King Mountain"), a corporation formed and licensed under the laws of the Yakama Indian Nation.[2] Wheeler Decl. ¶ 2; Ramsey Decl. ¶ 3; Ramsey Decl. Ex. B (King Mountain Articles of Incorporation); Philip Morris Amended Complaint ("Amended Complaint") at 4. Pursuant to Yakama Indian Tribal Code Chapter 30.05, the Yakama Tribal Council issued a certificate of incorporation to King Mountain (Ramsey Decl. Ex. A) and a business license to King Mountain (Ramsey Decl. Ex. C).

Wheeler and Ramsey started selling King Mountain cigarettes to smoke shops on the Yakama Reservation in January 2006. Ramsey Decl. ¶ 8. Eventually, they expanded the company's sales to other Indian tribes and smokeshops on other Indian reservations. *Id.* King Mountain manufactures and sells cigarettes only to Indian

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[1] The Wheeler and Ramsey declarations cited in this Memorandum were filed with Defendants' Response to the Motion for Preliminary Injunction.

[2] Philip Morris's Amended Complaint appears to name Mountain Tobacco and King Mountain as separate defendants. In reality, Mountain Tobacco and King Mountain are the same party, Mountain Tobacco Co. d/b/a King Mountain Tobacco Company.

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tribes and tribally-licensed smoke shops on reservation lands. Wheeler Decl. ¶ 10. According to Mr. Ramsey, King Mountain:

> market[s] the product only to Indian smoke shops located and doing business in Indian Country, that is only to shops owned and operated by Indians, and located upon reservation lands. . . . [W]e have made it our policy to sell only "Indian to Indian;" that is only from our Yakama Indian business to other enrolled Indians or tribally licensed businesses. We have not made any sales or distributions of the King Mountain product to any non-Indians or businesses that were not located upon a recognized Indian reservation or to a business not licensed by the tribe upon which reservation such business was located.

Ramsey Decl. ¶ 8.

King Mountain's warehouse and distribution facilities are located on the Yakama Reservation at 2000 Signal Peak Road, White Swan, WA. Ramsey Decl. ¶ 6. All King Mountain cigarettes are distributed and shipped from these facilities on the Yakama Reservation. *Id.* Typically, King Mountain customers submit orders by phone or fax to King Mountain's distribution facilities on the Yakama Reservation. *Id.* Wheeler and other King Mountain sales representatives solicit business by telephone from their offices on the Yakama Reservation, at trade shows, or through visits to their customers' places of business. *Id.*

III. ARGUMENT

A. The Tribal Court Exhaustion Doctrine Requires Dismissal or Stay of Philip Morris's Complaint Until Philip Morris Exhausts its Tribal Court Remedies.

Principles of comity govern the relationship between tribal courts and the United States federal courts. "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (internal citation omitted). Therefore, a federal court's exercise of jurisdiction over matters relating to reservation

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affairs can "impair the authority" of these tribal courts. *Id.* at 15. The tribes are independent jurisdictional entities, and as such their courts—like the state courts—are presumed to be competent to apply federal and state law as well as tribal law. *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not readjudicate questions—*whether of federal, state or tribal law*—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." (emphasis added)).

The tribal court "exhaustion" doctrine was announced by the United States Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Under this doctrine, if a dispute involves tribal members or activities on tribal lands, an aggrieved party is required to seek relief in the tribal courts first, giving those courts an opportunity to determine whether they have jurisdiction to hear the case. "If the dispute arises in Indian territory, both [Indian and non-Indian federal plaintiffs] are limited to tribal court as the forum of first recourse. It is in non-Indian matters only that non-Indians can go to district court directly." *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 579 (9th Cir. 1987). Such exhaustion is "not discretionary; it is mandatory" and is "a prerequisite to a federal court's exercise of its jurisdiction." *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 & n.3 (9th Cir. 1991). Exhaustion is required regardless of whether: (1) the federal court plaintiff is Indian or non-Indian (*see Wellman*, 815 F.2d at 579); (2) a parallel tribal court action is or is not pending at the time the federal court action is filed (*Burlington N. R.R.*, 940 F.2d at 1246-47); or (3) exhaustion is raised "on the eve of trial, years after the action was filed" (*Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1406-08 (9th Cir. 1991)).

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Under the exhaustion doctrine, if the tribal court determines that it has jurisdiction to decide a matter, the case will proceed in tribal court to a final decision. The "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system," so "exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut.*, 480 U.S. at 16-17. The federal court must "stay[] its hand" until tribal appellate review is complete. *Nat'l Farmers*, 471 U.S. at 857. After the party challenging the tribal court's jurisdiction has exhausted its tribal court remedies, the tribal court's decision on jurisdiction is subject to challenge in federal court. *Iowa Mut.*, 480 U.S. at 19; *Ninigret Dev. Corp. v. Narragansett Indian Wetoumuck Hous. Auth.*, 207 F.3d 21, 35 (1st Cir. 2000).

B. Defendants' Demonstration of a Colorable Claim to Tribal Court Jurisdiction Triggers the Exhaustion Doctrine.

In the Ninth Circuit, tribal court exhaustion is required whenever there is even a "colorable question" that tribal court jurisdiction may exist. "Ordinarily, so long as there is a 'colorable question' whether a tribal court has subject matter jurisdiction, federal courts will stay or dismiss an action in federal court 'to permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction in a *civil* dispute between Indians and non-Indians that arises on an Indian reservation.'" *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 n.1 (9th Cir. 2006) (en banc) (emphasis in original) (citing, inter alia, *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc)); *see also Ninigret*, 207 F.3d at 31. A "colorable" question exists whenever the record demonstrates that "the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." *Stock W. Corp.*, 964 F.2d at 919. For example, this is true where the activities giving

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rise to the suit occurred on tribal land and involved tribal members. "A tribal court has the initial power to determine its own jurisdiction when the undisputed facts show that 'the transactions which form the bases for appellants' claims occurred or were commenced on tribal territory.'" *Id.* (quoting *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416 (9th Cir. 1986)).

Indeed, the Ninth Circuit has uniformly required the exhaustion of tribal court remedies in disputes arising from the on-reservation business activities of a tribe or tribal members. *See, e.g., Stock W. Corp.*, 964 F.2d at 918-19 (exhaustion required with respect to non-Indian corporation's claims against tribal attorney for malpractice and misrepresentation); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1223-24, 1228-30 (9th Cir. 1989) (notwithstanding arbitration clauses in relevant contracts, exhaustion required in contract dispute arising in connection with construction of on-reservation sawmill and provision of business and marketing plans); *Wellman*, 815 F.2d at 578-79 (tribal member required to exhaust tribal court remedies with respect to claims against Pennsylvania corporation arising from contract to construct on-reservation road); *A & A Concrete*, 781 F.2d at 1416 (exhaustion required in federal civil rights action arising from on-reservation transaction); *see also Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1029-30 (D. Ariz. 1993) (citing exhaustion doctrine, district court required non-Indian contractor to bring claims arising from on-reservation activities in tribal court).

Philip Morris's complaint should have been brought in the Yakama Nation Tribal Court. It is undisputed that this suit is against tribal members who own a tribal business incorporated under the laws of the Yakama Nation. King Mountain is located on the Yakama Reservation and conducts much of its business activities on reservation land. Moreover, the cigarette products at issue are sold primarily on the

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reservation, or to other Indian reservations. Therefore, most or all of the conduct complained of—the sale of products with allegedly infringing trade dress—occurs on Indian lands. The circumstances giving rise to this suit are inextricably intertwined with tribal lands and tribal members.

The comity accorded tribal courts through the tribal court exhaustion doctrine is particularly important for adjudicating claims involving tribal members or activities on tribal land. Indeed, it is well established that a party *may not* litigate in federal court a dispute arising in connection with on-reservation activities without first giving the tribal courts an opportunity to decide whether they have jurisdiction over the matter. *See United States v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992) ("A tribal court presumptively has jurisdiction over activities that take place on tribal land. The deference that both state and federal courts must afford tribal courts concerning activities occurring on reservation land is deeply rooted in Supreme Court precedent."); *see also R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983) ("We have recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation."); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

The Yakama Nation and its courts deserve the opportunity to govern the affairs that occur on its reservation.[3] The Supreme Court in *Iowa Mutual* specifically recognized that federal court action in cases involving tribal members and on-

[3] *See Salish Kootenai*, 434 F.3d at 1140-41 ("The Tribes have a strong interest in regulating the conduct of their members; it is part of what it means to be a tribal member. The Tribes [also] plainly have an interest in compensating persons injured by their own . . . .").

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"[T]he [tribal exhaustion] doctrine applies *even though the contested claims are to be defined substantively by state or federal law*." *Ninigret*, 207 F.3d at 31 (emphasis added).[4] The Ninth Circuit recently upheld the tribal exhaustion requirement in a case involving federal statutory rights—the Family and Medical Leave Act. *See Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 975 (9th Cir. 2003) (per curiam) ("The district court did not err in concluding that tribal courts should have first opportunity to determine whether they have jurisdiction to hear actions based on the Family and Medical Leave Act.").

Indeed, there is a long history of federal courts—including the United States Supreme Court—applying the tribal court exhaustion rule when the litigation involves a federal cause of action or an issue of federal law. *See Iowa Mut.*, 480 U.S. at 15 ("[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court."); *Plainbull*, 957 F.2d at 728 (affirming district court's dismissal of case brought by the United States against tribal member for failure to pay grazing fees required under federal law; "Because the Plainbulls grazed their cattle on tribal land without

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[4] *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993) ("A tribal court, presumably, is as competent to interpret federal law as it is state law."); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999) ("[T]here is no doubt that the Plaintiffs' claims of mismanagement of the Housing Authority involves a reservation matter. The Plaintiffs believe that a federal court should hear their claims because they are alleging that the Defendants are liable to them under a federal law—the Racketeer Influenced and Corrupt Organizations Act. However, the 'interpretation of another jurisdiction's laws . . . does not alone foreclose application of the tribal exhaustion rule. A tribal court, presumably, is as competent to interpret federal law as it is state law.'" (citing *Altheimer*)).

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reservation activities would only serve to undermine the sovereignty of Indian tribes and the authority of tribal courts. 480 U.S. at 14, 16 ("Tribal courts play a vital role in tribal self-government[.] . . . [U]nconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."). Here, where the Yakama Nation has adopted statutes and regulations to govern the incorporation and operation of businesses on the reservation, and the Nation imposes a tax on the cigarettes sold by King Mountain (Ramsey Decl. Ex. D), the tribal court exhaustion doctrine demands that the Yakama Nation Tribal Court should have the first opportunity to rule on the jurisdictional question in this case.

There is certainly a "colorable question" as to whether the tribal courts may exercise jurisdiction over this matter. The defendants in this case are Yakama tribal members who operate a business on the Yakama Indian Reservation. The conduct challenged by Philip Morris arose on the reservation. The Ninth Circuit's colorable claim threshold for application of the tribal court exhaustion doctrine provides that the federal courts simply defer to the Yakama tribal court to determine its jurisdiction in this case. Because tribal court jurisdiction is a question of federal law, however, Philip Morris may challenge the tribal court's jurisdictional decision in federal court proceedings after it exhausts its tribal court remedies. *Iowa Mut.*, 480 U.S. at 19.

C. Tribal Courts Are Competent to Apply Federal Law and Are Competent to Apply the Lanham Act to On-Reservation Activities of Tribal Members and Businesses.

Philip Morris argues that because one of the claims in its Amended Complaint raises a question of federal law, its complaint as a whole is entirely exempt from the tribal court exhaustion doctrine. But Philip Morris cannot avoid the application of the tribal exhaustion doctrine simply because it alleged a federal Lanham Act violation.

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obtaining a tribal permit, the Government should have filed in tribal court. The fact that the Government is attempting to enforce a federal law is immaterial. The alleged trespass was to tribal land and considerations of comity require that the tribal courts get the first opportunity to resolve this case."); *A&A Concrete*, 781 F.2d at 1416 (applying exhaustion doctrine to non-member plaintiff who brought federal civil rights claims against tribe in federal district court); *Prescott, v. Little Six, Inc.*, 897 F. Supp. 1217, 1222 (D. Minn. 1995) (applying exhaustion doctrine to plaintiffs' ERISA claims; "Although federal courts have exclusive jurisdiction to award equitable relief under 29 U.S.C. § 1132(a)(3), federal courts do not have exclusive jurisdiction to determine whether an ERISA plan exists or whether benefits were wrongfully denied." (footnote omitted)).

1. Philip Morris's Argument Ignores Its State Law Claims.

Moreover, Philip Morris does not appear to argue that its complaint as a whole is exempt from the exhaustion requirement. Philip Morris has brought state common law claims, state statutory Unfair Competition claims, and federal Lanham Act claims against the Defendants. Taken together, these broad ranging claims allege a scheme of unfair competition by the Defendants to misappropriate the trade dress of Marlboro cigarettes. Yet Philip Morris, in its motion to enjoin Defendants' tribal court declaration action, opposes the exhaustion of tribal court proceedings *based solely on the existence of its Lanham Act claim*. *See* Philip Morris Brief in Support of Additional Injunctive Relief at 10-19. Apparently, Philip Morris lacks any basis to argue that its state common law claims and the Unfair Competition claims are exempt from review by the tribal courts, and obviously, the conduct giving rise to the state law claims and the Lanham Act claim is the same. Philip Morris does not assert that the nature of the conduct at issue, or the posture of the parties, somehow exempts this

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case from the exhaustion doctrine. Instead, Philip Morris relies on a technical argument having to do with the federal removal statute.

2. Philip Morris's Argument Expands *El Paso v. Neztsosie* Beyond the Supreme Court's Holding.

Philip Morris appears to take the remarkable position that the tribal courts have been divested of *all* jurisdiction to hear *any* case alleging federal law claims and *any* case in which the parties may be diverse. To reach this position, it relies exclusively on *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), while ignoring the vast body of case law on the tribal court exhaustion doctrine, but Philip Morris has stretched the holding of *Neztsosie* beyond recognition.

Neztsosie was a case involving a particularized, centralized, and exclusive scheme of federal jurisdiction over nuclear power accidents. In *Neztsosie*, the federal statute at issue was the Price-Anderson Act regulating the nuclear power industry. That statute contained a sort of "super-removal" provision, intended to vest exclusive jurisdiction for claims involving nuclear power plants in a single federal court. The Act also created a mechanism for consolidating in federal court multiple related lawsuits filed in different judicial districts. *Neztsosie*, 526 U.S. at 477. The Supreme Court described this scheme as an "unusual preemption provision," defined as "complete pre-emption," which "transforms into a federal action any public liability action arising out of or resulting from a nuclear incident." *Id.* at 484 & n.6 (internal quotations omitted). Under this structure, "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well pleaded complaint rule." *Id.* at 484 n.6 (internal quotations omitted). The Court found that by such a super-removal provision, "Congress thus expressed an unmistakable preference for a federal forum[.]" *Id.* at 484.

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The *Neztsosie* Court explicitly distinguished the Price-Anderson Act super-removal situation from a plain vanilla "suit involving the federal-question jurisdiction of a United States District Court." *Id.* at 483. Indeed, the Court made clear that the *Neztsosie* holding did not change its prior jurisprudence requiring tribal exhaustion for federal law claims and even diversity cases, reiterating that "[e]xhaustion was appropriate in each of those cases because Congress is committed to a policy of supporting tribal self-government … [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 484 (citing *Nat'l Farmers*, 471 U.S. at 856) (internal quotations omitted).

Although Philip Morris relies exclusively on *Neztsosie*, it nowhere describes these essential elements of the case. *See* Brief in Support of Additional Injunctive Relief at 10-16. In fact, Philip Morris ignores the crucial passages in *Neztsosie* where the Court clearly states that the decision did not change the tribal exhaustion requirement for federal law claims. Instead, Philip Morris cites *Neztsosie* for the proposition that *any* case removable from state court to federal court should be exempt from the exhaustion requirement. *Id.* at 11, 13-14. Relying solely on the general removal statute, 28 U.S.C. § 1441, Philip Morris asserts: "The exercise of jurisdiction by a federal court is mandatory upon proper application of the removing defendant," and "in such circumstances, to avoid frustration of Congressional intent to afford a federal forum to a litigant, an injunction should issue to stop the tribal court proceeding." *Id.* at 11-12. That is not what *Neztsosie* held—indeed the *Neztsosie* Court emphasized that its holding was limited to the Price-Anderson Act: "This case differs markedly. By its unusual preemption provision, the Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting

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from a nuclear incident,' . . . Because the comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act, the District Court should have decided whether respondents' claims constituted 'public liability action[s] arising out of or resulting from a nuclear incident' . . . ." *Neztsosie*, 526 U.S. at 484, 487-88. The Court also pointed out that "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, . . . The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum." *Id.* at 485 n.7. Philip Morris's position would work a profound transformation in the relationship between the federal and tribal courts and would overturn decades of clear federal court authority. It has cited no authority that supports such a radical modification in existing law.

3. Federal Courts Have Original Jurisdiction Over Lanham Act Claims, Not Exclusive Jurisdiction, and Therefore, Tribal Courts, Like State Courts, Are Competent to Hear Lanham Act Cases.

King Mountain is aware of no case holding that Lanham Act claims are somehow exempt from the general rule requiring tribal court exhaustion for claims involving tribal members or activities on reservation lands. Nor has Philip Morris cited any such case. Indeed, the trademark provisions of the Lanham Act are subject to general jurisdiction, and are enforced equally by the federal courts and the state courts. *See, e.g., Foxrun Workshop, Ltd. v. Klone Mfg., Inc.*, 686 F.Supp. 86, 87 n.3 (S.D.N.Y. 1988); *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. 1996); *Pioneer First Fed. Sav. & Loan Ass'n v. Pioneer Nat'l Bank*, 659 P.2d 481, 487 (Wash. 1983). The Lanham Act simply contains no exclusive jurisdiction or "super-removal" provision or other particularized circumstances such as those in the Price-Anderson Act or in other cases where tribal court jurisdiction has

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been rejected. *See AT&T Corp. v Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) (denying tribal court jurisdiction because of "exclusive" federal court jurisdiction provisions in the Federal Communications Act); *Nevada v. Hicks*, 533 U.S. 353 (2001) (denying exhaustion where a non-tribal "state actor" defendant—a game warden who served arrest and search warrants on tribal land against a poaching suspect—was sued by the poaching suspect in tribal court for federal civil rights violations). The tribal courts—like the state courts—are competent to apply federal law, and there are no special considerations that would exempt the Lanham Act from the general rule of tribal exhaustion.

In reality, Philip Morris's theory would deprive tribal courts of jurisdiction anytime there is a cause of action based on a federal statute, because every federal cause of action can be removed under 28 U.S.C. § 1441. Taken to its logical conclusion, Philip Morris essentially is advocating for a rule where exhaustion will never apply. This premise guts the entire notion of comity established by the Supreme Court in *Iowa Mutual* and disrupts a long-line of case law applying the tribal exhaustion doctrine in cases involving federal causes of action or questions of federal law.[5] The Yakama Nation Tribal Court should be provided the first opportunity to

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[5] *See Sharber*, 343 F.3d at 975; *Plainbull*, 957 F.2d at 728; *A&A Concrete*, 781 F.2d at 1416; *Buchanan*, 40 F. Supp. 2d at 1048; *Prescott*, 897 F. Supp. at 1222; *Whitebird v. Kickapoo Hous. Auth.*, 751 F. Supp. 928, 930 (D. Kan. 1990) ("In her complaint, plaintiff alleges that jurisdiction is proper based upon the general federal question statute, 28 U.S.C. § 1331, and the Privacy Act of 1974, 5 U.S.C. § 552a. . . . Thus, although the court finds both that plaintiff has adequately alleged the court's subject matter jurisdiction to withstand defendants' motion to dismiss on that ground, and that the court possesses jurisdiction over the subject matter of this case, the court finds that the principles of comity underlying the exhaustion requirement dictate that this court defer to tribal court remedies.").

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hear Philip Morris's federal Lanham Act, Washington state Unfair Competition statutory claims, and common law unfair competition claims.

D. The Exceptions to the Tribal Court Exhaustion Rule Do Not Apply in This Case.

In *Iowa Mutual* and *National Farmers*, the Supreme Court recognized three exceptions to the tribal court exhaustion doctrine: (1) where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 857 n.21 (internal quotations and citations omitted); *Iowa Mut.*, 480 U.S. at 19 n.12.

None of these exceptions applies to this case. Defendants are not motivated by a desire to harass. Defendants are two Yakama tribal members that own a business located on the Yakama Reservation, licensed by the Yakama Indian Nation, and operated on the Yakama Reservation. Defendants have a legitimate interest in having any claims challenging their on-reservation business activities brought against them in Yakama tribal court. Philip Morris asserts that Defendants filed their tribal court action in bad faith. *See* Philip Morris Brief in Support of Additional Injunctive Relief at 9. All of Philip Morris's support for its bad faith accusation, however, depends on accepting its legal arguments that tribal courts are not competent to hear Lanham Act and treaty questions, or for that matter, any federal question that could be removed to federal court. *See id.* at 9-10. Defendants have explained why Philip Morris's theory based on *Neztsosie* does not apply to run-of-the-mill Lanham Act claims. Regardless, differences of opinion over complicated issues of tribal court jurisdiction do not demonstrate bad faith.

As for the other two exceptions recognized in *National Farmers* and *Iowa*

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Mutual, (1) there are no express jurisdictional prohibitions that prevent the tribal court from exercising jurisdiction over Lanham Act claims, Washington state law claims, or common law claims brought against the members of the tribe and businesses operating on the Yakama Reservation; and (2) exhaustion would not be futile in this case because Philip Morris can challenge the Yakama tribal court's jurisdiction during proceedings in tribal court.[6]

Philip Morris also relies on a more recent exception to the tribal court exhaustion doctrine that has been recognized by the federal courts in the wake of the Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997): "[I]t is plain that no federal grant provides for tribal governance of nonmembers' conduct *on land* covered by *Montana* [*v. United States*]'s main rule . . . and remand would only delay a final judgment." *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 2000) (emphasis added). Philip Morris's argument, however, hinges on its new-found status as a defendant—a defendant in the recently filed tribal court declaratory judgment action.

Strate and *Montana*[7] involved whether tribal courts have jurisdiction over

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[6] Philip Morris will be in tribal court as a plaintiff challenging the tribal court's jurisdiction. The Ninth Circuit recently concluded that it is not inconsistent for non-Indian plaintiffs in tribal court to challenge the tribal court's jurisdiction. *See Salish Kootenai*, 434 F.3d at 1137 ("Indeed, even though Smith invoked the jurisdiction of the tribal courts, he may still challenge the court's subject matter jurisdiction on appeal.").

[7] In *Strate*, the Supreme Court addressed whether a tribal court could adjudicate a personal injury claim brought against a nonmember driver and his employer as a result of a car accident that occurred on a federal right-of-way within an Indian reservation. The Court held that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. We express

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nonmember defendant activities on non-tribal land. This exception to the tribal court exhaustion doctrine clearly does not apply in this case, as the Yakama tribal court would be exercising jurisdiction in a dispute involving business activities occurring on the reservation and over two Yakama-member defendants who own a tribally-licensed business operating on the Yakama reservation. This case has nothing to do with the activities of a nonmember defendant engaging in activities on non-tribal fee lands.[8]

Furthermore, Philip Morris remains the *plaintiff* in this federal court action against tribal defendants engaged in activities on the Yakama Reservation. Philip Morris's status as a defendant in the tribal court declaratory judgment action is irrelevant to Defendants' Motion to Dismiss, which Defendants would have filed in this Court regardless of whether they had filed a declaratory judgment action in tribal

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no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." 520 U.S. at 442. In *Montana*, the Supreme Court held that tribes do not have the authority to regulate hunting and fishing by nonmembers on land owned in fee by non-Indians within the boundaries of a reservation. 450 U.S. 544, 566 (1981). The Court in *Strate* explained its holding in *Montana*, which serves as the basis of the fourth exception to the tribal court exhaustion doctrine: "*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446.

[8] Although the Ninth Circuit recently held that the *Montana* jurisdictional standards are not necessarily tethered to whether the issue in the litigation involves a non-Indian on fee land (*see Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1178-79 (9th Cir. 2005)), a more recent en banc panel of the Ninth Circuit held that the fee or trust status of the land at issue in the case is still relevant to the *Montana* analysis. *See Salish Kootenai*, 434 F.3d at 1135.

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court.[9] *See Sharber*, 343 F.3d at 975 ("The absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement."). Besides, it is not uncommon for courts to treat defendants in a declaratory judgment action as the equivalent of a plaintiff. *See Cent. Tools, Inc. v. Mitutoyo Corp.*, 381 F. Supp. 2d 71, 76 n.5 (D. R.I. 2005). Either way, the essentials of this case do not change whether viewed from the perspective of the pending federal action brought by Philip Morris or whether viewed from the perspective of the tribal court action brought by Defendants. Philip Morris challenges the on-reservation activities of two tribal members and their tribal business, and therefore Philip Morris's *Montana* arguments should be disregarded.

The Ninth Circuit's recent en banc decision in *Smith v. Salish Kootenai College* distinguished between non-member plaintiffs and non-member defendants, confirming that the *Montana* restrictions on tribal court jurisdiction are focused on nonmember *defendants*, not nonmember *plaintiffs* asserting claims arising from Indians engaged in on-reservation activities:

> The Court's recent cases, and our own experience with the *Montana* exceptions demonstrate that there are two facts courts look to when considering a tribal court's civil jurisdiction over a case in which a nonmember is a party. First, and more important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or a defendant. . . . The Court has repeatedly demonstrated its concern that tribal courts not require "defendants who are not tribal members" to "defend [themselves against ordinary claims] in an unfamiliar court." Second, the Court has placed some store in whether or not the events giving rise to the cause of action occurred within the reservation. Within the reservation, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians . . . even on non-Indian fee lands," . . . *[W]here the nonmembers are the plaintiffs, and the*

[9] In substance, the "declaratory action" in tribal court is nothing more than a forum in which Defendants' defenses to Philip Morris's claims can be presented.

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> *claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction.*

434 F.3d at 1131-32 (emphasis added) (citations omitted). It is irrelevant that Philip Morris is not a tribal member or tribal business entity. As a non-member plaintiff, the tribal court may exercise jurisdiction over Philip Morris in a dispute that involves on-reservation events or activities. *See Burlington N. R.R. v. Crow Tribe Council*, 940 F.2d 1239 (9th Cir. 1991); *Stock W. Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992); *see also Williams v. Lee*, 358 U.S. 217, 233 (1959) ("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.").

None of the four exceptions to the tribal court exhaustion doctrine apply, and therefore, this Court should not second-guess the jurisdiction of the tribal court until the tribal court has been provided the opportunity to determine its jurisdiction to adjudicate Philip Morris's Lanham Act and state law claims against a business licensed and operating on the Yakama Reservation.

IV. CONCLUSION

It is important to note that even under the exhaustion doctrine, Philip Morris will still have a full and fair opportunity to contest the jurisdiction of the Yakama Nation Tribal Courts. The comity principles underlying the doctrine merely require that the tribal court be given the first opportunity to *decide* the jurisdictional question. The jurisdictional arguments that Philip Morris presents here may be presented to the tribal court, and the tribal court is fully competent and qualified to decide those questions. Indeed, this is the gravamen of the entire exhaustion doctrine. If the tribal court agrees with Philip Morris, this matter will return to federal court. If the tribal

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court does not agree, Philip Morris will still have "another bite at the apple" in federal court to challenge the tribal court's jurisdictional decision, after the tribal court proceedings have run their course. Philip Morris, which has chosen to file suit against a tribal business owned by tribal members doing business on tribal lands, should not be allowed to entirely circumvent the federal policy of comity towards the tribal courts.

DATED this 17th day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2006, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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