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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' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS OR STAY

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

I. INTRODUCTION AND SUMMARY OF REPLY

The sole issue before the Court is whether there is a colorable basis for Yakama tribal court jurisdiction. If so, Ninth Circuit precedent requires the Court to stay or dismiss this action until after the Yakama tribal court has issued its ruling. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 n.1 (9th Cir. 2006) (en banc) (citing *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc)), *cert. denied*, 126 S.Ct. 2893 (June 19, 2006). In their opening brief, Defendants established a colorable basis for tribal court jurisdiction under *Salish* because Philip Morris is a plaintiff seeking relief for claims arising from on-reservation commercial activity. In response, Philip Morris has offered a skewed and selective reading of governing precedent which avoids the question presented and which encourages the Court to issue a premature ruling on tribal court jurisdiction.[1] Philip Morris largely ignores controlling precedent holding that it is the tribal court that must decide jurisdiction in the first instance.

Philip Morris seeks to take advantage of a limited exception to tribal court exhaustion, which applies when the tribal court plainly and undeniably lacks jurisdiction. *See Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 2000); *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). Specifically, Philip Morris makes four arguments in support of its claim that the tribal court lacks jurisdiction.

Those arguments fall well short of meeting Philip Morris's burden. First, Philip Morris argues that it should be treated as a non-consenting defendant, and under *Montana v. United States*, 450 U.S. 544 (1981), it should not be subject to tribal court

[1] If the Yakama tribal court does exercise jurisdiction, that decision would be subject to review by this Court based on a fully developed record. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

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jurisdiction in these circumstances. Philip Morris, however, is unmistakably the plaintiff in this action, and it is seeking relief under Washington and federal law arising from on-reservation conduct of tribal members. Whether Philip Morris's action proceeds in this Court or in tribal court, there is no risk that Philip Morris will be subject to an unanticipated body of law or an unexpected damages award. Thus, Philip Morris's simplistic application of *Montana* is inapposite.

Second, Philip Morris argues that on-reservation activity is irrelevant to the jurisdictional question. That argument specifically was rejected in the Ninth Circuit's en banc opinion in *Salish*. 434 F.3d at 1131-32, 1135.

Third, Philip Morris argues that tribal court exhaustion is not required because its action was filed before the Defendants filed a declaratory judgment action in tribal court. Philip Morris confused the tribal court exhaustion doctrine with the first-to-file rule. For purposes of the exhaustion doctrine, it is irrelevant when (or whether) a tribal court action was filed. There is but one action here, a trademark infringement action, brought by Philip Morris against the Defendants, based on on-reservation conduct. Supreme Court and Ninth Circuit precedent requires such claims to be brought in tribal court to protect tribal government sovereignty. The first-to-file rule, which is designed to prevent forum shopping, is inapposite.

Fourth, Philip Morris argues that *Nevada v. Hicks*, 555 U.S. 353 (2001), holds that tribal courts are not competent to consider questions of federal law. Philip Morris's overreading of *Hicks* is belied by a body of federal case law that concludes tribal courts are competent to consider questions of federal law.

Philip Morris has failed to overcome Defendants' colorable assertion of tribal court jurisdiction. The tribal court exhaustion doctrine therefore applies, and Philip

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Morris must bring its Lanham Act, state law, and common law claims against Defendants in Yakama tribal court.

II. ARGUMENT

A. The Tribal Court Has Jurisdiction Because Philip Morris Is the Plaintiff In This Action and Its Claims Arise From On-Reservation Commercial Activity.

Philip Morris argues that there is no basis for tribal court jurisdiction because "non-Indian defendants cannot be sued in tribal court"[2] and because "Defendants have attempted no showing whatsoever that their invocation of tribal jurisdiction is within either [*Montana*] exception." Resp. Mem. at 4. This argument rests on two errors. First, as the party seeking relief against tribal members, Philip Morris is the plaintiff, whether its claims are heard in this Court or in the Yakama tribal court. Second, that argument rests on an oversimplification of *Montana* and a complete disregard of the 2006, en banc opinion in *Salish* that applied *Montana* and its progeny. In *Salish*, the Ninth Circuit held that "where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction." 434 F.3d at 1132 (emphasis in original). Philip Morris is a nonmember plaintiff bringing claims that arise out of commercial activities on the Yakama Reservation. Under *Salish*, there is a colorable claim to tribal court jurisdiction.

1. Philip Morris is a Plaintiff, Not a Defendant.

To avoid *Salish*—and its authoritative interpretation of *Williams v. Lee*[3], *Montana*, *Strate*, and *Hicks*—Philip Morris seeks to cast itself as a defendant in this action. Resp. Mem. at 3, 6. Philip Morris should not be permitted to switch hats in

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[2] Philip Morris USA Inc.'s Memorandum in Response to Defendants' Motion to Dismiss or Stay and Reply Re Additional Injunctive Relief ("Resp. Mem.") at 5, 6.

[3] *Williams v. Lee*, 358 U.S. 217 (1959).

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order to avoid the implications of *Salish*. Philip Morris is seeking judicial intervention to remedy alleged violations of Washington common law, Washington statutes, and federal trademark laws. This Court should not accept Philip Morris's attempt to characterize itself as a nonmember defendant so that it can claim to be a non-consenting litigant under the Supreme Court's decision in *Montana*[4] and avoid the application of the tribal court exhaustion doctrine. The Court should recognize that Philip Morris is the natural plaintiff in this action even though there is a pending declaratory action in tribal court in which Philip Morris is named as the defendant.[5] Philip Morris is the party seeking relief, and therefore, is the plaintiff—regardless of whether its claims are heard by this Court or the Yakama tribal court.

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[4] Resp. Mem. at 5, 6. *See, e.g.*, *Salish*, 434 F.3d at 1131 ("[T]here 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 most important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or a defendant. As Justice Souter observed in *Nevada v. Hicks*, '[i]t is the membership status of the unconsenting party . . . that counts as the primary jurisdictional fact.'" (emphasis added)).

[5] While Defendants are the plaintiffs in the pending tribal court declaratory judgment action, they are the natural defendants and Philip Morris remains the natural plaintiff. *See BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995) ("In this case, the declaratory plaintiff BASF is seeking to ward off suit by the injured party, Symington. In examining the propriety of such a declaratory action, we realign the parties to reflect the actual controversy underlying the action. Here, Symington claims injury by BASF, and is therefore the natural plaintiff." (internal citation omitted)).

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2. Nonmember Plaintiffs are Subject to Tribal Court Jurisdiction When the Suit Involves the On-Reservation Commercial Activities of Tribal Members.

Philip Morris's gross oversimplification of *Montana* is inconsistent with existing authority that tribal courts may exercise jurisdiction over nonmember plaintiffs where the nexus of the events underlying the cause of action are commercial activities on tribal land. *Salish*, 434 F.3d at 1132. As the Ninth Circuit recognized in *Salish*, "[t]here is no simple test for determining whether tribal court jurisdiction exists . . . questions of jurisdiction over Indians and Indian country remain a complex patchwork of federal, state, and tribal law, which is better explained by history than by logic." 434 F.3d at 1130 (quoting *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989), and *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005)).

In *Salish*, the Ninth Circuit harmonized disparate and narrow Supreme Court holdings to determine whether a tribal court had jurisdiction over Smith, a nonmember counterclaim plaintiff:

> [T]here 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 most important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or a defendant. . . . 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," *Montana*, 450 U.S. at 565, . . .
>
> The interaction of these factors—the status of the parties and the connection between the cause of action and Indian lands—is complex. Nevertheless, the cases provide some guidance for our discussion, and we can summarize them as follows. First, where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction. *See Williams v. Lee*, 358 U.S. 217 (1959). Second, where the

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> nonmembers are *defendants*, the Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claims arose on Indian lands. *See Hicks*, 533 U.S. at 356 (claims arose on Indian fee lands); *Montana*, 450 U.S. at 547 (claims arose on non-Indian lands within the reservation). Our own cases, however, suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands. Finally, where *neither* party is a tribal member the tribe lacks jurisdiction to adjudicate claims arising from an accident on a public highway within the reservation. *Strate*, 520 U.S. at 456-59.

Salish, 434 F.3d at 1131-32 (footnote omitted) (emphasis in original). The guideposts provided by the Supreme Court—*Williams*,[6] *Hicks*, *Montana*, and *Strate*[7]—simply did

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[6] The Ninth Circuit's justification in *Salish* for concluding that tribal court jurisdiction exists over nonmember plaintiffs for claims arising from commercial activities occurring on the reservation was provided by the Supreme Court's holding in *Williams v. Lee*. *Salish*, 434 F.3d at 1132. In *Williams*, the Supreme Court held that a non-Indian plaintiff must bring a suit against a tribal member in tribal court, not state court, for claims involving on-reservation commercial activities. *Id.* at 223 ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.") (internal citation omitted).

[7] *Hicks*, *Montana*, and *Strate* all involved nonmember defendants, and the Supreme Court took pains in each case to issue a narrow holding concluding that the tribal courts or governments did not have jurisdiction over non-consenting, nonmember defendants. *See Hicks*, 533 U.S. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general."); *Montana*, 450 U.S. at 565 (holding that a tribe's regulatory jurisdiction over hunting and fishing did not extend to nonmembers on non-Indian fee lands, but noting that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee

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not resolve whether Smith, a nonmember counterclaim plaintiff in tribal court, could later obtain an injunction in federal court based on the tribal court's lack of jurisdiction. The Ninth Circuit proceeded to apply a combination of the analyses from all of these cases, including the two-prong *Montana* framework, to conclude that the tribal court had jurisdiction to consider Smith's counterclaim in tribal court.

The Ninth Circuit's en banc decision in *Salish* made clear that the *Montana* test does not apply in a simplistic manner when a lawsuit involves a nonmember plaintiff for claims arising out of on-reservation commercial activities. *Id.* at 1132. In fact, the majority of the en banc panel specifically rejected the dissent's argument that the *Montana* framework applies in any case where a nonmember is a party:

> In light of the [U.S. Supreme] Court's observations on the relevance of party status, we are puzzled by the dissent's insistence that the *Montana* "framework applies to legal actions involving 'nonmembers' without limitation," and that we have "err[ed]" in holding that jurisdiction may turn on "whether the nonmember party is a plaintiff or defendant." Party status is plainly relevant as the Court has repeatedly made clear.

Salish, 434 F.3d at 1132 n.3 (emphasis added) (citing *Hicks*, 533 U.S. at 358 & n.2, 382; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985)).

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lands."); *Strate*, 520 U.S. at 442 ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members. . . . Such cases, we hold, fall within state or federal regulatory and adjudicatory governance; 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 no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.").

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All parties must agree that the Supreme Court has not developed a clear formula for determining whether tribal courts have jurisdiction over nonmember parties.[8] The Ninth Circuit's distillation in *Salish* of the relevant Supreme Court's many narrow holdings is the best guidance available to address the open question in this case. Philip Morris, the nonmember party, is a plaintiff. Defendants Wheeler and Ramsey are Yakama tribal members and their business, King Mountain, is a tribally incorporated and licensed business located on the reservation. Philip Morris's claims involve the Defendants' on-reservation activities. Philip Morris's claims involve on-reservation commercial activities. Under *Salish*, this is enough to conclude that the Yakama tribal court should be permitted to determine its jurisdiction over Philip Morris's claims.

In *Salish*, the en banc court noted that when defendants show a colorable question of tribal court jurisdiction, this Court is required to stay or dismiss the pending action "to permit a tribal court to determine in the first instance whether it has

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[8] The Supreme Court in *Hicks* noted the confusing state of its tribal court jurisdiction jurisprudence:

> In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985), we avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959). In *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants.

533 U.S. at 358 n.2.

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the power to exercise subject-matter jurisdiction in a *civil* dispute between Indians and non-Indians that arises on an Indian reservation." *Salish*, 434 F.3d at 1131 n.1 (quoting *Stock W.*, 964 F.2d at 919) (emphasis in original). The Ninth Circuit likewise emphasized that the showing necessary is not onerous. Defendants have established a colorable claim for tribal court jurisdiction because the claim is "plausible and appears to have a valid or genuine basis." *Stock W.*, 964 F.2d at 919. Defendants have more than met that burden.

B. On-Reservation Commercial Activity Provides a Colorable Basis for Tribal Court Jurisdiction.

Philip Morris contends that tribal court jurisdiction is not appropriate in this case because (1) whether the Defendants' activities occurred on the reservation is irrelevant after the Ninth Circuit's decision in *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005), and (2) Defendants' cigarettes are sold outside the Yakama Reservation and other elements of Defendants' business occur off the reservation. Resp. Mem. at 7-9. Both arguments fail to overcome application of the tribal court exhaustion doctrine because Defendants' assertion of tribal court jurisdiction is "plausible and appears to have a valid or genuine basis"—the colorable question threshold. *Stock W.*, 964 F.2d at 919.

First, Philip Morris argues that on-reservation activities are insufficient to support Defendants' claim to tribal court jurisdiction based on the Ninth Circuit's decision in *Todecheene* because the *Todecheene* decision makes the status of the land connected with the dispute irrelevant to the tribal court jurisdictional analysis. Resp. Mem. at 7-8. This argument fails because *Todecheene* predates the Ninth Circuit's en banc decision in *Salish*. *Salish* held that party status and tribal land status are both relevant to the "complex" question of tribal court jurisdiction. 434 F.3d at 1131-32, 1135 ("[T]he Court has placed some store in whether or not the events giving rise to

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the cause of action occurred within the reservation. . . . We next turn to whether the claims bear some connection to Indian lands. This fact is significant, though not dispositive."). In *Salish*, the court found it relevant that "[b]oth of Smith's claims . . . alleged negligence occurring on the reservation, on lands and in the shop controlled by a tribal entity." *Id.* at 1135.[9] Defendants present the same colorable claim to tribal court jurisdiction as Salish Kootenai College did in *Salish*—a nonmember plaintiff challenging the conduct of tribal members and corporations engaged in activities on the Yakama Reservation.

Second, the answers to whether King Mountain sells its products to other Indian tribes and smokeshops on other Indian reservations, or whether King Mountain purchases its products from a manufacturer off the reservation, do not undermine Defendants' colorable claim to tribal court jurisdiction. The center of gravity for the conduct challenged in Philip Morris's suit—the alleged trade dress infringement by a business located on the Yakama Reservation—is the Yakama Reservation. The facts of our case are consistent with the Ninth Circuit's decision in *Stock West Corp. v. Taylor,* where the court applied the tribal court exhaustion doctrine to claims brought by a nonmember plaintiff in federal district court because of the centrality of the

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[9] Philip Morris's reliance on *Todecheene* also fails because (1) the court was attempting to determine jurisdiction over a nonmember defendant, Ford, in tribal court (*id.* at 1174) and (2) the plaintiffs' product liability claims were tied to the off-reservation manufacturing of the vehicle involved with the on-reservation accident (*id.* at 1178). In sum, the Ninth Circuit in *Todecheene* was struggling with whether a nonmember defendant car manufacturer could be haled into tribal court simply because an accident involving one of its cars occurred on Indian trust land, as opposed to Indian-owned fee land or non-Indian owned fee land. None of these issues are at stake in this case, as Philip Morris is a nonmember plaintiff targeting tribal member defendants engaged in activities on the reservation.

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events supporting Stock West's claims were on the Colville Reservation. 964 F.2d 912, 919 (9th Cir. 1992) (en banc). The Ninth Circuit acknowledged that several of the events surrounding the nonmember plaintiff's claims of legal malpractice and false representation occurred off the Colville Reservation. However, because the core of the activities giving rise to plaintiff's claims occurred on the reservation—the operation and financing of a lumber business on the Colville Reservation—there was a colorable assertion of tribal court jurisdiction. *Id.* at 919-20.

Defendants' claim to tribal court jurisdiction here is stronger than in *Stock West*. Defendants Wheeler and Ramsey are members of the Yakama Tribe. *See* Declaration of Delbert L. Wheeler ("Wheeler Decl.") ¶ 2; Declaration of Richard "Kip" Ramsey ("Ramsey Decl.") ¶ 2. King Mountain is a business licensed and incorporated by the Yakama Indian Nation. Wheeler Decl. ¶ 2; Ramsey Decl. ¶ 3. King Mountain's sales are primarily solicited from King Mountain's offices on the reservation, and all of King Mountain's cigarettes are warehoused and distributed from King Mountain's facilities on the reservation. Ramsey Decl. ¶ 6. Under these factual circumstances, the Defendants' assertion of tribal court jurisdiction is colorable and sufficient to invoke the tribal court exhaustion doctrine. The Yakama tribal court should be provided the first opportunity to address the facts that may impact its jurisdiction. *See Nat'l Farmers Union*, 471 U.S. at 856 ("[Congress's commitment to tribal self-government and self-determination] 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." (emphasis added)).

Philip Morris also argues that tribal court jurisdiction is not appropriate because tribal court is "inconvenient to the plaintiff." Resp. Mem. at 12. Philip Morris USA, a Virginia corporation, filed suit in the Eastern District of Washington to challenge the

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activities of tribal members and their businesses on the Yakama Reservation. Philip Morris ventured across the country to challenge the conduct of tribal members in Washington state, which is a clear acknowledgment that the center of gravity of the Defendants' alleged conduct occurred in Eastern Washington, and more specifically, on the Yakama Reservation. Seeking the same relief in tribal court a few miles away from the federal district court is hardly an inconvenience. If Philip Morris is concerned about the unfamiliarity of tribal court practices, it surely has the resources to hire competent counsel.

C. Philip Morris's First-to-File and Compulsory Counterclaims Arguments are Red Herrings.

Philip Morris argues that it cannot be required to exhaust tribal court remedies because it filed this action before Defendants filed their related action for a declaration of non-infringement and because Defendants have an obligation under Fed. R. Civ. P. 13(a) to bring counterclaims arising out of the same transactions or occurrence. Resp. Mem. at 11-14. That argument ignores controlling authority and conflates the tribal court exhaustion doctrine with two unrelated rules.

1. First-to-File Rule.

Philip Morris concedes—as it must—that the tribal exhaustion rule applies whether or not the plaintiff brought its action in federal court first. Resp. Mem. at 12-14. Specifically, Philip Morris concedes that there are three published Ninth Circuit opinions with that specific holding.[10] Philip Morris attempts to distinguish these cases by arguing that they involved a specific application of *Montana*, but that argument is

[10] Philip Morris cites *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), and *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003), all of which required tribal court exhaustion of claims first filed in federal district court.

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specious: Not one of these three cases even cited *Montana*. Moreover, there are more than three such cases. Philip Morris failed to cite the Ninth Circuit's en banc decision in *Stock W. Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992), where the court applied the tribal court exhaustion doctrine to a complaint filed in federal district court by a nonmember plaintiff even though there was no corresponding case pending in tribal court. Likewise, in *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987), the court applied the tribal court exhaustion doctrine to the complaint of a tribal member plaintiff who filed a contract claim against a nonmember corporation in federal district court. Even with no pending tribal court proceeding, the court held "[t]here is no difference between Indians and non-Indians here. If the dispute arises in Indian territory, both 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." *Id.* at 579.[11] Simply put, the issue of whether the action in federal court was filed before the action in tribal court—or whether there even is a tribal court action pending—is irrelevant.

2. Compulsory Counterclaims.

The same is true of Philip Morris's mandatory counterclaims argument. Philip Morris argues, presumably under Fed. R. Civ. P. 13(a), that "where it filed first in a court that has subject matter jurisdiction and personal jurisdiction over the parties, Defendants must make their compulsory counterclaims in their answer, and their

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[11] *Wellman* undermines Philip Morris's theory that *Burlington*, *Plainbull*, and *Sharber* were unique because they involved tribal sovereignty interests. In *Wellman*, the court applied the tribal exhaustion doctrine in a case where no action was pending in tribal court, where the tribal government was not a party, and where tribal sovereign immunity was not an issue in the case. 815 F.2d at 578 ("Chevron contracted with Wellman for the construction of an access road to one of Chevron's exploratory wells located on the reservation. The Tribe itself was not a party to Wellman's contract.").

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defensive action in another forum should be enjoined." Resp. Mem. at 11. Again, however, Philip Morris has conflated a procedural rule limiting piecemeal litigation with a doctrine governing where the action as a whole should proceed in the first instance. The Supreme Court developed the tribal court exhaustion doctrine to support tribal self-government and to promote tribal judicial institutions—not as an adjunct to other procedural rules. *See, e.g.*, *Iowa Mut. Ins.*, 480 U.S. at 16 ("Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."). The Defendants' pending tribal court action is irrelevant.[12]

D. Tribal Exhaustion Rule Applies Even When a Nonmember Plaintiff Brings a Federal Cause of Action or Raises a Question of Federal Law.

Relying exclusively on *Hicks*, Philip Morris argues that tribal courts have no jurisdiction over federal causes of action. Resp. Mem. at 3, 4-5, 10-11. That argument is simply incorrect. At the very heart of the Supreme Court's adoption of the tribal court exhaustion doctrine is the conclusion that tribal courts are capable of considering questions of federal law. In fact, the question of whether tribal jurisdiction exists is itself a question of federal law. In *National Farmers Union*, a non-Indian school district and insurance company brought an action in federal district court to enjoin the enforcement of a tribal court default judgment. The school district

[12] Contrary to Philip Morris's suggestion, in the tribal court action Defendants are not "seek[ing] to limit PM USA's trademark rights under federal law." Resp. Mem. at 5. Philip Morris can, and will, assert the same Washington common law, Washington statutes, and Lanham Act claims in tribal court that they would assert in this Court.

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and insurance company invoked the federal question jurisdiction of the district court, 28 U.S.C. § 1331, arguing that the district court must determine under federal law whether the tribal court's civil jurisdiction extended to non-Indian defendants. The Supreme Court concluded that this question of federal law must first be resolved by the tribal courts before the federal district court could consider the case:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. . . .
>
> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the tribal court itself.

471 U.S. at 853, 855-56 (footnotes omitted) (emphasis added). Thus, in the seminal tribal court exhaustion decision, the Supreme Court specifically recognized the competence of tribal courts to address questions of federal law.

Philip Morris argues that tribal courts lack jurisdiction over federal statutory causes of action, but federal courts repeatedly have concluded that tribal courts are competent to consider federal causes of action and questions of federal law, and that the tribal court exhaustion doctrine applies even when a plaintiff alleges a federal cause of action. *See, e.g.*, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (noting "that federal courts may not readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the

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tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.") (internal citations omitted) (emphasis added)).[13]

Philip Morris apparently claims that the Supreme Court's fractured 2001 *Nevada v. Hicks* decision reverses this entire line of cases—some of which predate *Hicks*, and some of which were decided after *Hicks*. Resp. Mem. at 4-5. Philip Morris's overly broad reading of *Hicks* fails to acknowledge that (1) the Court's discussion of the general jurisdiction of state and tribal courts must be read in the context of its very narrow holding, and (2) the difference between the concept of general jurisdiction and competency.

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[13] *See also A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1414 (9th Cir. 1986) (exhaustion required in federal civil rights action arising from on-reservation transaction); *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992) ("The fact that the Government is attempting to enforce 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."); *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."); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1222 (D. Minn. 1995) (applying exhaustion doctrine to plaintiffs' ERISA claims); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999) (applying the tribal court exhaustion doctrine even though plaintiffs made federal RICO claims; "[T]he 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." (internal citations and quotations omitted)); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("[T]he [tribal exhaustion] doctrine applies even though the contested claims are to be defined substantively by state or federal law."); *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 the first opportunity to determine whether they have jurisdiction to hear an action based on the Family and Medical Leave Act.").

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In *Hicks*, the Court specifically stated that it only reached the question of whether tribal courts have jurisdiction over nonmember/state officer defendants, and did not reach the question of tribal court jurisdiction over nonmember plaintiffs and nonmember defendants generally: "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2 (emphasis added).[14] The Supreme Court specifically did not reach the jurisdiction of tribal courts to consider federal causes of action filed by nonmember plaintiffs against tribal members and tribally chartered businesses that target the tribal defendants' on-reservation commercial activities. The Court's discussion of the general jurisdiction of tribal court's to hear § 1983 claims against state officer defendants does not negate the many federal cases concluding that tribal courts are competent to adjudicate questions of federal law.

Furthermore, tribal courts are not courts of general jurisdiction based on issues of the member status of parties and the location of the events giving rise to the cause of action. Defendants do not deny that tribal courts are specialized courts of limited jurisdiction that are quite different from state courts of general jurisdiction. The Ninth Circuit's decision in *Salish* makes these limits abundantly clear. *See* 434 F.3d at 1132

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[14] *See also id.* at 375 ("I would go right to *Montana*'s rule that a tribe's civil jurisdiction generally stops short of nonmember defendants, subject only to two exceptions, one turning on 'consensual relationships,' the other on respect for 'the political integrity, the economic security, or the health or welfare of the tribe,' . . ." (Souter, J., concurring) (emphasis added) (internal citations omitted); *id.* at 386 ("[T]he 'holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.' The Court's decision explicitly 'leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general,' . . .") (Ginsburg, J., concurring) (emphasis added) (internal citations omitted).

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("The Court's recent cases, and our own experience with the *Montana* exceptions, demonstrate that there are two factors courts look to when considering a tribal court's civil jurisdiction. . . . . the status of the parties and the connection between the cause of action and Indian lands . . . ."). However, the factors limiting tribal court jurisdiction—party and land status—have nothing to do with the source of law providing the cause of action in the suit.[15] Tribal courts are competent to consider federal causes of action and questions of federal law.

Philip Morris also argues that Lanham Act trademark claims are somehow "uniquely" federal. Resp. Mem. at 5. That argument overlooks the fact that trademark claims pursuant to federal statute routinely are brought in conjunction with claims under state common law and state statutes and that federal courts do not have *exclusive* jurisdiction over federal trademark claims. In fact, a long-line of state and federal cases have recognized that state courts are competent to adjudicate Lanham Act claims,[16] and Philip Morris cites no precedent to suggest that tribal courts are not

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[15] This conclusion is supported by the analysis of *Hicks* in the leading Indian law treatise, Cohen's Handbook of Federal Indian Law:

> *Nevada v. Hicks* addressed the particular limits of tribal jurisdiction over suits against state officers and opines that the federal courts will not accord tribes the same presumption of concurrent jurisdiction over federal claims as is enjoyed by state courts because of limits on tribal adjudicative authority over non-Indians in certain circumstances. *Nevada v. Hicks* is best understood as a case addressing the particular limits of tribal jurisdiction over suits against state officers.

F. Cohen, Handbook of Federal Indian Law 217 (2005 ed.) (footnotes omitted).

[16] Although federal courts are granted exclusive jurisdiction with respect to patent and copyright cases, it is well-settled that state courts have concurrent jurisdiction to adjudicate claims arising under the Lanham Act. *See Foxrun Workshop, Ltd. v. Klone Mfg., Inc.,* 686 F.Supp. 86, 87 n. 3 (S.D.N.Y.1988); *Health Care & Ret. Corp. of Am.*

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similarly competent. While tribal courts are not courts of general jurisdiction in the same way as state courts because the member status of parties and location of the events giving rise to a claim may limit the tribal court's jurisdiction, tribal courts remain competent to adjudicate federal law claims.

III. CONCLUSION

Defendants assert a colorable claim to tribal court jurisdiction because Philip Morris, a nonmember plaintiff, not a nonmember defendant, challenges the on-reservation commercial activities of tribal members and their on-reservation businesses. At this stage, this Court must dismiss or stay Philip Morris's action while Philip Morris files an action in Yakama tribal court and exhausts its tribal court remedies. Ultimately, this Court will have an opportunity to review the Yakama tribal court's jurisdictional decision. However, the tribal court's analysis of the factual and legal bases for tribal court jurisdiction should not be cut short. *See Nat'l Farmers Union*, 471 U.S. at 856.

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v. Heartland Home Care Inc., 324 F. Supp. 2d 1202, 1208 (D. Kan. 2004); *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. 1996); *Pa. State Univ. v. Univ. Orthopedics, Ltd.*, 706 A.2d 863, 867 n. 2 (Pa. Super. 1998); *Pioneer First Fed. Sav. & Loan Ass'n. v. Pioneer Nat'l Bank*, 659 P.2d 481, 487 (Wash. 1983); *Flagship Real Estate Corp. v. Flagship Banks, Inc.*, 374 So.2d 1020, 1021 (Fla. Dist. Ct. App. 1979); *Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 375 (S.D.N.Y.2000).

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DATED this 3rd day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 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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