UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

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| FARMERS UNION OIL COMPANY,<br><br>PLAINTIFF,<br><br>vs.<br><br>STELLA GUGGOLZ; WILLIAM P. ZUGER, TRIBAL COURT JUDGE OF THE STANDING ROCK SIOUX TRIBAL COURT OF THE STANDING ROCK INDIAN RESERVATION; AND THE STANDING ROCK SIOUX TRIBAL COURT.<br><br>DEFENDANTS. | * | CIV. 07-1004<br><br>**REPLY BRIEF OF WILLIAM P. ZUGER, TRIBAL COURT JUDGE, AND STANDING ROCK SIOUX TRIBAL COURT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR STAY ACTION PENDING EXHAUSTION OF TRIBAL COURT REMEDIES** |

COME NOW defendants William P. Zuger, Tribal Court Judge of the Standing Rock Sioux Tribal Court of the Standing Rock Indian Reservation, and the Standing Rock Sioux Tribal Court, and submit this brief in response to plaintiff's Brief in Response to Defendants' Motion to Dismiss [doc. 13] and in support of the Motion to Dismiss or Stay the Action Pending Exhaustion of Tribal Remedies [doc. 10].

## BACKGROUND

On October 20, 2006, Stella Guggolz commenced a personal injury action in the Standing Rock Sioux Tribal Court against Farmers Union Oil Company (hereafter "Farmers Union"). Ms. Guggolz is an enrolled member of the Standing Rock Sioux Tribe. Her suit in tribal court concerns personal injuries she allegedly sustained while on Farmers Union's land on the Standing Rock Indian Reservation. Farmers Union is a non-Indian-owned corporation that operates a retail gas station and convenience store

on land it owns in fee on the Standing Rock Indian Reservation. Farmers Union sells gasoline, fuel oil, automotive parts, supplies, and other products to tribal members and nonmembers.

In her complaint in tribal court, Ms. Guggolz alleged that on October 12, 2005, she entered upon the premises owned by Farmers Union for the purpose of purchasing supplies from Farmers Union. See Tribal Ct. Compl. ¶ 3 (attached as Exh. A to Pl. Compl. in this action [doc. 1]). Ms. Guggolz drove her vehicle onto a parking lot on Farmers Union's land. She parked and got out of the vehicle. Id. at ¶ 4. She alleged that she then tripped on uneven sections of pavement in the parking lot and fell on her shoulder, ribs, hand, arm, and face. Id. at ¶ 5. She alleged that she suffered various injuries, some of which will require surgery, id. at ¶ 8, and that those injuries were proximately caused by Farmers Union's negligence in failing to maintain its premises in a reasonably safe and proper condition. Id. at ¶¶ 6, 7.

Ms. Guggolz alleged that prior to October 12, 2005, she had been a customer of Farmers Union for many years. See Br. in Opp. to Motion to Dismiss in Tribal Ct. at p. 1 (true and accurate copy attached hereto as Exhibit A).

Farmers Union filed a special appearance and original answer in the Tribal Court on November 10, 2006. It then filed a motion to dismiss the Tribal Court action on November 17, 2006. In its motion to dismiss, Farmers Union argued that the Tribal Court did not have subject matter jurisdiction over the action, citing the "general proposition" articulated by the Supreme Court in Montana v. U.S., 450 U.S. 544 (1981), that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. In Montana, the Supreme Court articulated two exceptions to this general proposition, stating:

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

Id. at 565-566 (citations omitted). Farmers Union argued that neither of these exceptions was satisfied in Ms. Guggolz's case.

After briefing and oral argument, on February 8, 2007, the Tribal Court, per Associate Tribal Judge William P. Zuger, denied Farmers Union's motion to dismiss. See Tribal Ct. Mem. Op. (attached as Exh. B to Pl. Compl. in this action [doc. 1]). The Tribal Court held that it had jurisdiction over the action under the first of Montana's "two narrow exceptions." Id. at 1. The court found that Farmers Union had a consensual relationship with Ms. Guggolz through commercial dealing and that there was a nexus between that consensual relationship and the cause of action. Id. at 2, 3.

Specifically, the Tribal Court found that, by "operating a retail establishment for profit," Farmers Union was engaged in commercial dealing within the meaning of Montana's first exception. Id. at 3. Commercial dealing, the court held, includes the exchange of goods and services at stores such as Farmers Union's. Id. The court noted that Farmers Union operated "a gas station and convenience store, selling gas and sundries to Indian as well as non-Indian persons." Id. at 1.

The Tribal Court noted that Farmers Union "was on the reservation to deal with Indians and non-Indians alike who came to deal with it," id. at 3, and that Ms. Guggolz was one such Indian who came to deal with it. The court stated:

> The Complaint alleges that the plaintiff was on the defendant's property to make a retail purchase ...
>
> She alleges that she was there to make a purchase, to "purchase supplies," and we must presume she will so testify. Indeed, it must be presumed that she was there for a purpose related to Farmers' Union's presence there. If the store were not there; if it were an empty lot, she certainly would not have stopped there or walked there.

Id. at 1, 2.

The court reasoned that when Ms. Guggolz came onto the property of Farmers Union to make a purchase, her entry onto the land and her presence there were within "the common sense contemplated scope" of Farmers Union's commercial dealings. Id. at 3. The court noted that the parking lot where Ms. Guggolz was allegedly injured was "part and parcel" of Farmers Union's commercial dealings with its customers, "there to facilitate those dealings." Id. at 3.

Thus, the Tribal Court found that Ms. Guggolz's cause of action arose out of, and was directly related to, the consensual relationship she had with Farmers Union through commercial dealing.

Farmers Union brought this action on March 13, 2007. It did so without petitioning the Standing Rock Sioux Supreme Court for review of the Tribal Court's denial of the motion to dismiss or, in the alternative, trying the case to its conclusion and taking an appeal from a final order or judgment to the Tribal Supreme Court.

On May 1, 2007, Tribal Judge Zuger and the Standing Rock Sioux Tribal Court filed a Motion to Dismiss or Stay the Action Pending Exhaustion of Tribal Remedies [doc. 10]. The defendants urge that the claims against the Standing Rock Sioux Tribal Court should be dismissed based on the doctrine of tribal sovereign immunity and that

the claims against Tribal Court Judge Zuger and Ms. Guggolz should be dismissed or stayed pending exhaustion of tribal court remedies.[1]

## ARGUMENT

### I. The Standing Rock Sioux Tribal Court Is Immune From Suit And All Claims Against It Should Be Dismissed.

It is a well-settled principle of federal law that Indian tribes are immune from suit in federal court unless "Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe v. Mfg. Technologies, Inc., 523 U.S. 751, 754 (1998). In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court held that:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit.

Id. at 58 (internal citations and quotation marks omitted). Since deciding Santa Clara Pueblo in 1978, the Supreme Court has consistently affirmed the sovereign immunity of Indian tribes. See C & L Enters. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001); Kiowa Tribe, 523 U.S. 751 (1998); Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986).

Sovereign immunity shields Indian tribes from suits for declaratory and injunctive relief, as well as from suits seeking damages. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) (citing Santa Clara Pueblo, 436 U.S. 49, 59 (1978)). In Santa Clara Pueblo, the Court held that the Indian Civil

[1] The defendants no longer seek dismissal of the claims for declaratory or injunctive relief against Tribal Court Judge Zuger based upon a claim of official or sovereign immunity. Further, the defendants no longer seek dismissal of the entire action for failure to join an indispensable party under Fed R. Civ. P. 19.

Rights Act, 25 U.S.C. §§ 1301-1303, did not abrogate tribal sovereign immunity so as to "subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." 436 U.S. at 59. In the absence of a valid congressional abrogation of tribal immunity, the Court held, suits against tribes for injunctive or declaratory relief "are barred by [their] sovereign immunity from suit." Id. Similar suits against individual tribal officers acting outside the scope of their authority are not barred by tribal sovereign immunity. Id. (citing Puyallup Tribe, Inc., v. Washington Dept. of Game, 433 U.S. 165, 171-172 (1977) and Ex parte Young, 209 U.S. 123 (1908)).[2]

Tribal sovereign immunity extends to all branches of Indian tribal governments. It also extends to agencies and entities that are arms of the tribes. The Court of Appeal for the Eighth Circuit has stated that, "[i]t is undisputed that an Indian tribe enjoys sovereign immunity" and "[i]t is also undisputed that a tribe's sovereign immunity may extend to tribal agencies." Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040, 1043 (8th Cir. 2000) (citations omitted). In Hagen, the court held that a tribal community college that "serves as an arm of the tribe and not as a mere business" is "entitled to tribal sovereign immunity." 205 F.3d at 1043. Numerous cases are in accord.[3]

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[2] In TTEA v. Ysleta Pueblo, 181 F.3d 676 (5th Cir. 1999), a case cited by Farmers Union, the court adopted the approach set forth in Santa Clara Pueblo. Declaring "Santa Clara Pueblo controls," 181 F.3d at 680, the court affirmed on sovereign immunity grounds the dismissal of a claim for damages against an Indian tribe, but found that tribal immunity did not support the dismissal of actions against tribal officials seeking declaratory and injunctive relief. Id. at 680-681. The court reasoned that, "[s]tate sovereign immunity does not preclude declaratory or injunctive relief against state officials. There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity." Id. (citing Ex parte Young).

[3] See Dillon v. Yankton Sioux Tribe Housing Authority. 114 F.3d 581, 583 (8th Cir. 1998) (holding that "a housing authority, established by a tribal council pursuant to its

The Standing Rock Sioux Tribal Court is a constituent branch of the tribal government of the Standing Rock Sioux Tribe. The Constitution of the Standing Rock Sioux Tribe provides that, "[t]he judicial power of the Tribe shall be vested in one Supreme Court and one Tribal Court." S.R.S.T. Const., Art. XII (available online at http://www.state.sd.us/oia/files/standingcon.pdf). As the arm of the Tribe that exercises the judicial power of the Tribe, the Tribal Court is immune from suit in federal court absent congressional authorization or tribal consent. No such authorization or consent is present here.

In its Brief in Response to Defendants' Motion to Dismiss [doc. 13], Farmers Union incorrectly suggests that the federal courts have abrogated tribal sovereign immunity from suit in federal court "with respect to declaratory and injunctive relief requested by non-Indian defendants sued in tribal court." Pl. Resp. Br. 10. While it is true that the Supreme Court has held that the federal courts have jurisdiction, under 28 U.S.C. § 1331, to "determine ... whether a tribal court has exceeded the lawful limits of its jurisdiction," National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 852 (1985), this does not amount to an abrogation of tribal sovereign immunity.

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powers of self-government, is a tribal agency" and is entitled to tribal sovereign immunity); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000) (holding that tribal housing authority, "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); Pink v. Modoc Indian Health Project, 157 F.3d 1185, 1188 (9th Cir. 1998), cert denied, 528 U.S. 877 (1999) (holding that nonprofit health corporation created and controlled by Indian tribes is entitled to tribal immunity, since it "served as an arm of the sovereign tribes, acting as more than a mere business"); Worrall v. Mashantucket Pequot Gaming Enterprise, 131 F. Supp. 2d 328, 331 (D. Conn. 2001) (holding that tribal gaming enterprise "is an economic subdivision of the Tribe that was established as an arm of the tribal government" and thus "is entitled to the same tribal sovereign immunity that protects the Tribe itself"). Cf. Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1109 (Ariz. 1989) (holding that while tribal immunity does extend to subordinate tribal governmental agencies and subordinate economic organizations of the tribe, it does not extend to tribally chartered corporations that are completely independent of the tribe).

Under federal law, it is Congress, not the courts, that has the power to abrogate tribal sovereign immunity. Kiowa Tribe, 523 U.S. at 759. Congress has not abrogated the immunity of Indian tribes or tribal courts from federal suits seeking declaratory or injunctive relief concerning the scope of tribal court jurisdiction.

Farmers Union incorrectly cites as authority for its argument three cases in which this Court has entertained actions seeking declaratory and injunctive relief against Indian tribal courts. See Pl. Resp. Br. 10 (citing Hornell Brewing Co. v. Rosebud Sioux Tribal Court, D.S.D. Civ. 96-3028, vacated by 133 F.3d 1087 (8th Cir. 1998); Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court, 103 F. Supp. 2d 1161 (D.S.D. 2000); and Progressive Specialty Insurance Company v. Burnette, D.S.D. Civ. 06-3013). While it is true that in each of those cases, an Indian tribal court was named as a party defendant, it does not appear that the tribal courts in any of the cases raised the defense of sovereign immunity.[4] In deciding the three cases cited by Farmers Union, this Court did not address the question of the tribal courts' sovereign immunity from suit. Nothing in the cases suggests that Indian tribal courts can be subjected to suits for declaratory or injunctive relief without their consent, in the absence of congressional authorization.

Provided that all tribal court remedies are exhausted, this action may proceed against Ms. Guggolz. It may also proceed against Tribal Court Judge Zuger, insofar as the complaint seeks equitable relief, not damages, and insofar as it alleges with specificity that Tribal Court Judge Zuger acted outside the scope of his authority.

[4] For example, in Christian Children's Fund, the Court noted that the Crow Creek Sioux Tribal Court did not answer plaintiff's complaint, file or join in any motions, or file any resistance to the plaintiff's motion for summary judgment. 103 F. Supp. 2d at 1162-1163. In Progressive Specialty Insurance Company, the Court considered cross-motions for summary judgment, but the tribal court did not properly join in the motions and, in any event, the motions did not raise the issue of sovereign immunity. Slip Copy, 2007 WL 1202752 *2 (D.S.D. Apr. 19, 2007).

However, the action may not proceed against the Tribal Court, and all claims against the Tribal Court should be dismissed.

## II. This Action Should Be Dismissed Or Stayed Pending Exhaustion Of All Tribal Court Remedies.

In National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845 (1985), the Supreme Court stated that:

> [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. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy 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.
>
> Exhaustion of tribal court remedies ... will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Id. at 855-857. Accord Strate v. A-1 Contractors, 520 U.S. 438, 449-450 (1997); Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1299-1301 (8th Cir. 1994).

### A. Farmers Union Has Not Exhausted All Tribal Court Remedies.

In the instant case, Farmers Union has not exhausted all available tribal court remedies. Although it litigated a challenge to the tribal court's jurisdiction in the Standing Rock Sioux Tribal Court, it has not yet exhausted its remedies in the Standing Rock Sioux Tribal Supreme Court.

In Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987), the Supreme Court held that exhaustion of tribal appellate court remedies is essential:

> The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower federal courts.

Id. at 16-17.

Farmers Union argues that its failure to exhaust available remedies in the Standing Rock Sioux Tribal Supreme Court is excusable because it "is aware of no provision in the Standing Rock Sioux Tribal Code of Justice or the Standing Rock Sioux Tribal Court's Rules of Court which would permit an interlocutory appeal to the Supreme Court of the Standing Sioux Tribe." Pl. Compl. [doc. 1] at ¶ 20. Thus, it asserts, the only way it can exhaust its remedies in the tribal appellate court is "to proceed through a full trial on the merits and appeal the matter" to the Tribal Supreme Court. Id. This, Farmers Union contends, is unacceptable.

The Supreme Court rejected precisely the same argument in Iowa Mutual. There, two non-Indian litigants, Iowa Mutual and Midland Claims, filed motions to dismiss an action in the Blackfeet Tribal Court action for lack of subject matter jurisdiction. 480 U.S. at 12. The tribal court denied the motions. Id. The Supreme Court noted that, "[a]lthough the Blackfeet Tribal Code establishes a Court of Appeals ... it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can only occur after a decision on the merits." Id. This fact was of no consequence to the Supreme Court, which held that:

> In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code ... Until

> appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

490 U.S. at 17.

In the instant case, even if it were true, as Farmers Union argues, that the Standing Rock Sioux Tribal Code does not authorize interlocutory appeals from jurisdictional rulings, this fact alone would not excuse Farmers Union from exhausting all available tribal court remedies, including appellate review after a trial on the merits.

It is true that the Standing Rock Sioux Tribal Code does not expressly authorize interlocutory appeals. By the same token, it does prohibit such appeals. Instead, the Tribal Code provides that, "where appropriate, the [Standing Rock Sioux Tribal] Court may in its discretion be guided by the statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the action took place." Standing Rock Sioux Tribal Code, Title II ("Civil Procedure"), ch. 4, § 2-401 ("Applicable Laws"). As Farmers Union notes in its brief, South Dakota law permits appeals from intermediate trial court orders. See Pl. Resp. Br. [doc. 13] at 23 (citing S.D.C.L. § 15-26A-13). Thus, the Standing Rock Sioux tribal courts may entertain petitions for intermediate, or interlocutory, appeals from jurisdictional rulings. Farmers Union has not yet filed such a petition with the Tribal Court or the Tribal Supreme Court.

### B. No Exception To The Exhaustion Requirement Is Met In This Case.

In National Farmers Union, the Supreme Court recognized three exceptions to the exhaustion requirement. Exhaustion is not required when "an assertion of tribal

jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U.S. at 856, n.21. Further, in Strate, the Court held that where exhaustion "would serve no purpose other than delay," the exhaustion requirement must give way. 520 U.S. at 459, n.14.

There has been no suggestion in this case that the assertion of tribal jurisdiction is motivated by a desire to harass or bad faith. Nor is there an assertion that exhaustion would be futile because of the lack of an adequate opportunity in the tribal court system to challenge the tribal court's jurisdiction. The futility exception applies generally only when the tribe does not have a functioning court system, see Krempel v. Prairie Island Indian Community, 125 F.3d 621, 622 (8th Cir. 1997), or when the tribal court system fails to provide fundamental due process, see Greywater v. Joshua, 846 F.2d 486, 488-489 (8th Cir. 1988).

Farmers Union must argue, instead, that exhaustion would serve no purpose other than delay. Such an argument cannot succeed since the claim of tribal court jurisdiction in this case is not beyond the arguable scope of tribal court jurisdiction as defined by Montana and its progeny. This case is distinguishable from those in which the courts have exhaustion of tribal remedies inessential. Strate involved dispute the Court described as "'distinctly non-tribal in nature,'" arising between two non-Indians and involving a "'run-of the mill highway accident.'" Strate, 520 U.S. 438, 457 (1997) (quoting A-1 Contractors v. Strate, 76 F.3d 930, 940 (8th Cir. 1996) (en banc)).

This case raises the question of whether or not a tribal member's entry upon the land of a non-Indian retail business for the purpose of engaging in commercial dealings

creates a consensual relationship within the meaning of Montana's first exception. The Tribal Court found that it does, and its ruling is defensible for several reasons.

First, without Farmers Union's consent, Ms. Guggolz's entry onto its land would have constituted trespass. Ms. Guggolz was a business invitee of Farmers Union. Her presence on the premises was desired and invited by Farmers Union. The tort of negligent maintenance of the premises is directly related to the consensual relationship formed by Farmer Union's invitation of entry upon the premises and Ms. Guggolz's acceptance of that invitation.

Second, as the Tribal Court noted, Ms. Guggolz was not merely visiting the plaintiff's property, she was there to engage in commercial dealings with the plaintiff, and her entry upon the land and injury thereon was "part and parcel" of the commercial dealings.

Finally, Farmers Union suggests that it "may have an agreement with the Tribe which allows it to conduct business on the reservation," but "[Ms.] Guggolz has no connection with any such agreement." See Pl. Resp. to Motion to Dismiss [doc. 13] at 18. However, Farmers Union's alleged negligence in failing properly to maintain its premises may well be connected to the licensing agreements between the Tribe and Farmers Union. Maintaining the premises is a part of conducting the business.

The Standing Rock Sioux Tribal Supreme Court may reverse or affirm the jurisdictional ruling of the Tribal Court. Regardless, it must be given the opportunity to evaluate the claim.

## CONCLUSION

For all of the foregoing reasons, defendants William P. Zuger, Tribal Court Judge, and the Standing Rock Sioux Tribal Court urge the court to grant their Motion to

Dismiss or Stay the Action Pending Exhaustion of Tribal Remedies and enter an Order dismissing all claims directed at the Standing Rock Sioux Tribal Court on the ground that it is immune from suit and dismissing the remaining claims directed at Tribal Court Judge Zuger and Ms. Guggolz or, in the alternative, holding those claims in abeyance pending exhaustion of all tribal court remedies.

Dated: June 1, 2007

Respectfully submitted,

**WILLIAM P. ZUGER, TRIBAL COURT JUDGE, AND STANDING ROCK SIOUX TRIBAL COURT**

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**CERTIFICATE OF SERVICE**

I certify that on June 1, 2007, I caused a true and accurate copy of the foregoing REPLY BRIEF OF WILLIAM P. ZUGER, TRIBAL COURT JUDGE, AND STANDING ROCK SIOUX TRIBAL COURT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR STAY ACTION PENDING EXHAUSTION OF TRIBAL COURT REMEDIES to be served electronically through the Notice of Electronic Filing service provided by the Court or by first-class mail upon the following counsel of record:

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| STANDING ROCK SIOUX TRIBE<br>STANDING ROCK INDIAN RESERVATION<br>FT. YATES, NORTH DAKOTA | ) | IN TRIBAL COURT |
| STELLA GUGGOLZ,<br><br>Plaintiff, | ) | Civil 06-681 |
| v. | ) | PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO DISMISS |
| FARMERS UNION OIL COMPANY,<br><br>Defendant. | ) | |

This is a trip and fall personal injury case that occurred because of a dangerous condition on defendant's premises causing injury to the plaintiff. The evidence will show that defendant had for years operated a commercial business in McLaughlin, South Dakota, within the exterior boundaries of the Standing Rock Indian Reservation. This business consists of primarily the sale of gasoline and fuel oil, automotive products, and the conduct of a convenience store for sales to the public. The percentage of Indian customers of the business is certainly no less, and is probably higher, than the percentage of Indian people residing in McLaughlin and Corson County. Plaintiff is an enrolled member of the Standing Rock Sioux Tribe and had been a customer of the business for many years. Being a customer of defendant means that it is necessary to go to and from the store, which is done primarily by driving or walking to the store, going inside the store to make a purchase, and then returning to one's vehicle to drive away or to walk away if transportation is by foot. The business is open early in the morning and does not close until late at night so the number of people going to and from the store is significant. There is no dispute but that the business is located on deeded land within essentially an Indian community.

The Standing Rock Sioux Tribal Code at Section 1-107 provides for civil jurisdiction in this Court over any matter where one party to the action shall be an Indian and the transaction or occurrence giving rise to the cause of action occurs on the Standing Rock Indian Reservation. Since plaintiff is an Indian of the Standing Rock Sioux Tribe and the occurrence occurred within the exterior boundaries of the Standing Rock Indian Reservation, there can be no question that this Court has jurisdiction over this matter under Tribal law.

Defendant moves to dismiss this case on grounds that this Court lacks subject matter jurisdiction over this action. Personal jurisdiction is conceded as it must be since defendant's business is located on the Reservation over which this Court has jurisdiction. In moving to dismiss, defendant relies upon what is known as the Montana exceptions to otherwise lack of jurisdiction over non-Indians. In Montana v. United States, 450 U.S. 544 (1981), it was held that a tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relations with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements. The other exception is that a tribe retains "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe."

In Strate v. A-1 Contractors, 520 U.S. 438 (1997), the court stated that "(a)s to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Thus, if a tribe has the power to apply its law to govern a dispute involving a nonmember, then its courts likely can hear the claim.

Defendant maintains, first, that it did not enter into any consensual commercial dealings on the Reservation. This position is belied by the fact that defendant has a commercial business in the middle of the Standing Rock Indian Reservation within an essentially Indian community with significant numbers of regular Indian customers to whom defendant sells goods and services and collects monies from. Defendant is engaged in classic consensual commercial dealing on the Standing Rock Indian Reservation. It purposefully directs its activities toward residents. See Hirsch v. Blue Cross, 800 F.2d 1474, 1478 (9th Cir. 1986).

Defendant in this case argues that in determining a consensual commercial dealing, the inquiry is whether the plaintiff had such a dealing with defendant. That is not the correct inquiry. The question is whether defendant has entered into a consensual commercial dealing on the Reservation generally, not specifically with the plaintiff. However, in this case, this disagreement is a distinction without a difference because in this case plaintiff had in the past and, at the time, was on the property in question because she was going to purchase goods from defendant. So even looking at the inquiry from defendant's viewpoint, plaintiff in this case did have a consensual commercial dealing with defendant in this case.

It is also argued by defendant that if there is a consensual commercial relationship between the Tribe and defendant, there is no link to connect that relationship to the lawsuit. Again the facts belied defendant's argument. Plaintiff was on the property because she had or intended to purchase goods from defendant. No more persuasive or direct link could exist.

Defendant relies upon Strata v. A-1 Contractors, supra, Ford Motor Company v. Todecheene, 394 F.3d 1170 (9th Cir. 1995), and Hornell Brewing Company v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1988), in support of its position that there was no link between the lawsuit and the commercial relationship. Plaintiff has established above that this is not the case. None of the cases cited by defendant helps it in its effort to convince this Court to dismiss this action. Strata was a case between non-Indians on a state highway within that Reservation. Todecheene involved a product liability claim against Ford Motor Company for defective manufacturing of a motor vehicle. Ford had an insufficient connection to the Reservation to enable the Tribal Court there to exercise jurisdiction over it. It was not enough that Ford sold a vehicle that was defective and the vehicle was taken to the Reservation. In Hornell, the defendant there had no presence on the Rosebud Indian Reservation. It was doubtful whether its products even reached the Reservation. This is a far cry from the facts here. In this case, the defendant maintains a business on the Reservation with a dangerous parking lot where significant numbers of Indian people go each day to purchase products from defendant. The first Montana exception is satisfied. See Good House v. Tri-State Water, Civ. 05-835 (Standing Rock Sioux Tribal Court).

Finally defendant relies upon Montana's second exception pertaining to the inherent power to exercise civil jurisdiction when conduct on fee land has some direct effect on the health and welfare of the Tribe. In the present case, it cannot be seriously questioned that the Tribe could apply its legislative regulations to defendant so that the health and welfare of the Tribe was not endangered. For example, if the defendant created a danger in the manner that it maintained gasoline on its premises, there could

be little question that the Tribe could apply its safety regulations to defendant. The same thing could be said about unsafe food. The situation at hand is analogous. Defendant has maintained a dangerous condition on their property causing an adverse effect on the health and welfare of the Tribe, namely, Indian people, of which plaintiff is only one, who use the premises on a continuous, regular basis day in and day out. If the Tribe has legislative jurisdiction, it certainly has adjudicative jurisdiction over defendant.

There are a plethora of cases where tribal court jurisdiction over non-Indians have been sustained. See, e.g., McDonald v. Means, 309 F.3d 530 (9th Cir. 2002)(upholding tribal court jurisdiction over tribal member's tort claim against non-member); Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988)(upholding tribal jurisdiction over divorce action brought by tribal member against non-Indian); City of Timber Lake v. Cheyenne River Sioux Tribal Court, 10 F.3d 554 (8th Cir. 1993) (enforcement of tribal liquor laws); and Plains Commercial Bank v. Long Family Land and Cattle Co., 2006 WL 2055880 (DSD 2006)(jurisdiction over non-Indian in Cheyenne River Tribal Court).

Some comment is required of defendant's point that an action has been contemporaneously filed in Corson County Circuit Court. Such filing by plaintiff is for protective reasons only. Plaintiff desires that her case be heard by the Standing Rock Tribal Court.

## CONCLUSION

For all the above reasons, jurisdiction should be sustained in this Court. Plaintiff would suggest, however, that the Court hold the motion and plaintiff's opposition in abeyance pending the completion of discovery so that the Court will have a factual

basis upon which to make its decision. This will not cause any hardship to defendant because regardless of whether tribal or state court hears this case, discovery will have to be undertaken.

Dated this 22nd day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing Plaintiff's Brief in Opposition to Motion to Dismiss upon the person next designated herein, by depositing a copy thereof in the United States mail, postage for first class mail prepaid, in an envelope addressed to said person at his last known address, to wit: Jack H. Hieb, Richardson, Wyly, Wise, Sauck & Hieb, LLP, P.O. Box 1030, Aberdeen, South Dakota 57402-1030.

Dated this 22nd day of December, 2006.

Terry L. Pechota